# JUDICIAL REVIEW REFORM

## GOVERNMENT CONSULTATION ON THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

## RESPONSE on behalf of the CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION (ALBA)

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**For further information contact**
Malcolm Birdling
Secretary (ALBA)
Email: enquiries@adminlaw.org.uk
Tel c/o: 020 7379 3550

ALBA
c/o Malcolm Birdling
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
Email: enquiries@adminlaw.org.uk
Website: www.adminlaw.org.uk/

## INTRODUCTION

1. ALBA is the professional association for barristers in England and Wales practising in public law, which includes administrative law, constitutional law, judicial review, and other areas of practice concerned with regulating the exercise of public powers.

2. ALBA's members are predominantly self-employed barristers in England and Wales, but also include employed barristers working in the UK Government Legal Profession (formerly known as the Government Legal Service), local authorities, businesses, and campaigning organisations and other NGOs. ALBA's wider membership includes (as associate members) judges, solicitors, legal academics, law students, and lawyers in other jurisdictions.

3. One of ALBA's principal objectives is to provide a forum for exchanges, between practising lawyers, judges and academic lawyers, of knowledge and ideas about the development of public law, including developments in public law jurisprudence and practice across the common law world and within the European Union. Every year ALBA responds to a number of consultations by the Ministry of Justice and other organisations about matters affecting public law.

4. ALBA has convened a working group to produce this consultation response. The members of the working group overlap with but are not the same as the working group which produced a response to the IRAL call for evidence. The working group comprises the following members:

    - Catherine Callaghan QC, Blackstone Chambers (Vice Chair of ALBA);
    - Malcolm Birdling, Brick Court Chambers;
    - Joanne Clement, 11 KBW;
    - Jason Coppel QC, 11 KBW;
    - Steven Coren, Isle of Man Advocate;
    - Flora Curtis (pupil), Francis Taylor Building;
    - Dilpreet Dhanoa, Field Court Tax Chambers;

- Professor Pavlos Eleftheriadis, Francis Taylor Building and Professor of Public Law, University of Oxford;
- Tom Fairclough, 2 Temple Gardens;
- Eric Fripp, The 36 Group;
- David Gardner, No 5 Barristers' Chambers;
- Sam Groom, Judicial Assistant in the Court of Appeal;
- Khatija Hafesji, Monckton Chambers;
- Stephen Hocking, Partner at DAC Beachcroft LLP;
- Raphael Hogarth (pupil), 11KBW;
- Richard Honey QC, Francis Taylor Building;
- Philippe Kuhn, 39 Essex Chambers;
- Jonathan Moffett QC, 11 KBW;
- Richard O'Brien, 4 New Square;
- Peter Oldham QC, 11 KBW;
- Rupert Paines, 11KBW;
- George Peretz QC, Monckton Chambers;
- Deok Joo Rhee QC, 39 Essex Chambers;
- Michael Rhimes (pupil), Francis Taylor Building;
- Joseph Sinclair, Paul L Simon Solicitors;
- Dan Squires QC, Matrix;
- James Strachan QC, 39 Essex Chambers;
- Jennifer Thelen, 39 Essex Chambers;
- Colin Thomann, 39 Essex Chambers;
- Gethin Thomas, 39 Essex Chambers.

5. The working group comprises barristers (including Leading Counsel), solicitors and legal academics who are experts in the field of public law, and more specifically, judicial review. The practitioner members of the Working Group

have extensive experience of appearing in judicial review cases, both for Claimants and for Defendants, including the UK Government. The response is a collaborative effort, and should not be taken to represent the views of any particular member of the working group.

6. The consultation was launched on the basis of the following assertion:

> "The Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision makers has been replaced, in essence, with that of the court. We should strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament."

7. This statement is demonstrably false. The IRAL Panel expressly considered the question whether there was a trend for the courts to trespass into the merits of decisions rather than keeping to their proper function of reviewing the legality of decisions, and clearly rejected that accusation. In its conclusion the Panel stated (para 15):

> "Respect should be based on an understanding of institutional competence. Our view is that the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers."

8. Thus the IRAL Panel expressly rejected the accusation that judges routinely overstepped their proper roles; still less did it suggest that there was an increasing trend for them to do so.

9. Even Lord Faulks did not think it was a fair summary of what his panel had said (in an interview with Joshua Rozenberg QC broadcast on 23 March 2021):[1]

> "There are some cases which we thought — and some of the people who made submissions to us thought — were crossing a line. But it's one thing to say, well, there are one or two cases the result of which is questionable — to then go on and conclude that there's an overall drift in one

[1] https://rozenberg.substack.com/p/faulks-defends-judicial-review

> particular direction. And I think there's a slight danger that you can go from the particular to the general."

10. The Lord Chancellor, Robert Buckland QC, summed up IRAL's conclusions in a statement to the House of Commons:

> "The report's finding — that there is a growing willingness to accept an expansion of the remit of judicial review, whether this is in terms of more decisions being considered justiciable or the way in which courts review an exercise of power and the remedies given — is a worrying one."

11. When questioned about this statement by Joshua Rozenberg QC, Lord Faulks stated as follows:

> "No, I don't think it really was our finding. I think we found that there were one or two cases, which we particularly pointed out, where there was considerable tension between what was legitimate to be considered by the courts and what was really a matter of politics. But those were particular cases. We did not think that there was an overall trend that you could extract from those particular cases."

12. Further, the Government expressly accepted the findings of the IRAL panel.

13. As a result, the mischief identified by the MoJ cannot support the potential proposals. In order to intelligently comment on the proposals, the alleged mischief needs to be identified. In general, it has not been, which raises the serious prospect of the consultation being found to be unlawful as it fails to satisfy the second of the well-known "*Gunning*" requirements for a lawful consultation, i.e. that there be "*sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response*": *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168.[2]

14. ALBA also submits that the consultation period of six weeks is far too short for a consultation with such far-reaching potential consequences. It is impossible to understand why this course would be necessary, and it is highly questionable whether the resulting process can be said to be fair. This gives rise to a serious problem, which is the issue of compliance with the third *Gunning* principle:

[2] The *Gunning* formulation was endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 (SC) at [25], where these requirements were described as "a prescription for fairness" (per Lord Wilson, with whom Lord Kerr, Baroness Hale and Lord Clarke agreed).

adequate time for consideration and response. As the IRAL Panel emphasised in paragraph 2 of its conclusions:

> "We would like to emphasize that *any* changes should only be made after the most careful consideration, given the important role that judicial review plays in our constitutional arrangements and, in particular, in maintaining the rule of law." (emphasis original)

15. This needlessly-rushed consultation does not comply with this clear injunction.

16. There is a further general issue. The terms of the IRAL were extremely wide and invited the panel to consider various reforms. The IRAL Panel expressly cautioned against the introduction of ouster clauses absent extremely cogent justification (see, for instance, the "serious disadvantage" of Parliament being able easily to oust judicial review by altering a statutory code (para 1.32); the likely hostile response from the courts to an ouster clause (para 2.99); and the reference to the practical advantage from an ouster clause not justifying the potential constitutional fallout (para 3.16)). It also proposed a discretion (not a mandatory duty) to issue a suspended quashing order, but rejected any suggestion that other remedial reforms were justified, which would include the prospective-only remedies which the Government is now proposing; still less would the IRAL Panel have approved of a presumption in favour of a prospective-only remedy. Yet the concept of ouster clauses is being consulted upon, without any such cogent justification being advanced, and a mandatory duty to issue prospective-only remedies is also being suggested by the MoJ, without any attempt to engage with its implicit rejection by the IRAL report.

17. The consultation proposals thus fail to deal with their inconsistency with the IRAL Report, and fail to give reasons for departing from it. Instead, they maintain a fiction that they complement the Report. That is to misunderstand the IRAL Report, its terms of reference, and its conclusions.

18. These general problems form the backdrop to the consideration of specific issues below.

**Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?**

19. This question relates to remedies, and overlaps with Question 6. It is therefore addressed below, together with Question 6.

**Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?**

20. ALBA opposes the proposal to legislate to remove Cart Judicial Reviews for two reasons:

    a. First, ALBA has serious concerns about the reliability of the statistical analysis used in the IRAL Report and relied on in the Consultation Document to justify the proposal;

    b. Second, as a matter of principle, Cart Judicial Reviews help prevent serious injustices in an area involving some of the most fundamental human rights, and play an important constitutional function. They should not be legislated away lightly.

***(1) Reliability of the statistical evidence***

21. The IRAL Panel concluded that the continued expenditure of judicial resources on Cart JRs could not be defended because of its conclusion that only 0.22% of all applications for a Cart JR since 2012 (12 out of 5,502 applications) had resulted in the identification and correction of an error of law on the part of the First-tier Tribunal (para 3.46). The Government relied on this so-called 'success rate' of 0.22% to justify its proposal to "*remove the avenue of lodging Cart Judicial Reviews, effectively reversing the outcome of the case*" (para 52).

22. ALBA considers that the statistical evidence set out in the IRAL Report, upon which the Government relies to justify its proposal, is seriously flawed. As a result, the statistical evidence cannot form the basis of any reform in this area.

*(a) Administrative burden*

23. To support its conclusion that Cart JRs form the largest category of applications for judicial review to the Administrative Court, the IRAL Panel relied on average figures over the five-year period 2015 to 2019 inclusive, which results in an average of 779 applications per year (paras 3.37-3.38). However, this is not a representative period because in 2015, the number of applications was dramatically higher than in all other years (1,159 applications in total): see para 3.45. The high number of applications in 2015 is unexplained but obviously exceptional, and there is no reason to treat it as indicative of current or future demand. ALBA suggests that a more representative period is that from 2016 to 2019 inclusive, which produces an average of 683 applications per year.

24. Second, ALBA is concerned about the inadequacy of the evidence as to the relative administrative burden of Cart JRs. No attempt has been made by the IRAL Panel or the Government to assess the administrative resources devoted to Cart JRs. In fact, the streamlined procedure for Cart JRs laid down by CPR Part 54.7A(7)-(9) is designed to reduce the judicial resources required to deal with Cart JRs. In particular:

    a. Permission applications in Cart JRs are dealt with on the papers only, without the possibility of renewal to an oral permission hearing;

    b. In cases where permission is given, there is rarely a substantive hearing. The procedure provided for by CPR Part 54.7A(9), which is applied by the court in the vast majority of successful applications, means that the Upper Tribunal's decision refusing permission is normally quashed automatically by the High Court.

25. This means that the resources required by Cart JRs are significantly less than those required by other forms of judicial review. Therefore, the mere number of applications per year is not indicative of the relative share of administrative and judicial resources consumed by Cart JRs.

*(b) Definition of success or failure*

26. ALBA agrees with the IRAL Panel that it is important to ask the question 'In how many of those cases were the courts able to detect and correct an error of law that

a FTT had fallen into and that the UT had failed to correct because it refused permission to appeal the FTT's decision?'. However, ALBA disagrees with the IRAL Panel's definition of success and failure. The correct approach, given the nature of Cart JR, is that it represents a success if an arguable error of law is identified and the decision of the UT refusing permission is quashed under CPR 54.7A(9) (even if the UT, on subsequent consideration, finds there has not been a material error). Such cases should have been included in the definition of a 'positive result'.

*(c) Success rate*

27. The headline 'success rate' of 0.22% calculated by the IRAL Panel and relied on by the Government is misleading and inaccurate. This figure was arrived at by taking the 12 cases reported on Westlaw and BAILII which were deemed to have 'positive' results, and comparing that figure to the total number of Cart JR applications since 2012 (5,502).

28. But that calculation is logically unsustainable. In fact, as the authors of the IRAL Report accept, the total number of reported cases involving a Cart JR on Westlaw and BAILII is only 45. So a more accurate figure, based on the IRAL Panel's own findings, is in fact **12 out of 45** (as opposed to 5,502), which represents a much higher success rate of **26.7%**. The IRAL Panel has not put forward any cogent explanation for why it relied on the total number of applications, when it had no data at all for 5,457 of those applications.

29. ALBA is extremely surprised that the IRAL Panel attempted to identify Cart JR cases through reports on Westlaw or BAILII. The bespoke Cart JR procedure, by design, will produce very few reported decisions because (a) applications for permission are dealt with on the papers, with no possibility of a renewed oral hearing, and (b) if permission is granted, the court will usually quash the UT's refusal of permission without a substantive hearing. It is only in very rare cases that the UT or Secretary of State requests that a substantive hearing be held. This means that there are very few reported judgments involving Cart JRs. The absence of oral judgments and the rapid remittal of successful cases under the CPR Part 54.7A(9) process means that successful cases will almost always be

invisible to Westlaw or BAILII. Again, the IRAL Panel put forward no coherent justification for its decision to rely only on reported cases.

30. ALBA is particularly surprised by the IRAL Panel's reliance on reported cases in Westlaw and BAILII given that official statistics are kept by the Ministry of Justice (and published in the *Civil Justice Statistics Quarterly*) which would have provided a better basis for analysis of successful Cart JRs. The MoJ statistics include details of 6,293 cases involving some form of Cart JR.

31. In particular, we note and commend the research carried out by Dr Joanna Bell of St Edmunds Hall, Oxford using publicly available information (J. Bell, 'Digging for Information about Cart JRs', U.K. Const. L. Blog (1st April 2021) (available at https://ukconstitutionallaw.org/)). This research demonstrates that in the period during which IRAL assert there were only 12 successful cases, applicants obtained a result which usually had the effect of remitting the appeal back to the Upper Tribunal for further consideration in 366 cases. Expressed as a percentage, this represents **5.34%** (366/6,293) of Cart JR cases detailed in the table, or approximately 25 times the success rate relied on by the IRAL Panel. Further, in the anecdotal experience of ALBA members, the rates of success in Cart JRs are much higher than the rates relied on by the Government or indeed even in Dr Bell's research. On any view, the statistics relied on by the IRAL Panel and the Government are inaccurate and misleading.

***(2) The importance of Cart JRs as a matter of principle***

32. As a matter of principle, Cart JRs help prevent serious injustices in an area involving some of the most fundamental human rights, and play an important constitutional function. In particular, judicial review of decisions of the UT to refuse permission to appeal provides an important safeguard against legal error by the FTT and UT. Any decision to exclude judicial review in this area will require particularly careful justification. This is entirely lacking in the present case.

33. Further, neither IRAL nor the Government have indicated by what mechanism the UT could be adequately supervised by the higher courts, if its decisions to refuse permission to appeal are shielded from judicial review.

***How the Cart JR procedure could be made more effective***

34. Rather than legislating to remove Cart JRs entirely, it would be possible to reform the Cart JR procedure, to make it more effective.

35. First, consideration should be given to extending the time limit for making an application, and/or to making all time limits effective from the date of service. Currently, by CPR Part 54.7A(3), the application and supporting documents must be filed '*no later than 16 days*' after the date on which notice of the Upper Tribunal's decision was *sent* to the applicant. This tight timeframe makes it difficult for applicants and their legal representatives to assess whether their case is suitable for a Cart JR and to prepare their application. By extending the deadline by a few days, the number of applications made may reduce and the quality of applications made may improve.

36. Further or alternatively, the time for filing a Cart JR application should start to run from the date of service of a decision, not the date on which it was sent. The general principle, which is overridden in relation to Cart JRs, is that a decision is treated as effective only from the time the person affected by it becomes aware of it: see *R (Anufrijeva) v SSHD* [2003] UKHL 36; [2004] 1 AC 604 at 621, at §26 per Lord Steyn. ALBA is aware of at least one instance during the current pandemic, when a decision reached an individual's legal representatives 14 days after the date on which it was marked as sent, so that only two days remained to file proceedings.

37. Further, there is a notable contradiction between this time limit, in respect of which the burden of delay in receipt is on the applicant, and CPR Part 54.7A(9) in which the UT or Interested Party (generally the Government department whose decision is under challenge) is given 14 days *from receipt* for the much less complex task of indicating whether a substantive hearing should be held. Ensuring that the time limit begins to run from *receipt* of the decision, not from

date of sending would increase certainty, give parties the opportunity to properly consider whether or not they wish to proceed with a Cart JR, and bring a measure of consistency as between claimants and defendants/Interested Parties.

**Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?**

38. ALBA does not have any specific mandate to represent practitioners in any of the devolved administrations other than Wales, so does not comment on the substantive question. Procedurally, however, we would consider that any proposal to extend these proposals to other jurisdictions ought to be made in close consultation with practitioners and professional bodies in those other jurisdictions.

**REMEDIES**

39. Questions 4, 5 and 6 are all concerned with remedies. Before addressing the individual questions, ALBA wishes to raise its serious concerns about the proposals set out in paragraphs 60 to 70 of the Consultation Document ("the Remedies Proposals").

