uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Professor Paul Daly

University Research Chair in Administrative Law & Governance

57 Louis Pasteur, Ottawa, Ontario K1N 6N5, Canada

Joint Committee on Justice, Home Affairs and Migration

Leinster House

Dublin 2

By email only

5 February 2026

Re: General Scheme of the Civil Reform Bill 2025 (Judicial Review)

A chairde,

1. This submission relates to the heads of legislation set out in the general scheme of the Civil Reform Bill 2025 that would significantly reform judicial review of administrative action.

2. I am an Irish legal academic based in Canada. My current position is University Research Chair in Administrative Law & Governance at the University of Ottawa. Previously, I was employed at the University of Cambridge and the Université de Montréal. My legal education began at University College Cork (BCL, LLM) before I moved to the United States (LLM, University of Pennsylvania) and the United Kingdom (PhD, University of Cambridge) for graduate studies. Throughout, I have maintained close ties to Ireland – I have written several book chapters and articles on Irish administrative law; I co-authored the fifth edition of *Administrative Law in Ireland* (with Justice Gerard Hogan and Emeritus Professor David Morgan);

and I spent the academic year of 2023-2024 as Scholar in Residence at the Law Reform Commission of Ireland. My legal research interests and expertise lie primarily in the law of judicial review of administrative action. I have written widely on this topic in comparative perspective and, in my practice as a barrister in Canada, I have appeared before the courts to argue cases in my area of interest and expertise.

3. Accordingly, I read the General Scheme with great interest, as someone grounded in the Irish legal tradition but with significant practical and academic experience with the law of other jurisdictions.

4. This submission welcomes aspects of the proposed reform that modernise the language and clarify the procedure of judicial review. However, several key proposals risk creating serious constitutional difficulties, increased litigation, and potential conflict with Ireland's obligations under European Union law and the European Convention on Human Rights.

5. The proposed reforms address the symptoms of concern about judicial review (volume, delay, cost) but risk undermining its core function: protecting citizens from unlawful, arbitrary, or procedurally unfair exercises of public power. The underlying causes of delay and volume in judicial review lie primarily in administrative decision quality, administrative capacity, and High Court resourcing – not in the legal principles governing remedies.

I. Executive Summary

Recommendation

- Proceed with reforms that modernise language and clarify procedure;
- Avoid substantive codification that will create uncertainty and litigation;
- Reconsider the transfer of jurisdiction to the Circuit Court;
- Ensure that any reforms preserve the High Court's central constitutional role and comply with EU and ECHR standards.

Positive elements of the General Scheme

- Replacing archaic "prerogative writ" terminology with plain English.
- Clarifying the procedural steps for leave applications and interim remedies.
- Setting out judicial review procedure in statutory form where this reflects existing practice.

Provisions that raise serious concerns

Codification of grounds for granting remedies (Head 8(5))

- Introducing concepts such as "materiality", "public interest" and "significant benefit" will generate extensive litigation over their meaning.
- Denying a remedy after a finding of unlawfulness because of "public interest" considerations undermines the core purpose of judicial review.
- These provisions risk being incompatible with the requirement for an "effective remedy" under EU and ECHR law.

New barriers at the leave stage (Head 11)

- Applying a "significant benefit" test and "reasonable prospect of success" test at the leave stage creates substantial new obstacles for applicants.
- The interaction between "arguable grounds" and "reasonable prospect of success" is unclear and will lead to litigation.

Transfer of judicial review jurisdiction to Circuit Court (Head 9)

- This represents a fundamental shift of judicial review away from the High Court's constitutionally protected role and raises serious constitutional questions.
- The proposal risks breaching requirements for effective remedies.
- A better approach would be a specialised, better-resourced division of the High Court.

Restrictions on appeals (Head 12)

- A certification requirement may be appropriate in fact-heavy areas like immigration, but not across all areas of administrative law.
- A more flexible, regulation-based approach would be preferable.

II. Starting Point: Understanding Judicial Review

6. When considering any legislative proposal, it is important to appreciate the mischief the legislation is aiming at. Plainly, the mischief here is perceived judicial overreach and the use of the courts to slow down or neutralise worthwhile projects.

7. Some historical perspective and context are needed.

A. The Historical Development of Judicial Review

8. Our law of judicial review evolved from the so-called 'prerogative writs' developed by English judges from (roughly) the 16th century onwards: *certiorari*, *mandamus*, *quo warranto*, prohibition and *habeas corpus*. These writs were later transplanted to other common law systems, Australia, Canada, Ireland and New Zealand most prominent amongst them. They have formed the backbone of judicial review in the common law world for centuries.