40. ALBA is concerned that the purpose of the Remedies Proposals is not to facilitate the courts having greater flexibility to tailor the remedies granted to the particular circumstances of individual cases. Rather, it appears that the purpose of these proposals is to reduce flexibility and, in particular, to make it more difficult for the courts to grant a meaningful remedy in cases where executive action has been held to be unlawful. ALBA considers that this is a clear example of what the IRAL Panel described as the Government seeking to "change the rules of the game" in its own favour (IRAL Report, para 1.32).

41. Further, ALBA is extremely concerned that the practical effect of the Remedies Proposals, if implemented, would be to immunise broad swathes of executive decision-making from effective legal challenge: a claimant will be unlikely to challenge an even obviously unlawful act if there is little prospect of him or her obtaining an order that provides for a meaningful remedy in his or her case. It is

also likely to be difficult to obtain legal aid or other funding in such a case. It might even come to be difficult for an individual claimant to obtain permission to apply for judicial review if there is little or no prospect of him or her obtaining a meaningful remedy in his or her specific case.

42. In this respect, it is of particular concern that the Government appears to rely upon a self-serving and novel conception of the rule of law to justify the Remedies Proposals, a conception which prioritises so-called "legal certainty" above all other considerations, including the requirement that the citizen can achieve a meaningful remedy when he or she is adversely affected by unlawful action on the part of the Government. In essence, the Government's position appears to be that it is better to be certain that its unlawful actions will be allowed to stand than for the courts to have the freedom to achieve justice in individual cases. ALBA considers that this is an extraordinary position for a Government that purports to be committed to the rule of law to adopt.

43. In ALBA's view, the Remedies Proposals would, if implemented, represent a significant legislative restriction of judicial review, far exceeding any previous legislative interventions in this field. Accordingly, it is a matter of considerable regret that paragraphs 60 to 70 of the Consultation Document are badly-written, in a way that obscures rather than elucidates the exact nature of the Remedies Proposals and the Government's reasons for promoting them, and that such reasoning as it is possible to divine from paragraphs 60 to 70 is superficial and on occasion illogical. ALBA wishes to record its profound concern that the Government considers it appropriate to propose such fundamental restrictions of judicial review on the basis of such a threadbare justification. Further, given the significant overlap between judicial review and Human Rights Act claims identified by IRAL, and the fact that the Independent Human Rights Act Review ("IHRA") Panel is not due to report any time soon, ALBA simply does not understand how these questions can be fairly asked prior to the report of the IHRA Panel, let alone seeking responses within six weeks on this threadbare basis.

44. One further general point of objection is the impact that the Remedies Proposals would be likely to have on public law litigation. The gist of the Remedies Proposals is that a remedy should not have any effect before the point at which it is granted. As the Government itself accepts, this will visit "unjust outcomes" on individual litigants. The nature and extent of those "unjust outcomes" in a particular case will, to a large extent, depend on the time that it takes that case to come to court. It is therefore likely that, in order to reduce the extent of that injustice, claimants will push to have their claims for judicial review heard as soon as possible. This will put pressure on both the courts and public bodies, and it is pressure that the Government will likely only be able to resist if it were to agree not to argue that any remedy should be prospective only.

45. The Government's other procedural proposals do not appear to take account of this point, and ALBA notes that the Government has not suggested that it will increase the resourcing available to the courts and defendant public bodies in order to enable them to cope with this increased pressure.

46. ALBA notes from the Lord Chancellor's foreword to the Consultation Document that the Government considers that the Remedies Proposals expand "on the logic and reasoning of the Panel" (see paragraph 3); would ensure "that the courts have available to them a flexible range of remedies, allowing cases to be resolved in a manner which is sensitive to both the rights of individual citizens and to the other public interest" (see paragraph 5); and constitute "one of the most pressing issues" arising in relation to judicial review (see paragraph 6). Accordingly, ALBA considers that, before addressing each of the specific Remedies Proposals, it is appropriate to evaluate them generally by reference to the Lord Chancellor's own explanation for them.

### *(1) The Remedies Proposals do not expand on the logic and reasoning of the Panel*

47. ALBA is unable to see how the Remedies Proposals expand on the logic and reasoning of the IRAL Panel, and it notes that the Government has not sought to explain why it considers that they do.

48. The IRAL Panel was clear that the only recommendation that it made in relation to remedies was the conferral on the courts of a power to grant a suspended quashing order (IRAL Report, para 3.49); the Panel deliberately did not recommend any further intervention in relation to remedies, and if did, it would have been expected to say so. ALBA therefore submits that the IRAL Panel implicitly rejected any further reform at this time, and (having accepted the IRAL Panel's recommendations), the Government must explain why it now rejects the IRAL Panel's refusal to go further. Further, and importantly, it is necessary to understand even this recommendation of the Panel in the context of the reasoning that underpinned it.

49. First, the IRAL Panel was of the view that, in certain high-profile cases, the grant of a suspended quashing order would provide a window within which Parliament could legislate so as to validate the act that had been held to be unlawful (IRAL Report, paras 3.51, 3.52 and 3.64). Accordingly, the Panel envisaged that, in such cases, it would be a matter for Parliament, and not the executive, to take the action that would be necessary to avoid the impugned act being quashed. This point appears to have been entirely overlooked by the Government, which seems to have assumed that the IRAL Panel intended that suspending quashing orders would be a vehicle for allowing the Government to take time to correct its own mistakes. This assumption is manifestly incorrect.

50. Secondly, the IRAL Panel considered the type of case where the courts would at present refuse a quashing order and grant only a declaration on the basis that the grant of a quashing order would cause administrative inconvenience. The IRAL Panel cited *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) as an example of such a case. The Panel considered that, in such a case, a suspended quashing order would have provided a more effective remedy which would have ensured that the defendant Secretary of State was properly held to account for the breach of his statutory duties (IRAL Report, para 3.54). This point is addressed further below. However, for present purposes it is necessary to recognise that this aspect of the IRAL Panel's reasoning in support of suspended quashing orders was predicated on the desirability of *expanding*, not restricting, the remedial powers available to the

courts in order to *maximise* their ability to impugn unlawful action. In the Panel's words, if in *Hurley and Moore* the Divisional Court had been able to grant a suspended quashing order, it would have been able to grant a remedy with "more teeth". Again, this point appears to have been entirely overlooked by the Government.

51. Thirdly, the IRAL Panel recommended that, if suspended quashing orders were to be introduced, it would be appropriate to leave it to the courts to develop the principles governing the grant of such orders on a case-by-case basis (IRAL Report, para 3.69). The Remedies Proposals, with their emphasis on presumptions and statutory factors to which regard must be had, are entirely inconsistent with this recommendation.

52. In light of the above, it would appear that, if the Government believes that the Remedies Proposals expand on the logic and reasoning of the IRAL Panel, it has fundamentally misunderstood that logic and reasoning. ALBA considers that, in reality, the Remedies Proposals are an example of a political decision to legislate more widely than the IRAL Panel recommended, and it is unfortunate and unhelpful that the Government has not been willing expressly to acknowledge that fact (IRAL Report, conclusions para 12).

***(2) The Remedies Proposals would not ensure flexibility***

53. As explained below, contrary to the recommendations of the IRAL Panel, the Remedies Proposals would not ensure greater flexibility in relation to the grant of remedies. On the contrary, their main purpose appears to be, and their main effect would be, to deprive a claimant who satisfies the court that he or she has been the victim of unlawful action by the state of a meaningful remedy in respect of that action.

54. In seeking to impose a presumption against the grant of a meaningful remedy, the Government is seeking to reverse decades of jurisprudence and accepted orthodoxy on the grant of remedies. As the Law Commission noted in 1994:[3]

[3] Law Com No 226, *Administrative Law: Judicial Review and Statutory Appeals*, para 8.17.

> "The consultation paper expressed the view that provided that the discretion to grant or refuse remedies is strictly limited and the rules for its exercise clearly understood, the mere fact that it exists should not be a cause for concern. The majority of those who responded agreed with the proposition and accepted that a limited discretion to refuse relief should be available."

55. The effect of the Remedies Proposals would be to turn this on its head: the courts would be left with only a limited discretion to *grant* an effective remedy to the individual claimant. This is exactly the kind of "radical restructuring" that the Government has purported to disavow (Consultation Document, para 32).

### *(3) There is no pressing need for the Remedies Proposals*

56. The IRAL Panel recommended that the Government should "think long and hard" before seeking to curtail the powers of the courts (Panel Report, conclusions para 10). In light of this, it is striking that the Government has not put forward any coherent reasoning or evidence in support of the Remedies Proposals.

57. In particular, there is no analysis or evidence in the Consultation Document of any particular difficulties currently arising out of the remedies that are available to the courts, or the courts' approach to their use. In this respect, the Consultation Document cites no evidence that the courts' discretion in relation to remedies does not generally allow a court to tailor any remedy to the particular circumstances of the case before it. In this context, it is relevant to note that the grounds on which a remedy might be refused were well-established as long ago as 1994:[4]

> "…Public policy requirements such as certainty, lack of standing or prejudice to good administration will, however, mean that ultimately a remedy may well not be granted, or that relief will only be granted on a prospective basis.
>
> There was little disagreement with the factors said to be taken into account by the courts at present. These have been established to include waiver, bad faith, and ulterior motives, prematurity, absence of injustice or prejudice, impact on third parties and on the administration, the procedural nature of the error and, exceptionally, the fact that the decision would have been the same regardless of the error."

[4] Law Com No 226, *Administrative Law: Judicial Review and Statutory Appeals*, para 8.17.

58. Importantly, the Government's own submissions to the IRAL Panel did not reveal any general concerns about the remedies available to the courts, or the way in which the courts approach those remedies:[5]

> "The discretionary powers available to the courts under Judicial Review were in some instances felt by Departments to be helpful, something which allowed a useful degree of flexibility given that no two Judicial Reviews are the same."
>
> "All Departments agreed that a central tenet of a Judicial Review is to encourage good decision-making and undo wrong decision-making. It follows that the appropriate remedy is often the quashing of a decision found to be unlawful or wrong, and in respect to giving other remedies the courts generally have a sensible degree of discretion."

59. In this respect, the Government's own submissions appear to have reflected those of other respondents:[6]

> "By a clear majority, respondents stated that remedies are indeed sufficiently flexible and the court's discretion is a positive element of judicial review….
>
> Many respondents who act for both defendants and claimants specified that quashing orders were a satisfactory remedy, despite the inconvenience they might occasion…."

60. In light of the Government's own submissions to IRAL, and its apparent *volte face* in the Consultation Document, the Government might have been expected clearly to identify why it now considers there to be a "pressing need" for the Remedies Proposals. It has not done so. Insofar as ALBA has been able to identify any justifications put forward for the Remedies Proposals, they fall into two main categories.

61. First, it is asserted that the Remedies Proposals would mitigate adverse effects on the Government's finances and "enable the Government to continue to spend on improving the lives of its citizens". However, the Consultation Document provides no analysis of and no evidence as to why, or to what extent, this might be the case, or any analysis of the reliability of any such evidence (as to which,

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[5] *Summary of Government Submissions to the Independent Review of Administrative Law*, paras 7 and 22.
[6] Panel Report, Appendix C, paras C17-C18.

see our submissions on *Cart* reform). Where the Government is proposing to visit what it accepts would be "unjust outcomes" on the victims of its own unlawful decisions (Consultation Document, para 61) on the basis of a utilitarian argument, it is incumbent on the Government at least to provide evidence to support that argument. It has not even attempted to do so.

62. Secondly, insofar as the Remedies Proposals would relate to secondary legislation, it is suggested that decisions to make secondary legislation are "inherently different from other exercises of power" and that therefore legal certainty requires that such legislation should be invalidated only prospectively. However, no attempt has been made to define what is meant by "secondary legislation" in this context (*cf* the very wide definition of "subordinate legislation" provided for by s.21(1) of the Human Rights Act 1998, which goes well beyond measures that would conventionally be regarded as "legislation"), and no attempt has been made to grapple with the obvious point that secondary legislation is an act of the executive, not the legislature. If the Government wishes to achieve the "legal certainty" of protecting so-called "acts of a legislative nature" from the risk of being quashed by the courts, the solution is obvious: it should ask Parliament to enact them by way of primary legislation. The Government cannot have it both ways; it cannot enjoy the benefits and convenience of persuading Parliament to confer upon it the power to legislate whilst at the same time escaping the consequences of such legislation being the product of a decision of the executive and not of the legislature.

63. Further, no attempt has been made to provide evidence of particular cases where the quashing of whatever types of secondary legislation the Government might have in mind has given rise to the type of "injustice and unfairness" to which the Consultation Document refers (Consultation Document, para 67).

64. Further, and importantly, one of the most striking aspects of paragraphs 60 to 70 of the Consultation Document is their complete failure to engage with the fact that a very wide range of decisions are susceptible to judicial review (as emphasised by the IRAL Panel), to address the wide range of remedies that may be granted, or to consider the justifications for, and consequences of, applying

the Remedies Proposals in all such cases. Strikingly, there is not even a mention of the anticipated impact of the Remedies Proposals in cases involving public bodies other than the Government; indeed, the Remedies Proposals entirely overlook even the existence of such cases or to grapple with the difficult practical questions that would arise should, for example, a grant of planning permission or a licence be subject only to prospective quashing.

65. In light of the above, ALBA is unable to discern from the Consultation Document the alleged "pressing need" for the Remedies Proposals that the Government asserts.

**Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?**

66. ALBA's response to Question 4 is:

    a. section 31 of the Senior Courts Act 1981 should *not* be amended to provide for prospective-only remedies;

    b. however, if such an amendment were to be made, it should *not* prescribe a list of factors that the courts must or may take into account; the principles governing the grant of any such remedies should be left to the courts to develop on a case-by-case basis.

67. At the outset, ALBA observes that Question 4 appears to refer to the full range of remedies that might be granted on an application for judicial review, but the reasoning set out in support of the proposal to which it refers appears to relate only to quashing orders (Consultation Document, paras 60-65). Further, the Consultation Document conspicuously fails to explain the point at which any "prospectiveness" should apply: is it the point at which the defendant is first alerted to a potential challenge, is it the point at which a claim is brought, is it the point at which the relevant act is held to be unlawful, or is it the point at which the remedy is granted? In ALBA's view, it is extraordinary that the Government has not made clear its position in this respect.

68. The result is that it is entirely unclear what exactly the Government is proposing under Question 4 and, if its proposal relates to the full range of remedies, how exactly the Government envisages the proposal would operate in practice or what the reasoning in support of it is. It is a matter of considerable concern to ALBA that the Consultation Documentation is so opaque on such an important matter, as it hampers the ability of consultees to provide a meaningful response.

69. The stated rationale for the proposal to which Question 4 refers is an "intention to provide courts with another option in much the same way as a suspended quashing order. A prospective remedy would allow the courts to apply a remedy in the future rather than retrospectively" (Consultation Document, para 43). The proposal appears to be predicated on the following assumptions (Consultation Document, para 60):

    a. a prospective-only remedy would provide "certainty in relation to government action"; and

    b. it would "mitigate the impact of immediately having to set up a compensatory scheme. In turn, this would mitigate effects on government budgeting". It is stated that, instead, a prospective remedy would lead to an "appropriate and robust" compensation scheme, rather than one "created in a reactive manner".

70. It is important to recognize that the law already provides courts with a wide discretion with respect to remedy, the grant of *any* remedy being discretionary in the first place, and that this discretion extends to the grant of a prospective-only remedy if it were appropriate in a particular case. It is therefore unnecessary to amend section 31 of the Senior Courts Act 1981 in the manner proposed. Moreover, to do so in a way which is intended to encourage greater use of prospective-only remedies would not be appropriate given the uncertainty and unfairness that can result from such remedies.

### *(1) The current law*

71. It is well settled that "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary" (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 656 *per* Lord Roskill).

72. However, the discretion must be exercised judicially and it has been recognised that, in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it (*R (Edwards) v Environment Agency (No 2)* [2008] UKHL 22, [2008] 1 WLR 1587, para 63). This is often referred to as a presumption in favour of relief.

73. A quashing order is the primary and usually the most appropriate remedy where a public law decision is unlawful. In *Cocks v Thanet DC* [1983] 2 AC 286, the House of Lords held (p 295 *per* Lord Bridge):

> "Even though nullification of a public law decision can, if necessary, be achieved by declaration as an alternative to an order of certiorari, certiorari to quash remains the primary and most appropriate remedy."

74. Where the court quashes a decision, it can remit the matter to the decision-maker to reconsider and reach a decision that is in accordance with the judgment of the court (pursuant to CPR 54.19). In some limited circumstances, the court may substitute its own decision for the decision to which the claim relates (insofar as permitted by section 31(5A) of the Senior Courts Act 1981[7]). A quashing order may be coupled with a declaration.

75. The key point is that the court has discretion, in determining what it is fair and just to do in a particular case. For example, the court may grant a declaration instead of a quashing order[8] (and/or a mandatory or prohibiting order or an injunction). In this respect, the Court's discretion is "a wide one" (*Credit Suisse v Allerdale BC* [1997] QB 306, 355 *per* Hobhouse LJ). Equally, a court may

[7] I.e. where: (a) the decision in question was made by a court or tribunal, (b) the decision is quashed on the ground that there has been an error of law, and (c) without the error, there would have been only one decision which the court or tribunal could have reached.
[8] See, for example, *Great North Eastern Railway Ltd v Office of Rail Regulation* [2006] EWHC 1942 (Admin).

decide to grant relief in respect of one aspect of an impugned decision, but not others.

76. Indeed, the only authority cited in the Consultation Document in relation to Question 4, *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201 (Admin), is a good example of the court exercising its remedial discretion, and making a declaration instead of a quashing order. It illustrates that the courts are acutely alive to concerns about administrative chaos and economic implications (further, and in any event, *Hurley and Moore* was cited by the IRAL Panel in support of their recommendation for suspended quashing orders; the IRAL Panel did not consider that it justified the introduction of a new power to grant prospective-only remedies).

77. Equally, however, as Sedley LJ lamented in *R (Parkyn) v Restormel BC* [2001] EWCA Civ 330; [2001] 1 PLR 108 (at para 32):

> "How, one wonders, is good administration ever assisted by upholding an unlawful decision? If there are reasons for not interfering with an unlawful decision, as there are here, they operate not in the interests of good administration but in defiance of it."

78. There are a number of other factors which may influence the exercise of the court's discretion, including the following.

    a. The public body acted unlawfully only on procedural, rather than substantive, grounds (see *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, paras 111-112).

    b. The extent of the claimant's interest in the matter under challenge (*R v Felixstowe Justices, ex p Leigh* [1987] QB 582).

    c. The remedy would serve no practical purpose. For example, the activity under challenge might have already ceased (*Williams v Home Office (No 2)* [1981] 1 All ER 1211 and [1982] 2 All ER 564).

d. In addition, where rights under the European Convention on Human Rights are in issue, the Court must consider whether any remedy for a breach of a right is effective and would afford just satisfaction.[9]

79. In *Re: Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41, Lord Nicholls of Birkenhead and Lord Hope of Craighead considered that, in exceptional circumstances, prospective overruling may be appropriate. Lord Nicholls considered that it may be necessary (at para 40):

> "to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions."

80. Similarly, Lord Hope observed:

> "71. …I do not think that we can say that there will never be cases when the interests of justice may require the removal of the retrospective effect of a judgment by making a declaration to that effect.
>
> 72. The question whether such a declaration will ever be consistent with the exercise of judicial power must, in the end, depend on the issue that the House is being called upon to decide…
> …
> 74 …I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively."

81. In *HM Treasury v Ahmed* [2010] UKSC 5, [2010] 2 AC 534, Lord Hope (dissenting) made the following *obiter* observations:

> "17. There was some discussion in the course of the hearing of the question whether the Court should declare that the orders that it proposed to make should have effect prospectively only. The usual rule, of course, is that an order quashing an order or other measure as *ultra vires* operates retrospectively as well as prospectively. The question whether there was power to place temporal limitations on the effect of its judgments was considered by the House of Lords in *In re Spectrum*

[9] *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, para 61 *per* Lord Nicholls. In *R (K) v Camden and Islington Health Authority* [2001] EWCA Civ 240, [2002] QB 198, para 54, Sedley LJ described Article 13 of the ECHR as reflecting "the longstanding principle of our law that where there is a right there should be a remedy".

> *Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680. The focus in that case was on the prospective overruling of decisions on points of law. The House held that it had jurisdiction to make such an order, although it declined to do so on the facts of that case. In *A Time for Everything under the Law: Some Reflections on Retrospectivity* (2005) 121 LQR 57, 77 Lord Rodger of Earlsferry acknowledged that prospective overruling might be particularly useful in cases involving the application of Convention rights.
>
> 18. The situation in this case is quite different. For the reasons that the Court has given, the TO 2006 and article 3(1)(b) of the AQO were ultra vires and void from the moment that the Orders were made. It would be entirely contrary to the reasoning on which that conclusion is based for the ruling to be applied only to the future and not to the past. But I do not think that it is necessary to explore the point further because Mr Swift, very properly, made it clear that the Treasury were not seeking prospective overruling in this case. He accepted that the Court's orders, when made, will apply retroactively as usual."

82. The majority of the Supreme Court (Lord Phillips, with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance agreed) did not make any comment beyond observing that the Appellant did not seek a prospective overruling.

83. Accordingly, the courts have already recognized that they have the jurisdiction to make an order that is prospective-only in effect, but that they will only do so in exceptional circumstances. Accordingly, the only purpose that would be served by the proposed amendment to section 31 of the Senior Courts Act 1981 would be to broaden the circumstances in which such a remedy might be granted and, for the reasons set out elsewhere in this response, the Consultation Document fails to advance any coherent case in favour of such an approach.

84. Moreover, there is long-standing case law on the position where a decision of the court alters a previous understanding of the law, which had previously been applied by a public body in other cases. In *R v Hertfordshire County Council, ex parte Cheung*, The Times, 26 March 1986, the courts were concerned with the effect of *R v London Borough of Barnet, ex p Shah* [1983] 2 AC 309, in which the House of Lords determined that, contrary to what had been previously understood to be the position, a person ordinarily resident in the UK was eligible for a student grant regardless of his immigration status. In *ex p Cheung*, Sir John

Donaldson MR held that if there is a change in the law, or the law is suddenly "discovered", previous decisions will remain valid unless and until set aside by a court of competent jurisdiction. He stated:

> "'Order, counterorder, disorder' is of the essence of good public administration. If the law is changed or suddenly discovered, it is right that it should be applied in its new form thereafter, but if it is to be applied retrospectively, this must be subject to some limitation. Quite what limitation should be applied would depend upon the particular circumstances. In the field of private law, retrospective action is controlled by the statute of limitations and the doctrine of laches. In the field of public law, it is controlled in the absence of any statutory provision by the exercise of the court's discretion."

85. The principle in *Cheung* was recently reaffirmed and considered by both the Divisional Court and Court of Appeal in *R (Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin) and [2014] EWCA Civ 194.

86. In such circumstances, the proposed amendment is unnecessary. The proposal does not recognise the existing discretionary power of the courts to provide for prospective relief, nor the principles which enable the practical effect of rulings which do have retrospective effect to be addressed in practice by decision-makers in line with the principles articulated in *Cheung* and *Ali*.

87. A degree of remedial flexibility is known to constitutional courts in Civil Law systems, including the French Conseil d'Etat and the German Constitutional Courts. The principle that overruling may take prospective effect only is further reflected in a long-standing jurisprudence of the Court of Justice of the European Union (see C-209/03 *R (Bidar) v Ealing London Borough Council* [2005] ECR I-2119 and see generally Aiden O'Neill, *EU Law for UK Lawyers* 1st edn, §2.153-4). The effect of the CJEU's jurisprudence on remedial flexibility is that it is resorted to only exceptionally and where the number of legal relationships entered into, in reliance upon the measure, and/or the economic repercussions of retrospectivity justify this. The party who has brought the case before the Court is generally *not* deprived in such cases of a remedy by CJEU (nor others who have, prior to delivery of the judgment, instituted proceedings), for the reasons outlined above. In ALBA's view, if the Government intends to pursue this

proposal, it should carry out a more detailed comparative law exercise before reaching any final conclusions.

***(2) Uncertainty and Unfairness***

88. The introduction of an "at large" discretion to grant a prospective-only remedy would serve only to increase uncertainty and to increase the potential for time-consuming and costly disputes at the remedies stage.

89. Despite this, there is no meaningful analysis put forward in the Consultation Document as to why a change in the law to provide expressly for prospective-only remedies is considered to be necessary. In ALBA's view, the reluctance of the courts to grant prospective-only remedies is, in itself, an indication that generally there is not a need for such remedies.

90. The Consultation Document states that prospective-only remedies could serve a useful purpose by allowing the Government to devote resources to "developing a conciliatory political mechanism to set up a compensation scheme that is appropriate and robust, rather than created in a reactive manner" rather than to "mitigate the impact of immediately having to set up a compensatory scheme" (para 60).

91. This focus on potential compensation schemes is surprising. As is well-known, the fact that a public body has acted unlawfully in a public law sense does not of itself give rise to a right to compensation on the part of the affected individual. Nevertheless, the Consultation Document appears to proceed on the basis of an assumption that, every time a decision is quashed, the relevant public body will be required to set up a compensation scheme. As a result, the reasoning in the Consultation Document is both confused and confusing.

92. No example of the supposed practical benefits of prospective-only remedies is given other than the reference to compensation schemes. This points to the absence of any evidence of the practical utility of the proposal.

93. The Consultation Document refers to "a decision" which "could not be used in the future (as it would be quashed), but its past use would be deemed valid" (para 60). This text is difficult to understand, and it appears to betray the problem (identified above) that the Remedies Proposals do not properly engage with the full range of decision-making that might be subject to judicial review. Most decisions which are challenged by way of judicial review are not "ongoing" decisions; they are decisions which are taken at a fixed point in time (although they might have ongoing consequences). If a successful claimant were deprived of a remedy in such cases as a matter of course, it would risk rendering the challenge meaningless.

94. Further, there is a real risk that use of prospective-only remedies will generate significant satellite litigation in relation to the point from which relief should be granted. In cases of any complexity, it will not be straightforward to determine what "prospective-only" application would mean, and it seems likely that the courts will be required carefully to craft case-specific remedies, resulting in an increase in disputes at the remedies stage and increased uncertainty as what the outcome is likely to be.

95. Use of prospective-only remedies will also place a significant emphasis on the speed of the litigation process itself. Claimants may well seek expedition, and shorter time scales, in order to expand the class of those potentially able to benefit from a successful judgment. This will place increased pressure on both Respondents and the Court to deal with the litigation in a shorter timescale.

96. The Consultation Document outlines four factors which courts could be required to consider before imposing a remedy (para 64):

    a. "whether such an order would have exceptional economic implications",

    b. "whether there would be a significant administrative burden",

    c. "whether injustice would be caused by a prospective-only remedy", and

d. "whether third parties have already relied considerably upon the impugned provision/decision".

97. ALBA has two main objections to specifying factors that must be taken into account by the courts in this respect. First, unless it is made clear that any list of factors is indicative only (in which case, there would seem to be little point in listing such factors), it would risk limiting the judicial discretion that the Government states that it wants to be applied (Consultation Document, para 61).

98. Secondly, the proposed four factors are unlikely to provide helpful guidance to courts. For example, it is inevitable that a court, when considering remedy, would take into account whether or not injustice would be caused by a prospective-only remedy, as well as the administrative burden and the position of third parties; these are factors that are already taken into account. Further, as currently formulated, the factors emphasise the burden on government at the expense of the injustice to the individual. Three factors arguably place weight on the status quo: i.e. the need to consider "exceptional economic implications", the "significant administrative burden" and the reliance of third parties. By listing these factors, and not other factors which specifically go to issues of unfairness and uncertainty, the decision-making framework is skewed towards preserving the status quo by use of a prospective-only remedy.

**Question 5 relates to: (a) a presumption of prospective-only quashing in relation to SIs, and (b) mandating that remedies granted in relation to SIs will be prospective-only, unless there is an exceptional public interest requiring a different approach.**

**Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?**

99. ALBA's response to Question 5 is:

a. Question 5 is predicated on two flawed premises, i.e. the assumption that "greater certainty" is required and the assumption that Statutory Instruments ("SIs") will have been scrutinised by Parliament; and

b. Accordingly, neither approach (a) nor approach (b) should be adopted.

100. ALBA's general position in respect of prospective-only remedies is set out in the response to Question 4, above. In addition, ALBA does not agree that there is any justification for prospective-only remedies in respect of SIs in particular. In summary:

a. there are no grounds for treating SIs any differently from other forms of executive action;

b. there are dangers in adopting a deferential approach to SIs;

c. the rule of law would be undermined by immunising SIs from quashing;

d. the justification advanced in support of the proposal is unclear and illogical; and

e. the proposed test of "exceptional public interest" is not settled.

***(1) There are no grounds for differential treatment of SIs***

101. SIs are in essence, and in all material respects, a species of executive action. Their only distinguishing feature is that they are adopted pursuant to authority granted by an Act of Parliament and in accordance with Parliamentary procedures. The fact that their authority derives from Parliament in this way affords no justification for applying either of the suggested approaches: (a) a presumption of prospective-only quashing or (b) mandating that remedies granted in relation to SIs will be prospective only, unless there is an exceptional public interest requiring a different approach.

102. The fact that SIs might (but by no means always will) be measures of general application does not differentiate them as a matter of principle from other species of executive action, which can similarly be of general application. ALBA does not agree with the observation (at para 67 of the Consultation Document) that, because (some) SIs are intended to be relied on by others, they are "inherently different" from other exercises of power. Executive actions can similarly be intended, and considered to be, valid and, in principle, relied on by others (an obvious example being grants of planning permission).

103. ALBA does not consider that the fact that a particular Parliamentary process must be followed when certain SIs are made affords any justification for either of the suggested approaches. For instance, the fact that subordinate legislation or rules may be subject to the affirmative vote of either or both Houses of Parliament does not relieve the public body making the legislation of its conventional public law obligations. For example, the affirmative resolution procedure does not absolve the Secretary of State of his duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (see e.g. *R (Project for the Registration of Children as British Citizens) v SSHD* [2021] EWCA Civ 193, para 70(iii); cf paras 121 and 123).

104. It is well-recognised that the Parliamentary processes afford only limited scrutiny in respect of SIs (*cf* in relation to the Immigration Rules *Huang v SSHD* [2007] 2 AC 167, para 17). Only a small handful of SIs have been voted down in recent decades. In addition, such scrutiny as there is is slow, and increasingly so, under the burden of Brexit legislation, Covid legislation and urgency procedures. Combined with the absence of any guarantee of any prior duty of consultation, the process for the making of SIs contains very few safeguards.

105. In this respect, ALBA notes that whilst the Consultation Document relies heavily on the submission of Sir Stephen Laws to the IRAL Panel, it does not cite his observation that "[o]ften statutory instruments become law without debate or discussion on the floor of either House, and Parliament's formal powers are confined to the options of acceptance or rejection, with no power of amendment".

106. There is therefore no principled basis for applying a presumption of prospective-only quashing in respect of SIs. Nor is there any justification for mandating that remedies granted in relation to SIs will be prospective-only. Indeed, such an approach would fundamentally undermine the rule of law (see further below) and seek to elevate the status and function of SIs and incentivise recourse to SIs as a means of bringing forward legislative proposals with limited scrutiny.

***(2) There are dangers in adopting a deferential approach to SIs***

107. The dangers inherent in the approaches suggested are only amplified by (i) increasing resort to framework Bills, where the details are left to be elaborated by SIs, and there is little detail in the enabling Act from which to divine the statutory purpose (which may necessitate an uncomfortable resort to investigating the scope and content of Parliamentary debate); (ii) aggressive recourse to "Henry VIII powers" (a live and pressing issue in the context of the UK's withdrawal from the EU); and (iii) increasing resort to and/or misuse of the urgency procedure resulting in minimal Parliamentary input before being made, all potentially exacerbated by the use of wide and open textured vires language.

108. Covid-related SIs illustrate starkly these dangers. According to the Hansard Society dashboard, the Government has laid 424 coronavirus-related SIs before Parliament (representing 32% of all the SIs laid before Parliament over the same period):

    a. Of these (i) 99 were "made affirmatives", of which 85 were made using the urgent power conferred on ministers by the Public Health (Control of Disease) Act 1984; (ii) 25 were "draft affirmatives"; (iii) 298 were "made negatives"; and (iv) 2 "laid only".

    b. Of the 298 Covid-related SIs laid before Parliament which were subject to the negative resolution procedure, 176 failed to comply with the convention by which, wherever possible, the SI which is subject to the negative procedure is laid before Parliament at least 21 days before it comes into effect.

c. Further, as of 22 April 2021, 52 Covid-related SIs have come into effect before they were even laid before Parliament.

109. The manner in which Covid Regulations have been made highlight the very real dangers of affording deference to SIs on the basis of supposed Parliamentary scrutiny. Whilst ALBA recognises that in some cases the circumstances of the pandemic required urgent action, it must also be recognised that in many respects Covid Regulations involved serious incursions into the rights and freedoms of huge numbers of citizens and businesses.

110. Further, when coupled with the approach to the availability of grounds of judicial review outlined in the Consultation Document (see, for example, para 25), the prospective-only quashing of SIs for illegality would in effect enable the Government to legislate at will, in the knowledge that even if a ground of judicial review were available, the SI would be functionally lawful up to the point of the issuing of any relief. This would risk creating an incentive to the Government to propose framework Acts, or Acts which push Government decision-making into SIs, so as to increase the chances of escaping meaningful legal challenge.