9. These writs were designed to make sure that creatures of statute respected the limits on their powers. Legislatures often create statutory schemes to achieve policy goals. Sometimes (if not almost all the time), this involves the creation of an administrative decision-maker – for instance, a regulator (like Coimisiún na Meán) or an administrative tribunal (like the International Protection Appeals Tribunal) – or giving an existing office-holder new powers or functions (like discretionary powers given to a Minister or by-law-making authority given to a council). These bodies are sometimes called "administrative decision-makers", but I will refer to them as "creatures of statute": they are created by law, assigned a task and given powers to achieve that task.

10. In using their powers, creatures of statute must remain within the statutory limits the legislature set for them. The International Protection Appeals Tribunal cannot decide unfair dismissal cases; Coimisiún na Meán cannot regulate electricity prices. In addition, creatures of statute must act in a procedurally fair manner: if

they propose to take action (against, say, X or Meta), they must give the target fair notice and an opportunity to comment; and an administrative tribunal like the Workplace Relations Commission has to give both sides a fair shake before making a decision on an unfair dismissal claim. Lastly, these creatures of statute have to act reasonably: their decisions have to be rational, grounded in the evidence and demonstrate responsiveness to the arguments or submissions made to them. Notice that 'fairness' and 'reasonableness' here are terms that have been carefully defined by the courts: someone cannot claim 'unfairness' or 'unreasonableness' in the colloquial sense and hope to win a judicial review case.

B. The Purpose of Judicial Review

11. In a nutshell, a creature of statute must act lawfully, procedurally fairly and reasonably – lawyers often refer to these requirements under the one heading of "lawfulness" or "acting lawfully". These are sometimes called requirements of 'good administration'. They ensure that creatures of statute restrict themselves to the areas assigned to them by legislation, and they protect citizens from oppressive or arbitrary exercises of public power. These requirements have ebbed and flowed over the centuries, with judges being more or less exacting at different points in history. Always, though, it has been understood in common law countries that it is for the judges to develop and enforce these requirements.

C. The So-Called 'Prerogative' Writs

12. Historically, the legally binding way in which these requirements were enforced was through the prerogative writs: *certiorari* to quash unlawful decisions; prohibition to prevent unlawful decisions from being taken in the future; *mandamus* to order a creature of statute to perform a lawful duty; *quo warranto* to ensure that the creature of statute was properly authorized to act; and *habeas corpus* to order release from detention. Judges developed these writs on their own initiative, without any statutory authority.

13. There are, of course, other ways in which creatures of statute can be held to account, by the Ombudsman (who makes recommendations to remedy "maladministration") or by the Oireachtas (where there is political accountability). But these are not legally binding.

D. The European Angle

14. It is also important here to note the requirements of European Union law. In areas regulated by European Union law, which forms an increasing part of our legal system, the citizen who has been wronged is entitled to an effective remedy for unlawfulness in the administration of European Union Law. A similar principle exists in the European Convention on Human Rights. As a result, our law of judicial review needs to be sufficiently robust to provide a remedy that the courts in Luxembourg and Strasbourg would consider effective. Up until now, our law of judicial review has mostly been consistent with the demands of Ireland's international obligations. Note also that this European requirement has kept the Irish courts away from considering whether under our own Constitution, judicial review is an effective guarantee of our constitutional rights.

III. Existing Limitations on Judicial Review

15. Let me reiterate that the primary function of judicial review is to ensure that the citizen is not subjected to arbitrary or oppressive state action.

16. But this function has long been subject to limitations designed to weed out busybodies and vexatious litigants.

17. First, only those with "standing" can bring a challenge. Generally speaking, a citizen has to be directly affected by allegedly unlawful action in order to bring a judicial review application before the courts.

18. Second, anyone seeking judicial review must obtain permission by demonstrating to the satisfaction of a judge that they have arguable grounds in support of their case.

19. Third, if there are alternative avenues of redress, such as an appeal or a reconsideration by the creature of statute itself, these must all be exhausted before proceeding with a judicial review.

20. Fourth, applications for judicial review must be brought in a timely manner. It is well recognized that decisions made by creatures of statute have wide-ranging implications, for instance in the area of planning and development, such that any challenges must be brought quickly, before others begin to act on the challenged decision.

21. Fifth, a court may withhold a remedy in its discretion, for instance where the person seeking judicial review has acted in bad faith.

22. And it is also extremely important to point out that damages are not available as a remedy for unlawful administrative action. This dramatically reduces the incentives to bring a challenge.

23. Notice that each of these limitations is judicially developed. The courts themselves have, over the years, accepted that these limitations are appropriate. There is nothing to stop the Attorney General, or counsel for anyone defending the decision of a creature of statute, from advocating for additional limitations. Judges could evaluate the appropriateness of new limitations in the light of argument and the facts of individual cases.

IV. Some Beneficial Proposed Reforms

A. Eliminating the Language of the Prerogative Writs

24. Today, we do not talk so much about the prerogative writs as we do about "judicial review of administrative action".

25. Helpfully, heads 8(9), 8(10) and 14 of the General Scheme would replace the Latin of the prerogative writs with plain English.