***(3) The rule of law is undermined by immunising SIs from quashing***

111. The rule of law would be undermined by immunising SIs from (retrospective or prospective) quashing when unlawful. The proposal represents an abrogation of the principle that the executive, like other legal and natural persons, is subject to the declaratory and therefore retrospective jurisdiction of the common law. The rationale of this proposal is that such an incursion into the rule of law is a price worth paying in the countervailing interest of "legal certainty". It is asserted that in some cases, such legal certainty is necessary to protect the expectations of those who have relied upon the SI; in others, to protect the public purse.

112. There are a number of difficulties with this justification, and the assumptions which underlie it. First, the reasoning relied upon suggests that the wide array of circumstances which may lead to a successful judicial review of an SI fit a single pattern. This is not evidenced empirically. It needs to be. Secondly, the assumptions underlying the proposal, that legal certainty is furthered by the

presumption proposed, does not reflect the experience of practitioners. The grounds of challenge to an SI may well include a complaint that the statutory instrument itself has breached or abrogated primary legislation, fundamental rights, and/or the legitimate expectations of the claimant and other public and private stakeholders. In only some, but by no means all, situations would legal certainty be furthered by the remedial presumption proposed. Thirdly, the presumption may render SIs, for practical purposes, immune from challenge. As pointed out above, a claimant deprived of the remedial fruits of a successful challenge is unlikely to invest the resources necessary to challenge an SI he or she considers legally flawed. Nor is he or she likely to be able to obtain the funding in order to secure a presumptively pyrrhic victory. Fourthly, the presumption suggested is liable to produce arbitrary results. The date upon which an unlawful SI ceases to impact upon those adversely affected stands to depend on the vagaries of the court's workload and/or the ability of the Administrative Court to list or expedite a matter. Fifthly, it is wholly unclear how the presumption proposed would be operated consistently with, and reconciled with other statutes, such as those protecting fundamental rights. Finally, the solution proposed would not achieve the finality suggested. Indeed, in cases where the legality of an SI is genuinely in doubt, the absence of a ready remedy may prolong uncertainty. And the meaning and import of SIs will remain a matter of judicial construction resolved, in appropriate cases, by recourse to judicial review.

### *(4) The justification advanced in support of the proposal is unclear and illogical*

113. The Consultation Document claims that (i) "Parliament-focused solutions are more appropriate where statutory instruments are impugned", and (ii) ordering a prospective-only quashing of SIs would focus remedial legislation on resolving issues related to the faulty provision (it is said, by leaving intact the non-offending components).

114. As to point (i), nowhere does the Consultation document explain what is envisaged by "Parliament-focused solutions" and, in doing so, it appears entirely to ignore the fact that any "remedial" SI would constitute a yet further exercise

of executive, and not Parliamentary, authority. Whilst Sir Stephen Laws states that, in cases of illegality "[i]t seems likely that the ordinary and proper working of political forces will repair the situation, at least to Parliament's own satisfaction", there is simply no evidence that this would be the case, or that it is even realistic to expect Parliament to play any meaningful role in examining any "remedial" SI.

115. If it were indeed the case that Parliament, rather than the executive branch, would be tasked with considering afresh the appropriate policy and implementation following the quashing of an SI, then the claim of "Parliament-focused solutions" might have some credibility. Indeed, that is the procedure which Parliament has provided for in relation to declarations of incompatibility against primary legislation under section 4 of the Human Rights Act 1998. However, there is no evidence that this is, or would be, the case for SIs.

116. As to point (ii), the reasoning is simply illogical. The assumption seems to be that quashing an SI has the effect that the entire SI has to be reviewed. This is obviously not the case but, in any event, even it were correct, this point does not provide an argument in favour of prospective-only quashing. The work that will be required to remedy a flaw in an SI will be the same whether the SI is prospectively or retrospectively quashed.

***(5) The test of "exceptional public interest" is not settled***

117. Approach (b) posits the application of an "exceptional public interest" test, claiming that such a test is "familiar". The implication appears to be that the law on what constitutes an "exceptional public interest" is well-settled, and it would be straightforward to apply it in the context of prospective-only quashing orders.

118. However, the test is still a novel one in judicial review. It was introduced by the Criminal Justice and Courts Act 2015, which provided that a remedy must be refused in certain specified circumstances unless there is an "exceptional public interest". The test is still relatively new, and there is little authority on its application even in the context of the current law. Accordingly, its introduction

as part of a new scheme governing prospective-only quashing orders is likely only to add to the inevitable uncertainty.

**Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?**

**Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?**

119. ALBA's response to Questions 1 and 6 is:

a. it is not at this stage persuaded that it would be desirable to give the courts an express discretion to issue a suspended quashing order ("SQO"), and

b. in any event, neither the presumptive approach (a) nor the mandatory approach (b) should be adopted.

120. ALBA considers that insufficient evidence has been presented to support a conclusion that giving the courts an express power to grant an SQO would add materially to the Courts' current discretionary powers as to whether to a grant a remedy and if so what remedy. In the absence of such evidence, ALBA would not favour the introduction of SQOs without further study. This is because such orders would carry inherent risks to the rule of law as well as creating several new practical problems. Further, even if there were an argument for creating a discretionary power (as to which ALBA is unpersuaded), ALBA considers that it would in any event be clearly contrary to principle to legislate for a presumption that quashing orders be suspended ("the Presumptive Approach"), or in mandating that quashing orders be suspended except where there is an exceptional public interest to the contrary ("the Mandatory Approach").

***(1) SQOs would solve no existing problem***

121. ALBA considers that, on the evidence presented in the consultation, there is nothing to suggest that granting a discretion to issue SQOs would add in any material way to the Courts' existing ability to provide relief, or no relief, as appropriate to the situation. That is because:

a. the Courts have existing and well-established remedial discretions, which they exercise on well-understood principles to achieve a just result in a particular case; and

b. the asserted advantages of SQOs (in providing "certainty" for decision-makers as to what they must do) are largely illusory.

*(a) The Courts' existing remedial discretions*

122. The Courts already possess the following powers and duties:

a. the power to refuse any relief at all,

b. the power to give only declaratory relief,

c. the power to quash in part (as opposed to in whole), and

d. the duty to refuse relief under s 31(2A) of the Senior Courts Act 1981 (save in cases of exceptional public interest) if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

123. For clarity, the Court's existing remedial discretion is not dependent on whether or not an unlawful act is conceptualised as a "nullity". As discussed further below in the response to Question 7, the Government's apparent view that some categories of unlawful act should be treated as "voidable" rather than "void" (Consultation Document, para 74), and that classification of unlawful acts as "voidable" or "void" should determine the scope of the applicable remedy, is incorrect. The correct position is that all unlawful acts are void, but that the Court retains remedial discretion in relation to all such acts. The Court may be more or

less likely to *exercise* its discretion in respect of particular remedies, such as quashing orders, where there is no conceivable power supporting a decision-maker's decision, or where a decision-maker's decision has had a particular effect,[10] but there is no hard limit on the Court's discretion.

124. Accordingly, it is simply not correct that "a court has no remedial discretion when an act is a nullity", or that "[r]eining in the court's propensity to declare the exercise of power null and void is required for suspended quashing orders to operate successfully" (*cf* Consultation Document, paras 76, 72). There is no principle that 'nullity = quashing'. The Government's analysis proceeds on a misconception as to the nature and extent of (i) the nature of unlawfulness in public law; and (ii) the Courts' existing remedial discretion.

(i) The Court's discretion to grant no relief

125. It is trite that, while a court will not refuse a final remedy unless there is good reason to do so, a successful judicial review claimant has no absolute entitlement to any remedy (see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, HL, 656 *per* Lord Roskill; *R (Edwards) v Environment Agency* [2008] UKHL 22, [2008] 1 WLR 1587, para 63 *per* Lord Hoffmann). The Court may decline to grant any relief at all, for example where the claimant has delayed, or failed to exhaust appropriate alternative remedies; where there is detriment to good administration or hardship or prejudice to third parties; or where the claim is academic or the unlawfulness has made no difference (or caused no prejudice to the claimant).

(ii) The availability of declarations

126. Moreover, where a quashing order would cause detriment to good administration or other prejudice, the courts may exercise their discretion to grant a declaration instead. In exercising that discretion, the courts already take account of the second and third factors suggested by the Government as potential mandatory considerations for the SQO discretion, namely, "whether remedial action to

[10] As in *Ahmed* and *Unison*, referred to at para 76 of the Consultation Document. These are cases where, on the facts, the Supreme Court decided that the nature of the unlawfulness was such that a quashing order would be appropriate. They do not stand for the principle for which the Government cites them.

comply with a suspended order would be particularly onerous/complex/costly", and "whether the cost of compensation for remedying quashed provisions would be excessive" (Consultation Document, para 56).

127. Where a declaration is made, the unlawful act is not quashed, and it does not necessarily fall to be treated as being of no effect. Rather, the public authority is obliged to reconsider its approach in line with the content of the Court's judgment and the declaration made. Paragraph 62 of the Consultation Document refers to one such case, *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201 (Admin), where the Divisional Court decided not to quash the regulations under challenge because doing so would have caused administrative chaos and would inevitably have had significant economic consequences.

128. There have been several such cases in the social security context. The recent case of *R (Blundell) v Secretary of State for Work and Pensions* [2021] EWHC 608 (Admin) was a challenge to the Government's policy for making deductions from claimants' universal credit to pay fines imposed under the criminal law. The judge held that aspects of the policy were unlawful, but said: "I do not propose to quash the policy. There are many parts of it that are good in law and untouched by this judgment. Severance of the good parts from the bad may not be easy. I am minded to grant a declaration in a form which I hope will be agreed between the parties." The Court did grant such a declaration, and the policy was amended forthwith. Similarly, in *R (Association of Metropolitan Authorities) v Secretary of State for Social Services* [1986] 1 WLR 1, Webster J granted a declaration that housing benefit regulations had been made pursuant to an unfair procedure, but refused to quash them because, if he did, "all applicants who had been refused benefit because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim".

129. ALBA notes the IRAL Panel's suggestion (referred to above) that an SQO would have "more teeth" than declaratory relief. We do not agree. A declaration is an order of the Court. As Lord Bridge said in *R (Factortame) v Secretary of State for Transport* [1990] 2 AC 85, 150, "a declaration of right made in proceedings

against the Crown is invariably respected". Further, as the Divisional Court has recently reiterated, "a declaration is binding": see *R (National Council for Civil Liberties) v SSHD* [2019] QB 481. Ministers' and civil servants' general legal duties, as well as their obligations under paragraph 1.3 of the Ministerial Code and the Civil Service Code, demand that they take any steps necessary to cure the unlawfulness identified in a declaration. Compliance is not a matter of cost-benefit analysis, but of constitutional necessity. The same applies to other public authorities. ALBA is not aware of any consistent trend or practice of declarations being ignored by public authority defendants.

130. The IRAL Panel cited *Hurley and Moore* as a case where an SQO could have been useful, in contrast to a declaration. We do not consider that this case supports the asserted need for SQOs. The case concerned the Secretary of State's decision to raise maximum tuition fees to £9,000 per year. The Divisional Court found that, although there had been "very substantial compliance" with public sector equality duties, there was no evidence of "conscious consideration of the full range of the statutory criteria which the law requires". In the circumstances, and in light of the chaos that would result if the decision were quashed, a quashing order was not considered proportionate. A declaration was granted instead. However, contrary to paragraph 62 of the Consultation Document, the Divisional Court did not "recognise the benefit of prospective-only remedies". The Court did not suggest at all that it lacked the tools to give appropriate relief, or that a declaration was a "bad fit".

(iii) The discretion to quash in part

131. Thirdly, where only part of a policy or scheme is unlawful, and where that part of the policy or scheme is severable,[11] the Court already has a discretion to quash the scheme only in part.

132. The Consultation Document expresses concern about cases where "an entire policy has to be quashed because of a defect which can be remedied". It suggests that SQOs would fill a void in these cases. ALBA does not agree. Unless the entire

[11] Where the good and bad cannot be severed, that is likely to be an argument in favour of a declaration rather than a quashing order: see *Blundell*, above.

policy is unlawful, the entire policy need not be quashed. As Lord Bridge said in *DPP v Hutchinson* [1990] 2 AC 783, in the case of a multi-clause instrument where only one clause exceeds the lawmaker's power, "if the remaining clauses enact free-standing provisions which were intended to operate and are capable of operating independently of the offending clause, there is no reason why those clauses should not be upheld and enforced". For that reason, it has been held that "the court should not strive officiously to kill [a regulation] to any greater extent than it is compelled to do".[12]

133. The Government's consultation document suggests that *R (British Blind and Shutters Association) v Secretary of State for Housing Communities and Local Government* [2019] EWHC 3162 (Admin) was a case where an entire policy had to be quashed due to a remediable defect. It was not. In that case:

    a. The Government consulted on banning certain components of buildings which failed to comply with specified fire safety standards. The consultation did not make clear that the Government was considering the inclusion of blinds and shutters in the ban. However, when the Government enacted the relevant regulations, the ban did include any "device for reducing heat gain within a building by deflecting sunlight which is attached to an external wall". It did, therefore, include blinds and shutters. The Court held that this was unfair.

    b. Steyn J therefore quashed one sub-sub-paragraph of one provision of the Regulations, which included the words above in the relevant definition (see paragraph 112). The rest of the scheme was left intact. The Government subsequently opened a consultation on reinserting those words. An SQO would not have conferred upon the lawful aspects of the scheme any greater protection than did the ordinary remedial discretion.

*(b) The benefits of SQOs are materially overstated*

[12] *Dunkley v Evans* [1981] 1 WLR 1522 1525B

134. As ALBA understands the Consultation Document, two main benefits of SQOs are asserted:

    a. they will permit the *status quo* to be maintained while providing a period in which the public authority can address the unlawfulness identified, and

    b. they will provide greater clarity as to the steps which the public authority needs to take to remedy the existing unlawfulness.

135. ALBA does not consider that the available evidence base supports these conclusions. Further, and as explained further below, ALBA is concerned that these asserted "benefits" in fact mask serious drawbacks for the rule of law and the proper conduct of public authorities. ALBA also considers that, even if regarded as benefits, their utility has been significantly overstated in the Consultation Document.

136. First, as already explained, the circumstances in which it is properly necessary for the *status quo* to be maintained are already covered by the existing remedial discretion of the Court. To give a practical example, the Court is highly unlikely to quash an unlawful decision where such quashing would cause unwarranted prejudice to third party interests.

137. Second, we do not consider that SQOs would be likely (other than perhaps in truly exceptional cases) to give public authorities greater clarity than existing remedies about how to comply with the law. In this respect, there are two key points.

    a. In very many cases, the nature of the unlawfulness identified (and what needs to be done to remedy it) will be clear from the substantive judgment. A failure to consult is remedied by undertaking a proper consultation process. A failure to take into account a mandatory relevant consideration specified by Parliament is remedied by the decision-maker reconsidering matters with the statutory scheme in mind. There is no need for an SQO to "focus remedial action on resolving issues relating to the faulty provision"

(*cf* Consultation Document, para 69); that is already possible and is what usually happens in where a judicial review has been successful.

b. If the Government hopes that, when formulating SQOs, the Courts will go into greater detail than is set out in the substantive judgment, that is not only unlikely in practice, but very likely to be constitutionally inappropriate. It is not the general role of the Courts either to mandate the action which the executive must take,[13] or to take on "ongoing monitoring" of the public body's compliance with the law: see *Meade v Haringey LBC* [1979] 1 WLR 637, 658.

138. We expand on these points briefly below.

139. The IRAL Panel considered that an SQO would be suitable in cases such as *R (Evans) v Attorney General* [2015] AC 1787, where the Government was concerned that "no form of legislative words would ever have been accepted as authorising, in a sufficiently clear manner, an Attorney General to 'overrule a decision of the judiciary because he does not agree with that decision'" (IRAL Report, para 3.52). The Consultation Document also argues that an SQO would provide "greater certainty to what rectification the Government will need to undertake" (see para 69).

140. We do not agree that it is possible to make any such statement as a matter of general principle. If the Court found that a decision was rendered unlawful by failure to comply with some legal requirement, then an SQO would be likely to say only that the decision will be quashed after some specified period, unless the public body complies with that requirement. It would still be likely to leave the manner of compliance to the Government. That is not a matter of judicial pusillanimity: it is a reflection of the important constitutional principle of the separation of powers.

[13] Save where there is only one course of action that is lawfully open to the executive.

141. The courts are, properly and often at the Government's own urging, extremely reluctant to fetter the executive's discretion to discharge its obligations as it sees fit. As Dingemans J put it in *Fletcher v Governor of Whatton Prison* [2015] EWHC 3451, "it is for the Secretary of State, who is subject to the public law duty, to determine how that public law duty is to be discharged. It is not the role of the Courts to manage how the duty is to be discharged. That is because the way in which the public law duty is to be discharged raises issues of policy for the Secretary of State, and because the Courts do not have the expertise to manage the discharge of the public law duty". The Court generally would and should refrain from making government policy by order. That is an important aspect of the separation of powers.

142. In any event, ALBA considers that the challenges that arise in working out how to act lawfully after a judgment, either in respect of the impugned decision or in future, should not be overstated. Although there might have been "governmental concerns" that no form of legislative words would be accepted by the Court as authorising the Attorney General's conduct in the *Evans* case, we do not think that such concerns were well founded. The statute required the Attorney General, if he was to overrule a decision notice or enforcement notice, to certify that he had "on reasonable grounds formed the opinion" that there was no failure to comply with the requirements of the statute. The Supreme Court held that the requirement for him to have reasonable grounds for such an opinion was more demanding than a requirement for him merely to form that opinion. Parliament could have provided that he may certify that he disagreed with it, and that in that event it would cease to have effect. In most cases, as in that one, the route to lawful decision making will be implicit in the judgment of the Court, even if it is not explicit in the order.

143. Third, the tenor of the Consultation Document is very much focused on challenges to general policies and schemes (primarily, general policies and schemes of central Government). This presumably reflects central Government's own main concerns, but fails to take account of the nature and range of judicial review business. Much of the work of the Administrative Court is concerned with the review of individual decisions, made by public authorities of all kinds. It is

hard to see that the suspension of quashing orders in such circumstances has any material benefit.

*(c) Conclusion on the utility of SQOs to solve an existing problem*

144. Accordingly, we do not consider that – on present evidence - SQOs are likely materially to assist with resolving any existing problem. The existence and scope of the remedial discretion is well understood by judges and practitioners, and enables the Court to do justice in the context of a particular case. The appropriate remedy in a particular case is a matter for argument and decision.

145. The approach espoused in the Consultation Document proceeds in large part by identifying cases in which remedies were ordered against the Government, which it considers undesirable or unjustified. We appreciate that the Government may have strong views about such cases. However:

a. It is equally true that many claimants are likely to consider that cases in which the Court's remedial discretion was exercised in a way contrary to their interests were wrongly or unfairly decided. Such feelings are common among litigants. Judicial review is an important constraint on the unfettered exercise of executive power. It is unsurprising that the executive sometimes finds adverse decisions to be less than satisfactory for it.

b. Even if the Government's concerns about particular cases had merit, that is not a satisfactory basis for legislation. Just as "hard cases make bad law", a legislative response to hard cases is likely to make bad legislation. The Government is proposing a set of fundamental reforms to an existing, well-established, well-understood area of law. It is doing so on the basis of a review process which the IRAL Panel itself considered potentially "inadequate given the complexity, scope, and importance of the issues",[14] and on the basis of a similarly inadequate and unnecessarily truncated consultation process which has not set out a satisfactory or coherent approach to or explanation of the resolution of such issues.

[14] IRAL Report, para 1.

146. Put bluntly, there is a real danger that the Government's desire to obtain a set of judicial review principles which it considers "preferable", pursued on the basis set out in the Consultation Document, will lead to consequences that are either or both (i) constitutionally impermissible or improper, and (ii) unanticipated and highly undesirable. It is for this reason that ALBA considers that this proposal – if it is to be taken further - should be the matter of further evidence gathering and consultation. We cannot support the proposal as it stands given the serious risks that it poses.

***(2) SQOs would create new problems***

147. As well as solving no existing problem, SQOs are likely to create some new ones: (a) in relation to the rule of law in general; (b) in relation to particular grounds of review, and (c) in practice. This is perhaps unsurprising given that SQOs could only add to the existing remedial discretion of the Courts in circumstances where there were no significant administrative consequences or other reasons which would currently justify the Court not quashing a measure which it had found to be unlawful. These new problems speak against both the presumptive approach and the mandatory approach identified in the Consultation Document.

148. We address these under three heads below:

a. rule of law problems,

b. problems related to particular grounds of review, and

c. practical problems.

*(a) Rule of law problems*

149. ALBA has three concerns about the impact of the Presumptive Approach and the Mandatory Approach on the rule of law generally. The stronger the legislative presumption in favour of SQOs, the more intense and widespread these problems would be.

(i) No remedy for the Claimant

150. First, in any case where the decision would otherwise be subject to an ordinary quashing order, an SQO would deprive the claimant, and others in their position, of an effective remedy.

151. Although the claimant's *legal* remedy is the relief granted by the court, what matters from the perspective of substantive fairness is the *practical* remedy: what happens, beyond the courtroom, as a result of a finding that the claimant has been the victim of unlawful conduct.

152. If the decision is quashed, the claimant's practical remedy is often that the decision must be retaken. That is an effective remedy, because matters begin afresh and (in part) because it leads to increased scrutiny. The decision-maker, its official advisers, its legal advisers, its political scrutineers and the wider public all consider the fresh decision with particular focus where the previous decision was held unlawful. The public body therefore needs to explain its rationale with particular care. It is particularly difficult for the public body merely to purport to take representations, or consultation responses, or relevant considerations, into account. If the public body cannot justify its decision, it is more likely to abandon that decision.

153. By contrast, if the court grants an SQO, a claimant has a much weaker practical remedy. The immediate impact of the court's order is that the decision is allowed to stand. The reconsideration of the decision will take place "in the shadow" of the existent but unlawful decision. There is an obvious but significant risk that, in that context, the existing unlawful decision will or may predetermine the content of the "replacement" decision. Whether or not it does so in fact, as we explain, as a matter of law it would not be procedurally fair to "re-take" a decision which is extant and has not been quashed.

154. Moreover, in circumstances in which the court's decision has not led to any practical change in the *status quo*, the manner in which the public body cures the defect is unlikely to attract the same scrutiny, inside and outside the public body, as a fresh decision. It will be far easier for the decision maker to say that he or

she has cured the defect (for instance, by taking into account a matter he or she ought to have taken into account the first time), but has not changed his or her mind, while failing in reality to consider the matter afresh.

(ii) Undermining the law

155. Secondly, SQOs would make the law less effective. If claimants were unable to get a remedy in court that was practically effective, they would not come to court in the first place. That would afford public bodies a degree of impunity, making it easier for them to ignore the requirements of the law. That is contrary to the principle of the rule of law.

(iii) Undermining the court

156. Thirdly, in ALBA's view a presumption in favour of SQOs or a requirement to grant SQOs would undermine the role of the court. If legislation encouraged or compelled the court to grant SQOs, it would thereby encourage or compel the Court to authorise, for the period of suspension, conduct it held to be unlawful. This is the opposite of the court's constitutional function, and would be contrary to the views of a majority of the Supreme Court, in *Ahmed v HM Treasury* [2010] 2 AC 534, 690E, that the Court "should not lend itself to a procedure that is designed to obfuscate the effect of its judgment".

*(b) Problems related to particular grounds of review*

(i) Vires cases

157. In cases where a decision is unlawful because it is *ultra vires* (i.e. the decision-maker had no power to take the relevant decision at all), ALBA considers that the grant of an SQO could result in uncertainty, unfairness and possibly a breach of Article 6 ECHR.

158. The only way of curing the illegality during the period of suspension would be for Parliament to legislate retrospectively, to provide the *vires* that the impugned decision lacked. This would be highly undesirable:

a. Retrospective legislation is undesirable from the point of view of legal certainty, because it prevents the citizen from knowing what their rights

and duties are at any given time. The answer depends on what retrospective legislation Parliament might enact in the future.

b. Retrospective legislation is also unfair, because it frustrates the citizen's legitimate expectation that the law is as it appears to be, rather than what it might, in the future, be deemed to have been.

159. For both of the above reasons, retrospective legislation is contrary to the principle of the rule of law. As Lord Neuberger held at §53 of *Flood v Times Newspapers Ltd (No 2)* [2017] 1 WLR 1415, "it is a fundamental principle of any civilised system of government that citizens are entitled to act on the assumption that the law is as set out in legislation…secure in the further assumption that the law will not be changed retroactively".

160. Retrospective legislation is also, in some cases, a breach of Article 6. As the Strasbourg Court held in *Zielinski v France* (1999) 31 EHRR 19, GC, "the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute". Hence, in *R (Hewstone and Reilly) v Secretary of State for Work and Pensions* [2017] QB 657, the Court of Appeal granted a declaration of incompatibility in respect of legislation which retrospectively validated regulations, and decisions made under them, that had been held in a different case to be *ultra vires*.

161. Although the IRAL Panel gives *R (UNISON) v Lord Chancellor* [2020] AC 869 as an example of a case where an SQO would have been appropriate, ALBA does not agree. In that case, the Supreme Court held that the Fees Order made by the Lord Chancellor, which provided that claims in the Employment Tribunal could only be commenced on payment of fees, was *ultra vires* the parent legislation. That was because there was a real risk that order would prevent access to justice, and the parent Act contained no words authorising the prevention of access to justice (see para 87 per Lord Reed). The Court quashed the order.

162. If the Court has granted an SQO instead, then the Government could have asked Parliament, in the period of suspension, for an express power to have effect both in the future and in the past, to prevent access to justice. Such legislation would have meant that individuals who were, at the time, unlawfully charged fees, would have no remedy. That would be unfair. It might be said that such unfairness is a matter for Parliament to consider; indeed, we are sceptical that a retrospective power to prevent access to justice would have been politically acceptable. However, it is unreal to say that statutes of this kind fall to be considered in each case on their individual merits. Legislation which retroactively deprives individuals of their rights is often objectionable. A scheme which facilitates and encourages it is, in our view, wrong in principle.

163. We also understand that *R (Miller) v The Prime Minister* [2020] AC 373, another *vires* dispute, is among the "high profile constitutional cases" where the IRAL Panel and the Government consider that an SQO would have allowed the Court to "acknowledge the supremacy of Parliament in resolving disagreements between the courts and the executive over the proper use of public power". Although we appreciate that the Government may disagree with the Court's decision on the substantive issue in this case, we do not see what benefit there would have been to an SQO. If the period of suspension had been shorter than the prorogation, then the Government could in any event only have cured the unlawful conduct, and obtained the necessary *vires* from Parliament, by ending the prorogation. If the period of suspension had been longer than the prorogation, then the SQO would have been impotent: even if Parliament had refused to give the Prime Minister retroactive *vires* for the prorogation, it would have been too late to stop it by then. An SQO would not, therefore, have been an appropriate or effective remedy.

(ii) Procedural cases

164. In cases where a decision is unlawful because of a procedural failing, ALBA considers that an SQO could result in substantial unfairness.

165. Under s 31(2A) of the Senior Courts Act 1981, the Court would be able to grant an SQO only in a case where adopting a proper procedure could have made a

difference to the outcome.[15] It is unreal, however, to say that curing a procedural defect *after* a decision has had an effect could make a difference in the way that the adoption of a proper procedure *before* the decision was taken could have done. The appearance, and in some cases the reality, would be that the public body had made its mind up, and would merely undertake a "tick-box" exercise in order to avoid its decision being quashed. Where a public body only considers the evidence or the arguments after having already determined the matter in hand, the decision is generally considered unlawful on the basis of apparent bias or predetermination.[16] In our view, there is a real risk that an attempt to cure a procedural defect during the period of suspension of an SQO would result in a decision that would be infected by (at least) apparent predetermination. That would be unfair, even if the legislative scheme was framed so as to exclude the possibility that it was unlawful.

(iii) Irrationality cases

166. In cases where a decision is unlawful because it is irrational, an SQO would be conceptually incoherent. An irrational decision cannot be made rational by curing a defect after the decision. The only way to deal with an irrational decision is to make a different decision, namely, a rational one. The way to ensure that a public body does that is to quash the irrational decision. If an SQO were granted, then nothing done during the period of suspension could cure the unlawfulness.

(iv) HRA cases

167. ALBA is also sceptical about the utility of SQOs in cases where a decision is unlawful because it is incompatible with the claimant's Convention rights. *Vires* for a Convention-incompatible decision could only be secured during a period of suspension by primary legislation. Such legislation would necessarily be incompatible with the same Convention rights as the decision originally challenged, or would have to repeal, partially at least, the HRA. In either event,

[15] More precisely, the Court would only be at liberty to grant relief where it did not appear to the court that it was highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred.

[16] *Electronic Collar Manufacturers Association v SSEFRA* [2019] EWHC 2813 (Admin), para 140 per Morris J. For the test for apparent predetermination, see also *R (British Homeopathic Association) v NHS Commissioning Board* [2018] EWHC 1359 (Admin), para 73 per Supperstone J and *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, paras 96–§97 per Rix LJ.

any such legislation would render the United Kingdom in breach of its international obligations.

*(c) Practical problems*

168. In addition to the problems set out above, ALBA considers that there are two further practical problems with applying a presumption or an obligation that the quashing orders be suspended.

(i) Unfair to put the onus on the Claimant

169. First, ALBA considers that it would be unfair and inappropriate to put the onus on the claimant to show why the decision in his or her case should be quashed. The courts have held that "*in most cases*" where a decision is held to be unlawful, the proper remedy is a quashing order.[17] At present, therefore, the onus to show that an unlawful decision should *not* be quashed is on the public body. That is appropriate, because the detriment to good administration that may arise from a quashing order is a fact-sensitive issue that will vary from case to case, and the public body will invariably be best placed to explain the nature and extent of any such detriment. In some cases, it will be a significant administrative burden to reverse the effects of the decision, and/or involve significant costs to the public purse. In others it will not. The public body is best placed to prove to what extent those factors apply in the individual case.

*170.* The factors in *favour* of a quashing order may vary to some limited extent from case to case, as some infringements of the claimant's rights will be weightier than others. However, a significant component of the argument for a quashing order *in any case* will be the grant of an effective remedy to ensure that the relevant rule is enforced and that the Government has a reason to comply with the law. In other words, a significant component of the argument for a quashing order will be the rule of law and the interests of justice in general. It would be highly artificial, in ALBA's view, to demand that claimants make that argument in every judicial review. It makes more sense for that to be the starting point. If the grant

[17] *R (Edwards) v Environment Agency* [2009] 1 All ER 57, §63 per Lord Hoffmann.

of an effective remedy would cause administrative problems then, as at present, the Government can say so and rebut the presumption of a quashing order.

171. The mandatory approach, as framed in the Consultation Document, would be particularly objectionable in this respect. The public interest in a quashing order is the public interest in an effective remedy and effective law. That is always a powerful public interest. It would be perverse, in our view, to require that it be "exceptional" for the Court to take it into account.

(ii) Interpretative uncertainty

172. The Government says that the Presumptive or Mandatory Approach would be preferable to the discretionary approach because "there is a considerable time lag in understanding how and when a discretionary power will be applied by the courts, and to what extent." However, in ALBA's view, the uncertainty would be greater under the Presumptive Approach or the Mandatory Approach.

173. If Parliament legislated for a rebuttable presumption of suspension, it would take time for case law to emerge on the circumstances in which the presumption was rebutted. If it legislated for a presumption that could only be rebutted in cases of exceptional public interest, then it would take time for the courts to work out what an exceptional public interest was.[18] The more that Parliament interferes with the Court's existing remedial discretion and introduces new fetters to it, the harder it will be for citizens and public bodies to know, on the basis of existing case law, what remedy the Court is likely to grant.

**Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?**

174. ALBA does not agree that legislating for these proposals will provide clarity in relation to when the courts can and should make a determination that a decision

[18] As to the fact that the approach to such a test in other circumstances is still being developed, see further above.

or use of a power is null and void. These proposals do not aim to solve a real problem in legal practice.

175. The Government has offered two reasons of principle for its proposed reforms. The first is that 'nullity' leads to the disadvantage of causing 'uncertainty'. With respect, any uncertainty will be caused by the failure of a public body to comply with the law, not by the court's uncovering of that failure or the claimant's initiative in challenging it. The second reason of principle offered by the Government is that a doctrine of nullity supposedly leads inexorably to the quashing of the decision of public authorities because it 'leaves no remedial discretion'. This is not correct as a matter of English law. The court always has discretion <u>not</u> to quash an unlawful decision.