26. This would be a salutary development, long since recommended and implemented in comparable common law jurisdictions (see e.g. *Royal Commission: Inquiry into Civil Rights, Report No. 1, Vol. 1* (Queen's Printer, Toronto, 1968); *Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971* (Commonwealth Government Printing Office, Canberra, 1971)).

27. Many decades ago, the Irish courts excised the last vestiges of prerogative power from the Irish body politic. Although the 'prerogative' writs were not royal in origin, consigning them to the dustbin of Irish history is entirely in keeping with the democratic character of our state.

B. Setting out the Judicial Review Procedure in Clear Terms

28. There are benefits to setting out some basics of the judicial review procedure in legislation. For example, Head 8's provisions on interim remedies and Head 10's provisions on the application for leave to seek judicial review seem to me to clearly lay out the existing procedures, without making any changes to the substantive law.

29. Other reforms, however, pose more difficult questions as they run up against established principles.

V. The Problematic Proposed Reforms

30. In the midst of a perceived crisis, it is tempting to forego the careful, incremental development of the law by the judiciary – even though this is how the law of judicial

review has developed for centuries. In my view, the proposed reforms would be more trouble than they are worth. And, again, they should be viewed in the proper historical perspective and context, with the purpose of judicial review in mind, namely to protect the citizen from arbitrary and oppressive exercises of public power.

A. Remedies

31. Head 8(5)(a) would set out the circumstances in which a remedy can be granted on judicial review:

> (i) the respondent has acted unlawfully,
> (ii) the applicant has suffered harm or prejudice,
> (iii) any error of law, or procedural error, was material to the decision,
> (iv) the interests of justice, taking into account the interests of the applicant and the public interest, require such a remedy to be granted, and
> (v) the granting of the remedy provides a significant benefit to the applicant.

32. There are two comments to make here: one about the dubious benefits of codifying the grounds for granting a remedy; another about pitting the citizen against the "public interest".

(i) The Dubious Benefits of Codification

33. (i) to (iii) largely reflect the current state of the law, but it is questionable whether it is worthwhile to codify the concepts of "harm", "prejudice" and 'materiality'. To take just one example, in Australia the meaning of 'materiality' in the law of judicial review has been the source of significant confusion, uncertainty and litigation in recent years (see Daly, "A Typology of Materiality" (2019) 26 *Australian Journal of Administrative Law* 134-144). Why should Ireland seek to repeat this experience?

34. (iv) and (v) contain novel undefined terms, such as "the interests of the applicant", "the public interest" and "significant benefit". There would inevitably be significant litigation over the meaning of these terms. It is difficult to see how additional litigation would contribute to a meaningful response to the perceived judicial review crisis we are currently facing.

35. In my view, this sort of codification game is simply not worth the candle. As I commented to the Independent Review of Administrative Law in the United Kingdom several years ago:

> Given that judges will inevitably be called upon to interpret codification statutes, any attempt to codify contemporary administrative law to eliminate or limit judicial creativity is likely to fail. Moreover, codification is likely to lead to litigation over the relationship between codified administrative law and the common law of judicial review of administrative action. It is difficult to say that codification has led to certainty in Canadian administrative law. In fact, codification has created uncertainty in some respects.

(ii) A Highly Problematic "Public Interest" Test

36. Whatever about the technical merits of codification, this proposed reform is dangerous in principle.

37. Start with some perspective. By definition, if a court is considering these provisions, the citizen will already have demonstrated that the decision at issue was unlawful, unreasonable or procedurally unfair. The court will have already determined that there was an arbitrary or oppressive exercise of public power.

38. If a court has already found the State acted unlawfully, it is incoherent to deny a remedy on the basis that it is in the "public interest" to let the unlawful action stand.

39. Why should the citizen who has been the victim of an arbitrary or oppressive exercise of public power have to suffer the consequences because it would be in

"the public interest" to do? Indeed, could it not be said that it is always in "the public interest" to make sure that the state treats its citizens reasonably and procedurally fairly, whilst acting within the boundaries of its powers?

40. Even the "significant benefit" test raises problems of principle. If the citizen has gone to the lengths of applying for judicial review (often at enormous cost), without any hope of receiving damages as a remedy, why should a court second-guess the citizen and withhold a remedy because the judge thinks there is no "significant" benefit?

41. Worse still, this legislation puts the judge in the difficult position of having to administer justice with a thumb on the scales in favour of the state. This is not likely to increase public confidence in the judiciary.

42. In addition, whether this would be an effective remedy for the purposes of European Union law and the European Convention on Human Rights is open to serious question. These provisions will almost certainly be litigated in Luxembourg and Strasbourg.

B. <u>The Leave Stage</u>

43. As noted, Head 10 helpfully codifies the current requirements for seeking leave to make a judicial review application.