176. The Government's own introduction to judicial review, '*The Judge Over Your Shoulder: A Guide to Good Decision Making'* (GLD, 2018), summarises the point with great clarity:

> ***"3.36 Remedies following a successful challenge:***
> *All of the Court's remedies are "discretionary", which means that the claimant has no absolute right to a remedy – although normally, the Court will at least make a declaration regarding the legality of the decision under challenge. In deciding whether to grant a remedy, the Court will consider factors such as:*
>
> *• any delay by the claimant in bringing the case that is prejudicial to the defendant;*
> *• whether the claimant has suffered substantial hardship;*
> *• any impact the remedy may have on third parties;*
> *• whether a remedy would have any practical effect or whether the matter has become academic;*
> *• the merits of the case; and*
> *• whether the remedy would promote good administration."*

177. A court will therefore exercise its discretion when it finds that a public body has acted unlawfully. It may choose to make a declaration, rather than quash the contested decision. This is a power regularly exercised by the courts: see the

examples given above, and the well-known planning cases, *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51 and *R (on the application of Champion) (Appellant) v North Norfolk District Council and another (Respondents)* [2015] UKSC 52, in which the Supreme Court refused to quash grants of planning permission even though it found procedural irregularities in the way these decisions were made.

178. It is arguable, although not entirely clear, that the discretion of the court, in principle, already includes the power to suspend a quashing order. In the case which the Government gives as one of the two examples where the doctrine of nullity leads to rigid results, *HM Treasury v Ahmed (No 2)* [2010] UKSC 5, Lord Philips noted, with the approval of all six other members of the court (at para 4):

> *"Mr Swift submitted that this court has power to suspend the effect of any order that it makes. Counsel for the appellants conceded that this was correct and that concession was rightly made".*

179. We pause to add here that such discretion as to the consequences of unlawful action by a public body is also a feature of European Union law. The Court of Justice of the European Union may annul a decision prospectively (Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation v Council and Commission*, [EU:C:2008:461] paras. 348 and 373-377), or only partially (see Case C-360/93 *Parliament v Council (EEC-US Agreement on Government Procurement)* EU:C:1996:84] paras. 32-36), whereas in the normal case the effects of annulment of a Commission Decision operate only among the parties to that case and not to parties that did not challenge it in court, even though they had standing to do so (Case T-227/95 *AssiDomän Kraft Products and Others v Commission* [EU:T:1997:108]).

180. The Government's proposal is to legislate in order to restrict the current discretion of the Court, by proposing three alternative 'principles'. The first is that "*only lack of competence, power or jurisdiction leads to the power being*

*null and void"* [para 81(a)].[19] The second is that there be a "*presumption against the use of nullity*" [para 81(b)]. The third is that there should be legislation setting out which issues "*can be considered as going outside the scope of executive power*" and which should be regarded as "*the wrongful use of a power that Parliament has granted*" [para 81(c)]. The substance of the third proposal is that most errors of law should be regarded as a "wrongful use of power" and would not lead to the "nullity" of the contested decision.

181. We do not support these proposals. In our view this is a *solution* without a *problem*, and one that is likely to be unworkable in practice and incoherent in principle. We also think it is likely to lead to a significant amount of arid litigation as the courts seek to grapple with the re-introduction of the distinction "*between error of law and excess of jurisdiction*", removed by *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (see *R (Cart) v Upper Tribunal* [2011] UKSC 28), and which had bedevilled the law previously.

***(1) The "problem"***

182. The supposed *problem* the proposals are said to address, is the issue of whether all errors of law should be regarded as going to the jurisdiction of the decision-maker, whether that means the errors should lead to an impugned decision being null and void, and whether, if the decision is a nullity, it should be treated as having no legal effect *ab initio*. Those are questions that have exercised academic lawyers for some years. The IRAL Report and the Government Response refer to some of the academic literature. It undoubtedly raises difficult theoretical questions. What is not clear, however, is why Parliament should seek to enter the academic debate to "*put beyond doubt that [one] theory is not the law*", and the other is correct [para 75].

183. Ultimately, we see no reason why Parliament should concern itself with an academic debate. Moreover, the legislative solutions proposed by the

[19] We assume what is meant by that is that only a lack of competence, power or jurisdiction leads to the "*exercise of a power*" being void as it does not make sense to speak of the "*power being null and void*".

Government do not resolve this academic debate. They change the law substantially and may make parts of that debate irrelevant. They propose to give effect to a novel theory, one that none of the academics involved in the earlier debates appear to support, namely a theory that states that all decisions are lawful until quashed by a court so that the Executive may act outside the law until the moment it is stopped by a court on the request of a claimant.

184. The "*problem*", insofar as there is one, is identified by reference to two cases: *Ahmed v HMT Treasury (No 2)* [2010] AC 534 and *R (UNISON) v Lord Chancellor* [2020] AC 869 [76]. We noted above that this is an incorrect reading of *Ahmed*. It is also not clear that there was any difficulty created by the Supreme Court considering in *UNISON* that it was required to quash the unlawfully made Employment Tribunal fees regulations, or why it would have been better if the court considered it had a discretion as to whether to do so.

185. *Ahmed* would appear to be the only case in which the Government argues that there was a difficulty created by the court assuming that unlawfully made legislation (in that case Orders in Council freezing suspected terrorists' financial assets) should be treated as a "nullity". It was said in *Ahmed* by the Treasury "*that the [asset-freezing] should persist until the invalid restrictions can be replaced by restrictions that have the force of law*" [para 2], and that the Supreme Court should therefore have suspended any order quashing the impugned legislation. The Supreme Court declined to do so, not because it did not have the power, but for the substantive reason that "*The problem with a suspension in this case is … that the court's order, whenever it is made, will not alter the position in law. It will declare what that position is. It is true that it will also quash the [*Terrorism Order 2006*] and part of the [Al Qaida Order 2006], but these are provisions that are ultra vires and of no effect in law.*" [para 4]

186. To see whether there was a "problem" in *Ahmed*, it is instructive to see what happened next. *Ahmed* involved two orders in council purportedly made under the UN Act 1946 both of which were found to be *ultra vires*. One (the Terrorism Order 2006) sought to freeze assets on the basis of the wrong standard of proof. The other (the Al Qaida Order 2006) sought to freeze assets without giving

individuals access to the court to challenge their designation. The decision in *Ahmed* was handed down on 4 February 2010. On 10 February 2010, Parliament passed the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and later that year passed the Terrorist Asset-Freezing Act 2010. That dealt with the Terrorism Order 2006 and ensured that assets of individuals could be lawfully frozen a week after the Supreme Court decision. No doubt had the matter been more urgent an Act could have been passed or lawful regulation promulgated more quickly. As to the Al Qaida Order 2006, those whose assets were frozen pursuant to Order had their assets frozen in any event pursuant to an EU Regulation. No immediate legislation was therefore required to secure an asset-freeze.

187. There appears to have been no particular problem, in fact, with the Supreme Court's remedy. It is striking that even in the context of legislation seeking to deal with those suspected of terrorism, and in the one example given by the Government in which the "nullity" doctrine was apparently problematic, there is no evidence (as far as we are aware) that it, in fact, caused any practical difficulties.

188. As we stated above, the current position is that the courts have wide discretion regarding remedies in cases of judicial review. The court will routinely decline to grant a remedy where it is concluded that some error of law (for example a failure to consult or a failure to consider a relevant factor) would have made no difference to the outcome and there would be considerable administrative inconvenience in quashing regulations (see for example *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201 (Admin)). Indeed, the courts are required to refuse to grant relief if "*it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*" (Senior Courts Act 1981 s 31(2A)). In some cases, parties will no doubt be unhappy with a decision to grant or refuse to grant the remedy sought. As set out above, however, we are not aware of any substantial body of evidence that suggests there are significant problems in practice with the law and the way the law currently works which requires legislative intervention.

***(2) The Government's "solution"***

189. The Government's proposals are fraught with difficulty. The question of "nullity" has led to a lively theoretical debate among academics because it raises difficult questions of principle. It is hard to see how they can be resolved successfully by any legislation that is clear, simple to draft and easy to apply. Unsurprisingly given the nature of the task, in our view the Government-proposed legislation is likely to cause far more difficulties that it resolves.

190. First, the assumption appears to be that there is some straightforward way to distinguish between "*acting without any power and the wrongful use of the power*" (para 81(c)), and that the former is "rare" and arises, for example, "*if Parliament creates a tribunal and gives it the power to hear only tax cases but the tribunal starts handing out murder convictions*" (para 77). That sort of example is no doubt extremely "*rare*", but there are numerous instances in which bodies are acting outside their powers that are routine. If a body has the power, conferred by statute, to act where it is "necessary" to take some step, or where it "reasonably believes" some fact is established, if the court concludes that the belief was not reasonable or that the measure was not necessary, the body will have been acting outside its power in precisely the same way as the body that wrongly believed it had the power to hear murder cases. In our view the discrete and rare category apparently envisaged by the Government simply does not exist.

191. Second, the attempt to legislate to distinguish between "*acting without any power and the wrongful use of the power*" at (para 81) do not appear to us to be coherent. For example, it is said that "*breach of the principle of legality*" should be regarded as "*the wrongful use of [a] power*" and not "*acting without power*". The principle of legality is a tool of statutory construction. As Lord Hoffmann explained in *R v SSHD ex p Simms* [2000] 2 AC 115, 131:

> *Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to*

> *the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.*

Thus where Parliament confers a general power in a statute, the statute is interpreted (in the absence of express language or necessary implication) as restricting the ability to override "fundamental rights". A body that purports to override such rights has no power to do so. It is not the case, as the Government apparently suggests, that the body was wrongfully exercising a power it had. It is acting outside of the powers Parliament has conferred on it. It is not clear whether it is intended to legislate to create a legal fiction that the decision-maker did have the power to act, and if so how that would work. It is also not clear how it is possible to coherently separate this particular tool of statutory construction from others. It would require deeming statutes interpreted via the principle of legality as leading to the "*wrongful use of [a] power*" while statutes interpreted using other canons of construction would apparently lead to a conclusion a body was acting "*without power*."

192. Third, no reference is made to acts that are unlawful under the Human Rights Act 1998 ("HRA"). It is assumed they would fall within "*all other standard public law grounds*" and therefore would be deemed to be the "*wrongful use of [a] power*" (para 81(c)(ii)). If so, the effect of the proposed legislation would appear to be that if a statutory instrument or order was made that breached the HRA, it is intended it would remain in effect unless and until amended by the Government. That is unworkable. Suppose the Government passed benefit regulations which were found to breach the HRA because they required local authorities conferring the benefits to discriminate unjustifiably between different groups (see ***RR v SSWP*** [2019] UKSC 52). As the Supreme Court made clear in ***RR***, the regulations could have no legal effect and should not be followed. If, instead, the regulations were to remain in effect, as is envisaged, it would mean that the local authority conferring the benefits would be acting unlawfully pursuant to HRA s 6(1) in distributing the benefits in a discriminatory manner (as they would have no defence under HRA s 6(2)). The local authority would be compelled by the regulations, which remained in force, to act unlawfully. An act cannot be both unlawful and required by the law. That is incoherent and obviously inconsistent with principles of legal certainty and the rule of law.

193. Fourth, in other cases, it is not clear how the Government's proposals could operate in practice. If one goes back to Ahmed, the relevant orders were found to be *ultra vires* on the basis of the principle of legality. It appears to be the Government's view that in those cases the desirable outcome (or at least a possible outcome) would have been that the asset-freezing measures should have continued while consideration was given to their replacement. The asset-freezing regimes operated by rendering it a criminal offence for those designated to deal with their funds without a Treasury licence. If the court were to find that the Government had no power to impose the regimes, but that they should remain in force, what would then happen? It would be obviously inconsistent with the rule of law for someone to be prosecuted for breaching an order that was unlawfully made. What, then, should those designated or the police or banks or others do knowing that the orders were unlawfully made but where they remain, somehow, in force? Could the police lawfully arrest someone for breaching the order? Could the bank lawfully refuse to give a person access to their funds? Rather than promoting legal certainty, as intended, it would appear to leave the law in a state of incoherence and uncertainty.

194. Fifth, any legislative intervention in this field should provide for the further unravelling of acts done on the basis of the unlawful act. These may be matters arising in criminal law, contract law or the law of restitution. These questions have been dealt with, case-by-case, on the basis that in principle an unlawful act does not develop any legal effects. Any legislative intervention on this matter introducing a novel theory according to which a court would have to 'invalidate' an otherwise "valid" unlawful law or decision, will have consequences in these other areas, which the new statutory scheme ought to provide for in some way.

195. For example, it is settled law that if a criminal conviction is based on the legality of a decision of a public body, the invalidity of that decision renders the conviction immediately invalid (*DPP v Head* [1959] AC 83, *Boddington v Transport Police* [1999] 2 AC 143). This would not be true under the Government's proposals to limit nullity only for some cases of illegality, under para 81(b) and para 81(c) of the Consultation Document. Under the

Government's proposals, if a conviction was secured at a time when the act was 'voidable' but not yet 'voided' by a court, then the natural position in law would be that the conviction was lawful. Such conviction would have been based on a "valid" (because not yet "voided") unlawful decision. A scheme like that would thus face the same inconsistencies now faced by the "standard" theory of nullity, since one act would be both lawful and unlawful for different purposes, or valid in public law and invalid in criminal law (and the same for contract law, restitution etc.). The new approach to nullity would thus soon prove equally troubling in legal theory.

196. Similar issues will arise in cases where further acts have been done in reliance to the contested decisions. Thus, for example, cases of claims of rent made on the basis of unlawful council decisions (*Wandsworth LBC v Winder (No 1)* [1985] AC 461), claims of restitution of taxes unlawfully paid (see *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 , restitution of license fees paid in error (*Vodafone Ltd. v Office of Communications* [2020] EWCA Civ 183, [2020] Q.B. 857) and claims of damages in the tort of false imprisonment (see *R (Lumba) v Secretary of State for Home Department* [2019] UKSC 56) and other similar examples too numerous to mention.

197. In summary, it is ALBA's view that this is not an area which can or should be dealt with by legislation.

**Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?**

***(1) Introduction***

198. ALBA's answer to Question 8 is "no", and that no such methods should be adopted.

199. To answer this question we consider first the true aim and effect of ouster clauses and, relatedly, why the courts are slow to give effect to them; secondly, why the existing concept of judicial respect is sufficient to ensure that courts do not intrude on the proper role of Parliament and the Executive; and thirdly why the

methods of reform proposed in the consultation paper would not in any event achieve the desired aim of giving effect to ouster clauses.

### *(2) Aim and effect of ouster clauses*

200. The aim of an ouster clause, generally speaking, is to "*foreclose any possibility of judicial intervention*" pertaining to a decision affecting an individual.[20] In effect, a natural reading of an ouster clause such as that in the Foreign Compensation Act 1950 would mean that even if the decision-maker failed to proceed on a correct legal basis, his or her decision would be immune from judicial scrutiny.[21] It would not make the decision-maker's decision legally sound; an effective ouster clause would merely immunise the decision-maker from challenge in the courts. A decision-maker could do something Parliament had not given him or her the power to do, and that decision would be unchallengeable, regardless of the impact on the affected citizen.

201. For example, one can imagine a statute giving the Home Secretary the power to deport individuals if certain conditions were met and provided an effective ouster clause that immunised such decisions from challenge. This would mean that the Home Secretary could deport people from the United Kingdom even if the conditions were not met because there would be no way of challenging the Home Office's decision in the courts.

202. Likewise, one can imagine a planning decision being made that would lead to a supermarket being built in the countryside and ruining the local scenery, upsetting local residents. It may be that the decision was made illegally (perhaps, for example, the body that granted planning permission had no power to give such permission without first consulting with local residents). If there were an effective ouster clause, then local residents would have no way of legally challenging the decision. This would be despite the fact that their local

[20] Mark Elliott, "Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution" Cambridge University Legal Studies Research Paper Series (Paper No 4/2018), available here.
[21] See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

countryside was being spoilt due to an unlawful exercise of power. (By contrast, the courts have enforced partial ouster clauses in respect of planning, such as those contained in the Town and Country Planning Act 1990, at sections 285 and 286 onwards, to the effect that a decision shall not be questioned in any proceedings whatsoever except by way of the appeal mechanism provided by the Act itself).

203. The two foregoing examples demonstrate the deep-rooted and complicated issues with effective ouster clauses: they do not make the illegal act legal; they merely rob the citizen from being able to have their legal rights and interests recognised and enforced by the courts.

204. Ouster clauses risk giving, in effect, a power to the Executive to act in an unlawful manner with no direct, judicial accountability. This is why the courts have generally interpreted statutes so as to preclude an effective ouster clause; to do otherwise would be to rob the individual of a constitutional right of access to the courts, which is a primary right which a citizen enjoys and which forms part of a long-established legal-political culture.

205. Likewise, ouster clauses would allow a decision-maker to interpret the powers Parliament has given him or her in whichever way they would like, without any authoritative judicial guidance. This would render the law as "*nothing more than a matter of opinion*"[22] and would mean that the decision-maker could determine, with impunity, "*what the law means*".[23] In short, an ouster clause would allow the Executive to decide for itself what Parliament meant when it said the relevant Secretary of State could use public money for a particular purpose or could order the building of a new railway line in particular circumstances. There could be no legal challenge even if the Secretary of State had interpreted the statute in a way Parliament did not intend; Parliament's intention could not be enforced in the courts.

[22] *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 305 (Admin), [38] (per Laws LJ).
[23] See Elliott above.

206. It is with considerations such as those outlined above in mind that the courts have questioned whether Parliament has truly intended statutory provisions to have the true effect of ousting the right of judicial review.

207. The aim of statutory interpretation is to give effect to Parliament's intention; however, what a particular piece of legislation means is not always straight-forward. Different considerations may influence a judge in determining statutory meaning.

208. Most pertinently, the courts have a long history[24] of being "*slow to attribute to the legislature an intention to override established principles*".[25] So, for example, in *R v Secretary of State for the Home Department, ex p Simms*[26] Lord Hoffmann stated:

> "*Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual*".[27]

209. The reason for this statutory presumption is given quite clearly in *R (on the application of UNISON) v Lord Chancellor*.[28] In that case the Executive had been given the power, by section 42 Tribunals, Courts, and Enforcement Act 2007, to impose Employment Tribunal fees. In short, the fees set meant that very few aggrieved employees could bring claims, regardless of the merits or demerits of their claims. In interpreting section 42, the Supreme Court stated that "*the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles*".[29] The key principle in *UNISON* was "*the constitutional right of access to the courts*", which "*is inherent in the rule of*

[24] Dating to at least *Minet v Leman* (1855) 20 Beav 269; 52 ER 606, 610 (per Sir John Romilly MR) (Court of Chancery).
[25] Feldman, Bailey, and Norbury (eds), *Bennion, Bailey and Norbury on Statutory Interpretation* ( 8th edn, LexisNexis Butterworths, 2020).
[26] [2000] 2 AC 115 (HL).
[27] Ibid 131.
[28] [2017] UKSC 51; [2017] 3 WLR 409.
[29] Ibid [65] (per Lord Reed).

*law*".[30] The level of the fees was such as to prevent people from exercising rights that Parliament had given them (e.g. the right not to be unfairly dismissed) and so the Supreme Court held that the effect of the fees had not been "*clearly authorised by primary legislation*".[31]

210. The cases cited above show why the courts are so slow to give effect to ouster clauses, which would create constitutional anomalies and cut across established principles. If Parliament does wish to attempt to create such difficulties, it should squarely face them by making its intention to do so totally unambiguous. It will, however, still remain: *"…ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review"*.[32]

### *(3) Judicial respect for Parliament and the Executive*

211. The Government describes its motivation to strengthen the use of ouster clauses as being driven by a desire to ensure accountability through "*collaborative and conciliatory political means"* (consultation paper, §86). There is said to be a feeling that the courts' approach to ouster clauses is driven by "*a loss of confidence in the competence of other (political) institutions and in the political process more widely"* (§87). The Government is also concerned to ensure that judicial oversight is constrained in claims concerning national security and areas of high policy (such as foreign affairs).

212. However, it is important to recognise that the courts already afford a great deal of respect to Government decision-making, especially in the areas of national security and high policy. By way of recent example, in the case of *R (Dolan) v the Secretary of State for Health and Social Care*,[33] which concerned a challenge to the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 at paragraph 86, the Court of Appeal placed particular weight on the judgement of the Executive where that judgement was coupled with parliamentary approval:

[30] Ibid [66] (per Lord Reed). Indeed, Lord Reed recognised the importance of the right of access to the courts in sources dating back to the mid-17th century.
[31] Ibid [79] (per Lord Reed).
[32] *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, per Lord Carnwath (at paragraph 131).
[33] [2020] EWCA Civ 1605.

> *"86. We must bear in mind that the regulations were approved by Parliament using the affirmative resolution procedure, albeit this occurred some weeks after they were made… although this does not preclude judicial review of the regulations, it does go to the weight which the courts should give to the judgement of the executive, because it has received the approval of Parliament."*

213. In matters concerning national security, the courts have afforded public authorities and the Executive considerable respect. See, for example, *R (Miranda) v SSHD*[34] at §79, per Lord Dyson MR: "*when determining the proportionality of a decision taken by the police in the interests of national security, the court should accord a substantial degree of deference to their expertise in assessing the risk to national security and in weighing it against countervailing interests. This is because the police have both the institutional competence and the constitutional responsibility to make such assessments and decisions…"*

214. A more recent example is the judgment of the Supreme Court this year in the case of Shamima Begum: *R (Begum) v SIAC and SSHD*.[35] Here Lord Reed, who gave the sole judgment with which the court agreed, found that the Court of Appeal erred in its approach, by making "*its own assessment of the requirements of national security, and preferred it to that of the Home Secretary, despite the absence of any relevant evidence before it, or any relevant findings of fact by the court below. Its approach did not give the Home Secretary's assessment the respect which it should have received, given that it is the Home Secretary who has been charged by Parliament with responsibility for making such assessments, and who is democratically accountable to Parliament for the discharge of that responsibility"* (§134).

215. In cases concerning transport, the courts have shown respect to Parliament of their own motion. See the case of *R (Buckinghamshire County Council) v Secretary of State for Transport*,[36] where the court noted that the claimant in that case was advancing an argument to which there was a "*fundamental*

[34] [2016] EWCA Civ 6, [2016] 1 WLR 1505.
[35] [2021] UKSC 7.
[36] [2014] UKSC 3, [2014] 1 WLR 324.

*constitutional objection"* namely that "*the court would be presuming to evaluate the quality of Parliament's consideration of the relevant issues, during the legislative process leading up to the enactment of a statute*" (§116).

216. Similarly, the courts have consistently refused to intervene on the question of assisted dying. See the Court of Appeal in *R (Conway) v the Secretary of State for Justice v Humanists UK and ors*[37] at 186: "*there can be no doubt that Parliament is a far better body for determining the difficult policy issue in relation to assisted suicide in view of the conflicting, and highly contested, views within our society on the ethical and moral issues and the risks and potential consequences of a change in the law and the implementation of a scheme such as that proposed by Mr Conway."* See also the Supreme Court in *R (Nicklinson) v Ministry of Justice*,[38] where Lord Hughes referred at §267 to: "*the balance between the public interest in the protection of the vulnerable and the preservation of life on the one hand and the private interests of those minded to commit suicide on the other… a change, whether desirable or not, must be for Parliament to make. That is especially so since a change would be likely to call for an infrastructure of safeguards which a court decision could not create."*[39]

217. In the context of social policy, the courts have also been careful to respect the margin of judgement which is due to Parliament. In *R (McConnell) v Registrar General for England and Wales*[40] the Court of Appeal rejected a challenge to the inability of a transgender man to be registered as the father on his child's birth certificate. The Court of Appeal held at §§81-82: "*This brings us to an important aspect of this case. The margin of judgment which is to be afforded to Parliament in the present context rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament. The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information … The second foundation*

[37] [2018] EWCA Civ 1431, [2018] 3 WLR 925.
[38] [2014] UKSC 38, [2015] AC 657.
[39] See also: Lord Neuberger at §116, Lord Mance at §164, 166-168, 190; Lord Wilson at §197; Lord Sumption at §230-232; Lord Reed at §296-297, and Lady Hale at §300.
[40] [2020] EWCA Civ 559; [2020] 3 WLR 683.

*is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy…Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgment more appropriately within the preserve of Parliament.*"

218. Similar reasoning, relying on *McConnell*, recently led to the rejection by the High Court of a challenge to the lack of legal recognition of humanist forms of marriage ceremony under English marriage law: *R (Harrison) v Secretary of State for Justice*[41] at §126.

219. The rationale for the respect shown by the courts to Parliament and the Executive mirrors the concerns expressed in the consultation paper regarding the importance, in appropriate cases, of Parliamentary sovereignty and of political accountability, rather than judicial accountability. In those circumstances, we question the necessity of attempting to reform the law relating to ouster clauses: such clauses are not necessary in order to achieve the government's objective of ensuring that accountability for decision-making in areas of national security and other areas of high policy is essentially political. The courts already extend significant respect to Parliament and the Executive.

### *(4) Proposed methods of reform*

220. We also doubt that any of the proposed methods of reform will achieve the aim sought in any event.

221. The first proposal seeks to address the courts' approach of considering the 'worst case scenario' when interpreting ouster clauses. The Government considers it "*inappropriate*" to refuse to give effect to ouster clauses as a result of considering a "*hypothetical and clearly unjust circumstance*" (consultation paper, §90) and wishes to "*invite*" the courts to "*construe any such worst-case narrowly, and instead consider what is required by the case at hand*". Instead it is said that there should be a "*safety valve*" provision in how ouster clauses are interpreted

[41] [2020] EWHC 2096, [2021] PTSR 322.

which "*essentially would allow the courts to not give effect to an ouster clause in certain exceptional circumstances.*" (§91).

222. There are a number of problems with this proposal. First, it is difficult to see how courts could consider ouster clauses only on the basis of the specific facts before them, without taking into consideration other situations which may arise. The exercise of interpreting a statutory provision necessarily involves considering what Parliament intended by it. However, Parliament would not have confined itself to considering only one situation which might arise. It is certainly highly unlikely to have considered only the *particular* situation before the court. Rather, Parliament would have considered a range of possible situations. To understand Parliament's intention the courts must therefore consider what effect Parliament intended the clause to have across a range of possible situations.

223. Second, the suggested approach would lead to a situation where an ouster clause might be upheld by the courts in a particular case, while leaving open the potential for it being held ineffective in a future case involving more "*unjust*" circumstances. That would lead to a high degree of uncertainty as to the meaning and effect of the ouster clause. We do not understand it to be the intention of Government that a given ouster clause might be effective in some cases but not others or to introduce uncertainty into its meaning.

224. Third, the proposal borrows heavily from the case law concerning judicial ouster clauses, for instance those concerning decisions of the Investigatory Powers Tribunal (in *Privacy International*); the county courts (*Sivasubramaniam)*; and the Lands Tribunal (*Sinclair Investments*). For instance, the Government proposes to adopt tests relating to denial of procedural justice, such as the exceptional circumstances referred to in *Subramaniam* at §56, namely "*procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing*". However, it is entirely unclear how a test which concerns fair hearing rights would be applied, as is apparently intended, outside the context of ouster clauses in relation to challenges to *judicial* decisions, and instead to clauses purporting to oust judicial review of *Executive* decisions.

225. The second proposal would be to "*enact as a principle of interpretation for future ouster clauses*" the principle that a body is subject to judicial review on the ground of lack of competence unless Parliament makes it clear that it intended for that body to have "*unlimited discretionary power to determine its own jurisdiction*." (consultation paper, 92). It is unclear how this would be enacted as a principle of interpretation, nor why it is needed (it already being the position that ouster clauses would not oust the principle that a body is subject to judicial review on the ground of lack of competence unless Parliament had made it clear that that was what it intended).

226. Thirdly, the Government proposes to address the issue of "*local laws*" (consultation paper, §§93-94). The Government appears to suggest that it is not problematic to have local laws because (1) they already exist (2) they used to exist (pre-Judicature Acts) and (3) arbitration agreements already lead to local laws. We consider that the problem whereby the law may be interpreted differently by one tribunal or public authority than by another, without the possibility of correction by a higher court, to be self-evidently problematic. The analogy with arbitration agreements does not assist: parties to arbitration agreements have freely chosen to enter into such agreements, and with that to take the risk of an interpretation of the law which is uncertain or inconsistent with other arbitrators or courts. By contrast, members of the public have not made any such choice. Indeed, they would be likely to be very surprised to discover that the law may be interpreted in one way in one court or tribunal than it is in another court or tribunal. They will understandably expect consistency in the application of the law, and a mechanism for correcting inconsistencies, in the former of a remedy in a higher court. Nor is the analogy with the position pre-Judicature Acts convincing, given that one of the purposes of those Acts was to create a unified system of law, precisely because of the disadvantages of not having one.

227. It is no doubt for this reason that the Government agrees that local laws, at least if unintended by Parliament, are undesirable. However, it is far from clear how they could ever be desirable or in what circumstances Parliament would intend to create them. As for the proposed solution – "*to clarify that the High Court retains the power to issues, in appropriate cases, a declaration about the correct interpretation of the law*" (consultation paper, §94) – it is difficult to see

the purpose of ousting judicial review for errors of law on the one hand, while retaining such a power on the other, nor in which "*cases*" it might not be "*appropriate*" for the court to have such a power. For reasons explained earlier in this section, it is a necessary part of the High Court's constitutional role that it must always be free to interpret legislation.

228. Two final point are worth making. First, the United Kingdom constitution relies for its stability on the willingness of all actors (Parliament, the Executive, and the courts) not to test its boundaries. It may be that the Government is considering the use of ouster clauses in a defined category of cases in which it is confident that the concerns explained above will not arise. If, however, Parliament normalises the use of ouster clauses, albeit in a specific and limited way (say, in what it considers to be unambiguously 'political' cases), it will pave the way for a future government to propose and have enacted ouster clauses that the present Government would consider less responsible (for example, immunising from challenge a minister's decision to expropriate second homes). The Government would be wise to re-consider the long-term implications of unsettling the current constitutional stability on the subject of ouster clauses.

229. Secondly, the proposals as to ouster clauses cannot be read in isolation but fall to be considered in conjunction with the Government's parallel proposals, including the proposal to legislate to state which issues go outside the scope of executive power and which are focused on the wrongful exercise of legitimately held power (§81c). One learned commentator[42] has noted that:

> *"… the Government is proposing that the vast majority of unlawful administrative acts should either not be reviewable at all (because review would be impossible thanks to more efficacious ouster clauses) or should be reviewable subject to remedial consequences that would be significantly inferior to those that currently exist thanks to a combination of conceptual avoidance of nullity and collateral challenge and the introduction of a significantly attenuated remedial regime".*

[42] Elliott, *Judicial review reform II: Ouster clauses and the rule of law, Public Law for Everyone* https://publiclawforeveryone.com/2021/04/11/judicial-review-reform-ii-ouster-clauses-and-the-rule-of-law/ (11 April 2021)

230. If correct, we would view such proposals overall with serious concern, as inimical to the rule of law.

**Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within 3 months.**

231. For the reasons set out below in more detail, ALBA can see the potential advantages of removing the promptness requirement, with the result that claims must be brought within 3 months. Claimants (and defendants) would benefit from the certainty of a clear 3-month time-frame. Adopting this proposal would bring England and Wales into line with Northern Ireland and Scotland, which both require claims to be brought within 3 months, without any promptness requirement. However, the requirement to bring claims promptly may have a legitimate role to play in certain areas, where good administration depends on decisions being implemented, and any challenges to those decisions being resolved, quickly. Therefore, the implications of removing the promptness requirement should be carefully considered and scrutinised before any decision is reached.

232. Currently, claims must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose (see CPR 54.5(1) and equivalent provisions at r.28(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008). Where there has been undue delay, the court has the power to refuse permission to proceed or to grant the relief sought if doing so *"would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration"* (s.31(6), Senior Courts Act 1981). The court may extend the time limit if there is a good reason to do so under CPR 3.1(2). Abridged time-limits apply in certain areas, such as challenges to decisions under the planning acts (six weeks: CPR 54.5(6)), the Public Contracts Regulations 2015 (generally 30 days: reg. 92(2) of the Public Contracts Regulations 2015), and public inquiries (14 days from the date an applicant became aware of the decision: s.38 Inquiries Act 2005).

233. Under the current rules, promptness is the primary requirement and the requirement that a claim be brought in any event within three months is a

"longstop": see *Mauritius Shipping Corp. v Employment Relations Tribunal & Ors* [2019] UKPC 42 at [8] per Lady Black. This means that, depending on the circumstances of the case, an application made within three months may not qualify as having been made promptly, with the effect that permission may be refused.

234. The rationale for the promptness requirement is that there is a significant public interest in judicial review claims against public bodies being brought expeditiously, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken: see Baroness Hale in *A v Essex CC* [2011] 1 AC 280 at [116]. Lord Diplock famously observed in *O'Reilly v Mackman* [1983] 2 AC 237 at 280H-281A:

> *"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision*".

235. However, the promptness requirement has the potential to be vague and uncertain because it places the time limit at the discretion of the court. In *R (Burkett) v Hammersmith LBC* [2002] UKHL 23 at [53], Lord Steyn opined that there is *"at the very least doubt"* as to whether the requirement is compliant with EU law and the European Convention on Human Rights. The European Court of Justice has held that the promptness requirement is contrary to EU procurement law because "*…a limitation period whose duration is placed at the discretion of the competent court is not predictable in its effects"*: see *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08)[2010] PTSR 1377 at [41]-[42]. The UK courts have gone on to disapply the promptness requirement in other judicial review claims involving challenges under EU legislation: see *R (Buglife) v Medway Council & Ors.* [2011] EWHC 746 (Admin) at [63]. This has given rise to the potential for two different approaches to the need for promptness, depending on whether the case involves pure domestic law or EU law: see eg *R (Salford Estates (No. 2) Limited) v Salford City Council* [2011] EWHC 2097

(Admin) at [2]); *R (Macrae) v Herefordshire District Council* [2012] EWCA Civ 457 at [10]-[11].