44. However, Head 11(1) goes on to make substantive changes to the law by setting out a variety of other considerations to be taken into account in determining whether the application should be entertained at all:

(a) the application is in accordance with the provisions set out in Head 10,
(b) there are arguable grounds for contending:

(i) in the case of a quashing order, that the impugned decision is invalid or otherwise ought to be quashed,
(ii) in the case of remedies other than a quashing order, that such remedies

should be granted,
(iii) the granting of the remedy would provide a significant benefit to the applicant.

(c) the claim has a reasonable prospect of success, and
(d) the issue is one appropriate for the court and not de minimis in nature.

45. The "conduct" of the parties would also be relevant (Head 11(2)).

46. Even at the leave stage, then, the "significant benefit" standard would apply. This could amount to an imposing barrier between the individual and the supervisory jurisdiction of the courts. As for the "de minimis" consideration, this is already part of the law, but has been interpreted extremely narrowly. It is also difficult to determine the intended relationship between "arguable grounds" (Head 11(1)(b) and "a reasonable prospect of success" (Head 11(1)(c)): surely one always has a reasonable prospect of success if one has an arguable ground for judicial review?

47. Again, much would depend on the interpretation of these provisions. My scepticism about codification applies again here.

48. Moreover, the question of effective remedy looms very large indeed given that these provisions impose substantive requirements at the leave stage, a point at which the citizen might not always have all of the information needed to establish unlawfulness.

C. Judicial Review in the Circuit Court

49. This proposal effectively downgrades judicial review from a constitutional function of the High Court to a statutory function of an inferior court.

50. Under the General Scheme, a wide range of judicial review proceedings would henceforth be commenced in the Dublin Circuit Court, which is an inferior court: immigration proceedings and any other such proceedings as specified by

regulation (Head 9(2)). Claims could be commenced in the High Court only in exceptional circumstances (Head (9)(4)).

51. This would be a remarkable change: as an inferior court, the Circuit Court has no supervisory jurisdiction over creatures of statute, nor have its judges been selected on the basis of their expertise in judicial review.

52. Moreover, the High Court is a superior court and its supervisory jurisdiction has constitutional status — question whether the possibility of invoking the High Court's supervisory jurisdiction only upon demonstration that a case is suitably exceptional satisfies the requirements of the Constitution. Indeed, Head 9(5) purports to oust the High Court's jurisdiction to supervise the Circuit Court – this is understandable given the context, but raises serious constitutional questions given the pre-eminent status accorded to the High Court by the Constitution.

53. Furthermore, there are further questions of effectiveness of remedies under European Union and European human rights law, which are likely to be litigated.

54. In principle, there might be something to be said for creating a bespoke jurisdiction to deal with judicial review applications (subject to the remedies being sufficiently effective).

55. But it is not clear why the Dublin Circuit Court is the best place, as opposed to a special division of the High Court armed with additional resources. It is also not clear why only the Dublin circuit would be a venue for judicial review proceedings. Presumably this is because immigration is the main focus, though even there it is not clear why the jurisdiction should not be decentralised – if the underlying goal here is to keep costs down, making judicial review practice possible in circuits other than Dublin could conceivably contribute to that.

56. I note also that appeals to the Court of Appeal (from the Circuit Court or the High Court) would only lie where a question of "exceptional public importance" is certified and an appeal is desirable in the public interest (Head 12(2)).

57. I confess that I have some sympathy for this provision. The highest-volume judicial review court in Canada is the Federal Court, and the largest contributor to that volume is immigration and refugee proceedings: applicants in those proceedings only have one kick at the can in Federal Court, subject to question being certified as important for resolution by the Federal Court of Appeal. This system works well in immigration and refugee proceedings. It has been criticized because the success rates vary enormously as between different judges (whereas on an appeal court with multiple judges on a panel, these differences would tend to even out). Nonetheless, given that immigration and refugee proceedings generally tend to turn on the facts rather than on questions of legal principle, this is an efficient means of managing the judicial review workload.

58. However, it is doubtful that a certification procedure *in all cases* is appropriate. Immigration and refugee proceedings have a fact-heavy quality. But not all areas of law will have this. One tweak to consider here would be the possibility of identifying the judicial review applications that are subject to a certification requirement in a regulation that could be updated from time to time as experience accrues (see e.g. Head 9(2)).

Conclusion

59. A few years ago, the Johnson government in the United Kingdom sought to reform the law of judicial review. In the end, the legislative changes made were quite limited. These Irish reforms seem to me to be much closer to what the Johnson government would have liked to have seen. True, Ireland is facing what many would term a 'judicial review crisis' given the current scope and scale of judicial review.

60. The Oireachtas should proceed with extreme caution and consider confining reform to procedural clarification rather than substantive restriction.

Is mise le meas,