236. The promptness requirement was removed in Northern Ireland with effect from January 2018: see the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017 SI No. 213. This followed complexities arising from *Uniplex* and the wide-ranging report, the *Review of Civil and Family Justice in Northern Ireland,* in September 2017. The report recommended its abolition to provide a measure of certainty to an otherwise "vague" aspect of the law (§20.32). The effect is that there is a uniform requirement to bring judicial review claims within 3 months. The 3-month time limit applies to a wider array of subject-matter in Northern Ireland than England and Wales, and includes procurement and planning.

237. In Scotland, section 89 of the Courts Reform (Scotland) Act 2014 inserted section 27A into the Court of Session Act 1988, which provides that an application for judicial review must be made before the end of 3 months beginning with the date on which the grounds first arise, "*…or such longer period as the Court considers equitable having regard to all the circumstances".*

238. Prior to this, there had been no specific time-limit to bring a judicial review claim in Scotland. A defendant could raise a plea of *"mora, taciturnity, and acquiescence",* that is to say (i) a delay beyond a reasonable time, (ii) a failure to speak out in assertion of a right or claim when a reasonable person in that position would be expected to speak out, and (iii) assent to what has taken place, to be inferred from the petitioner's inaction or silence: *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69 at [13]-[16]. In 2009, the Report of the Scottish Civil Court Review (the Gill Report) recommended that Scotland adopt the approach in England and Wales, of a promptness requirement and a backstop of 3 months. However, this was rejected on the grounds that it was insufficiently certain, and would lead to different provision for cases raising matters of EU law.

239. There is no doubt the promptness requirement can give rise to uncertainty and create anxiety for prospective claimants. Those of us who act for claimants are always conscious of the need to bring a judicial review claim as quickly as

possible, to avoid the possibility that a claim will be dismissed at the permission stage even where it has been brought within 3 months of the events giving rise to the claim. Removing the promptness requirement would introduce certainty and simplicity for all prospective claimants, as well as prospective defendants.

240. Having said that, in practice, the courts usually act on the basis of a rebuttable presumption that a claim is brought promptly if it is filed within three months: see *R (Agnello) v Hounslow LBC* [2003] EWHC 3112 (Admin) at [40]. In our experience, where claims are filed within 3 months, defendants do not generally raise an argument that there has been a failure to file promptly. It is rare for a court to dismiss a claim on promptness grounds.

241. We understand that the clear and straight-forward 3-month time limit in Northern Ireland and Scotland works well in practice. We can see considerable merit in having the same time limit across all four jurisdictions within the UK.

242. We can also see that there may be a number of indirect advantages flowing from removing the promptness requirement. If there is a clear 3-month time limit, this provides a fixed period within which the parties can attempt to resolve or settle the claim. It would allow time for the pre-action protocol process to work through properly, including the provision of information or documents, to ensure that the claim (when/if brought) is properly focused. It would also avoid claims being brought protectively before that process has concluded for fear of being knocked out by the promptness requirement. It would allow prospective claimants more time to reflect on their challenge, and to draft their grounds of challenge more carefully or to refine those grounds of challenge. Therefore, removing the promptness requirement may improve the quality of any claims brought.

243. However, we caution against removing the promptness requirement without careful consideration and scrutiny. Claims for judicial review arise in a vast array of scenarios in which the three-month long stop is not always appropriate. Parliament has legislated to abridge the time limit in certain areas, such as planning, but there remain a number of areas where it would be detrimental to good administration or would prejudice third parties for claims to be brought as late as 3 months after the relevant decision. For example:

a. Challenges to budgetary or funding decisions: It is obvious that this type of challenge should be brought very soon after any budgetary or funding decision is announced, before it takes effect, because of the potential impact on public finances. For example, in *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin), the claimant's challenge to the 2010 budget was filed five weeks after the budget and after some of the measures had been passed into law. Ouseley J refused permission to apply for judicial review on the basis that the challenge had not been brought promptly, holding at [19] that the challenge–

> *"[gave] rise to very significant problems in relation to delay and problems of a significant order for the certainty which the public and corporate world (individual and foreign) is entitled to have in the budgetary affairs of the United Kingdom*".

Further, in *R (Liverpool City Council) v SoS for Health* [2017] EWHC 986 (Admin), several councils sought to challenge inadequate funding provided by the defendant department. The claim was filed two days before the three-month time limit. Garnham J observed at [45] that *"it is self-evident that such a challenge has to be brought very promptly indeed since it potentially threatens the budgetary arrangements of the Government for an entire year."* The Judge refused to grant relief on the basis of delay, saying at [48] that: *"It would plainly be prejudicial to good administration for budgetary decisions taken in 2016 to be quashed as a result of an application made almost three months later"*.

b. Education cases: It is also obvious that in cases concerning allocation of school places, it is vital for claims to be brought and determined before the school term starts so that the child, parents and school know where they stand: see eg *R v Rochdale Metropolitan Borough Council, ex p B* [2000] Ed CR 117, approved in *R (Burkett) v Hammersmith LBC* [2002] 1 WLR 1593 at [18] per Lord Steyn. Likewise, in cases concerning school reorganisations or closures, it is important for claimants to act promptly so as not to interrupt unduly the proper functioning of the education system

in that area: see eg *R v Leeds City Council, ex parte N* [1999] Ed CR 949. This may necessitate bringing the claim well within a 3-month period.

c. Time-critical cases: There are many other areas of the law where speed is of the essence when challenging a decision, and where a delay in filing promptly may have serious adverse impacts on third parties and good administration. It will be difficult to legislate for these areas in advance – they are dependent on their factual context. They may include rail franchising decisions (*R v Director of Passenger Rail Franchising, ex parte Save Our Railways* [1996] CLC 589), broadcasting licensing decisions (*R v The Independent Television Commission, ex parte TV NI* [1996] JR 60), and cases concerning criminal proceedings (*R (Criminal Prosecution Service) v Newcastle Upon Tyne Youth Court* [2010] EWHC 2773 (Admin)).

244. In the areas identified above, the promptness requirement plays an important role in protecting good administration and ensuring predictability and certainty for third parties.

245. If the promptness requirement were to be removed from CPR 54.5(1), ALBA would recommend retaining section 31(6) of the Senior Courts Act so that the Court has a discretion to refuse to grant relief in cases where there has been undue delay in making the application and where granting the relief sought would be likely to cause hardship or prejudice to any person or would be detrimental to good administration.

246. Further, if the promptness requirement were to be removed, consideration should be given as to whether, and if so how, issues of hardship, prejudice and detriment to good administration should be considered at the permission stage.

**Question 10: Do you think that the CPRC should be invited to consider extending the time-limit to encourage pre-action resolution?**

247. Our view is that the answer to this question should be "no". We agree with the Government that the 3-month time limit is sufficient. We do not think that an extended time limit is likely to encourage pre-action resolution. Three months

should be sufficient to reach a resolution, if there is going to be one, especially where the pre-action protocol is followed properly. Outside of the pre-action protocol, the use of alternative dispute resolution in judicial review is likely to be limited in circumstances where the public interest is engaged and the issue often turns on whether or not the decision was lawful. We note that the IRAL Panel found that the majority of respondents were against increased use of ADR (see C30-31), whereas *"[respondents] argued that the PAP is genuinely effective at resolving judicial review cases, but too often parties did not engage in PAP correspondence either at all, or when they did it was not genuinely or constructively"* (see C33). This may be where efforts would be best utilised.

**Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?**

248. Our view is that the answer to this question should also be "no". We agree with the IRAL Panel that mechanisms for parties to agree to extend time between themselves would be difficult to implement without creating undesirable side-effects for third parties, including other government agencies. We do not consider it is appropriate for parties to a judicial review claim to agree to extend time, because such claims will always involve the public interest and will almost always impact on other persons, who are likely to want the challenge resolved as soon as possible and who may be prejudiced if time could be extended without reference to them.

**Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?**

249. The proposal is to allocate judicial review claims to different 'tracks', which would have different procedural requirements proportionate to the complexity of the case. The rationale for this proposed change is that it "could increase efficiency in the Administrative Court". We do not consider that there is any need for this or that there is any real scope to increase efficiency in the Administrative Court in this way.

250. The procedure which applies in judicial review is already very simple. Once permission is granted, there is sequential exchange of case statements (defendant's detailed grounds and evidence and, if directed, the claimant's reply and any further evidence), then preparation of a trial bundle and skeleton arguments. It is not possible to make this any simpler or more efficient. It is the bare minimum required to prepare a judicial review case for hearing. Nor is there any need to introduce additional steps for the more complex cases as a matter of standard practice. That would reduce, rather than increase, efficiency.

251. There would also be no point in introducing a track system. At the moment, in the order granting permission, the Judge will give case management directions tailored for the appropriate conduct of the case but based on standard directions, including any case-specific directions. That order will also include listing directions, stating how long the case is to be listed for, whether it would be suitable for hearing by a Deputy High Court Judge, and the venue for the hearing. This is explained in the Administrative Court Judicial Review Guide 2020 at para 9.1.

252. A claimant will have included any application for directions in the claim form and a defendant will have included any request for directions in its acknowledgement of service. The Judge at the permission stage therefore makes case management directions bearing in mind the parties' suggestions as to how to manage the case most efficiently and effectively.

253. As the consultation recognises, important cases can be expedited following the grant of permission, or a rolled-up hearing can be ordered. In appropriate cases the Judge could order a more limited degree of expedition as a way of ensuring that important but not urgent cases can be heard swiftly. Otherwise, cases are listed for hearing as soon as the Administrative Court's availability allows.

254. Case management directions are made in accordance with the overriding objective in CPR r 1.1, which ensures that they are dealt with as efficiently as the justice of the case allows. Administrative Court Judges have a wide discretion on case management directions and use it actively to ensure that cases are dealt with efficiently according to the needs of the case. A track system would make no contribution to how efficiently cases were dealt with. It is telling that this

suggestion was not picked up from the call for evidence by the IRAL Panel. It is pointless.

255. If a track system is to be introduced, we recommend that the factors that are used to allocate judicial review claims to differing tracks are based on those contained in paragraph 3.2 of PD 54E, which is used to judge whether claims in the Planning Court are 'significant' or not. Adapted for the Administrative Court, these would be whether the claim:

    a. relates to an action or decision which has significant practical impacts for a section of society or significant economic impacts;

    b. raises important points of law;

    c. generates significant public interest; or

    d. by virtue of the nature of the case, is best dealt with by judges with significant experience of handling judicial review matters.

**Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?**

256. ALBA does not consider there ought to be a duty on parties to identify any organisation or wider group who might wish to intervene in proceedings. This is primarily because we do not consider any purpose would be served by such an obligation and, indeed, it may be counterproductive. We would also observe that there is an inherent difficulty in parties identifying persons or bodies that might wish to intervene, where the considerations are wider than those who may be directly affected by the claim (and thus should be an interested party to the claim).

257. The ability to intervene in a judicial review claim is not a right. Whether or not to allow a group or individual to intervene is always a matter of discretion for the Court, which will only accede to such a request where the involvement of that party is in the interests of justice. The Court will not grant permission if the

intervention would be unlikely to have a significant impact on the case.[43] The assistance which interveners can provide on difficult questions of fact and law can be considerable. However, while the assistance which the Court would derive from the involvement of the intervener is an important factor, this must always be balanced against any inconvenience, delay or expense which that intervention may cause.[44] In our view this pragmatic and sensible approach strikes the correct balance. Where the Court considers that there are interests which may not be represented before them, they have case management tools before them to ensure that the appropriate parties are identified and can be represented. However, this is only necessary or appropriate in a narrow category of cases. Were this to become more widespread it would serve unnecessarily to increase the burden on the core parties.

**Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply?**

258. ALBA agrees that replies to the Acknowledgement of Service (AOS) are now frequent – and that they are often appropriate and of assistance to the permission judge in dealing with new points taken by the defendant in the AOS, either on the substance or on proposed directions at permission stage. It is, as the IRAL points out at §4.152, not satisfactory that the question of whether to admit a reply is left to judicial discretion – and even less satisfactory if, as sometimes happens, a reply is filed but does not reach the permission judge before permission is decided and directions made.

259. ALBA therefore supports the proposal that there be provision in the CPR for the service of a reply within seven days of receipt of the AOS. The Administrative Court Guidance could make it clear that the reply should be brief (perhaps imposing a page or word limit), should be responsive to new points made by the defendant, and should not repeat material already in the claim form.

[43] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin)
[44] *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25, para 32; the costs framework has subsequently been set out in statue: section 87(5)-(6) of the Criminal Justice and Courts Act 2015.

**Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?**

260. There is some confusion in the wording of question 15, and the text which precedes it, as to what is being proposed. As framed, the question refers to the obligation to prepare Detailed Grounds of Resistance. However, the obligation to prepare Detailed Grounds of Resistance arises only where permission has been granted: CPR 54.14(b). That being so, we do not think that any purpose would be served by inviting the Rules Committee to consider whether to change the obligations surrounding Detailed Grounds of Resistance in the sense proposed.

261. If, however, what is proposed is that the Defendant could elect not to file Summary Grounds of Resistance along with an Acknowledgement of Service, but instead indicate that they resist the grant of permission on the basis set out in their pre-action protocol response (which could then be annexed, if the Court did not already have it before them), then this would seem unobjectionable.

262. There is no reason in principle why this should not be permissible. The purpose of filing Summary Grounds of Resistance is to provide the Defendant with an opportunity to draw to the Court's attention:

    a. the basis on which it considers that the grounds of challenge are insufficiently meritorious to warrant the grant of permission; and

    b. any other considerations which it considers the Court ought to take into account (e.g. delay or that the outcome would not have been substantially different even if the conduct complained of had not occurred).

263. If these matters have already been addressed in Pre-Action Correspondence, and the Defendant has nothing further to add, then we consider it should be sufficient for the Defendant to cross-refer to (and append) that response in its Acknowledgment of Service, without the need to draft a separate document.

264. ALBA does not itself consider that a change to the Civil Procedure Rules would necessarily be required to achieve this result, although this is a matter which

could perhaps usefully be considered by the Rules Committee. The relevant requirement is found at CPR 54.8(4)(a)(i) which provides that where the Defendant intends to contest the claim, they must (in the Acknowledgment of Service) "*set out a summary of [their] grounds for doing so*". Practically, we see no reason why this result could not be achieved by the Defendant indicating on the Acknowledgment of Service Form (N462) that the claim is contested for the reasons set out in the Defendant's Pre-Action Protocol response.

265. We would not, however, support a change to the rules which would restrict the ability of Defendants, should they wish to do so, to prepare and file separate summary grounds of resistance. This is because it is in the interests of both the parties and the Court that permission is only granted in appropriate cases. If the Defendant is aware of matters which materially affect that issue, they ought to be able to put them before the Court at the permission stage.

**Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR 54.14 to 56 days?**

266. ALBA does not consider that it would be appropriate to invite the Rules Committee to consider a general change to the time limit for filing the Defendant's Detailed Grounds of Resistance and accompanying evidence. ALBA does, however, consider that the Rules Committee could usefully be invited to consider the means by which time could be extended, in appropriate cases, without requiring a Defendant to submit a separate application.

267. ALBA's suggestion would be that the Acknowledgment of Service form (N462) be amended so as to prompt Defendants (or Interested Parties) to consider whether they require longer than 35 days following the grant of permission to provide their detailed grounds and evidence. Where this is considered necessary, the Defendant could complete a further box on the form indicating what period of time they consider necessary, and the reasons for it. The Judge who determines the permission application (and who will therefore be able to make an informed judgement as to what period of time is appropriate) could then grant an appropriate extension at the same time as granting permission.

268. ALBA favours this approach because:

a. It is not apparent to the working group that there is any issue, in the majority of cases, with the current 35-day period.

b. If the timeframe were to be extended generally, in all cases, the consequence would be that there would be a delay in the final determination of cases which have reached the permission threshold. This would extend the period of uncertainty for those affected by the decision under challenge, and act to the prejudice of good administration. Further, as noted above, extending the timescale for resolving claims for judicial review would give rise to particular concerns in the context of the Government's proposals in relation to remedies.

c. On the other hand, there are a significant minority of cases where it will be apparent from the outset that a 35-day period would be insufficient due, for example, to the nature of the issues involved, or the complexity of the evidence which will be required. It is in the interests of all parties that such cases are identified at an early stage, and case managed appropriately.

**Questions 17 to 19**

269. ALBA does not seek to respond to these questions.