



THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

CALL FOR EVIDENCE

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

19 OCTOBER 2020

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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 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 of ALBA members to produce its response to the Call for Evidence. The Working Group comprises the following members:
 - Catherine Callaghan QC, Blackstone Chambers (Chair of Working Group);
 - Malcolm Birdling, Brick Court Chambers;
 - Tim Buley QC, Landmark Chambers;
 - Chris Callender, Partner at Simpson Millar;
 - Joanne Clement, 11 KBW;
 - Professor Pavlos Eleftheriadis, Francis Taylor Building and Professor of Public Law, University of Oxford;
 - Eric Fripp, Lamb Building;
 - David Gardner, No 5 Barristers' Chambers;

- Stephanie Harrison QC, Garden Court Chambers;
 - Stephen Hocking, Partner at DAC Beachcroft LLP;
 - Charlotte Kilroy QC, Blackstone Chambers;
 - Jonathan Moffett QC, 11 KBW;
 - Sheryn Omeri, Cloisters;
 - Tim Otty QC, Blackstone Chambers and UK's Member of the Council of Europe's Commission on Democracy through Law, the Venice Commission and Visiting Professor at Kings College London;
 - Charlotte Thomas, Brick Court Chambers;
 - Dr Anton Van Dellen, Fraser Chambers; and
 - Juliet Wells, Temple Garden Chambers.
5. In common with ALBA's members, the ALBA 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. At least five members of the Working Group are or have been members of the Attorney General's panels of counsel, which advise and represent UK Government Departments in civil and EU law cases. At least three members of the Working Group are members of the Welsh Government panels of counsel, which performs the same role for the Welsh Government.

ALBA'S CONCERNS ABOUT THE REVIEW AND THE CALL FOR EVIDENCE

6. On 31 July 2020, the Government launched the Independent Review of Administrative Law (“**the Review**”) and announced the constitution of the six-strong panel (“**the IRAL Panel**”) of practitioners and academics asked to conduct it. The announcement was accompanied by the publication of Terms of Reference (“**the ToR**”). In order to fulfil the ToR, the IRAL Panel issued a Call for Evidence on 7 September 2020, with an end date of midday on 19 October 2020, i.e. a period of six weeks (subsequently extended until 26 October 2020). The intention is that the IRAL Panel will report back to the Government by the end of the year 2020.
7. The ToR are exceptionally extensive in scope. As the footnotes to the ToR make clear, the intention is to conduct a comprehensive assessment of the substantive law of judicial review as well as all its procedures, with a view to potential reform of both. Encompassed in the assessment of substantive law are a review of what powers and decisions should be amenable to challenge, on what grounds, and with what consequences in law (whether nullity or otherwise) and what remedies should be available, as well as the question of whether the entire jurisdiction should be codified in statute. The review of judicial review procedures is equally all-encompassing, ranging across time-limits, standing, costs, procedures for claims and appeals, and disclosure/the duty of candour. The IRAL Panel has been asked to complete this extensive Review and produce a report in less than 6 months.
8. The Call for Evidence is also extensive, with recipients invited to offer comments on potential reform of judicial review by reference to the terms of the ToR, as well as answering specific questions on codification, on which decisions should be amenable to judicial review and on the possible reform of a wide array of procedures. Part 1 sets out a questionnaire which has been sent to Government Departments and public bodies (but no one else). Although comments are invited on the questions in the questionnaire, there does not appear to be an opportunity to comment on Government Departments’ or public bodies’ responses to the questionnaire.

9. ALBA has concerns about the Review and the Call for Evidence, both as to the principle of conducting such a review in this way, and as to the practicalities of doing so in the manner proposed.

In principle concerns: the rule of law

10. As explained below, the substantive law of judicial review of government action has been developed over centuries, alongside remedies which are equally ancient. Like every aspect of the common law, this substantive law and these remedies have been carefully and incrementally adapted by judges to reflect what the rule of law requires, namely, as the late Lord Bingham explained:¹

“Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.”

11. The role of judges in developing and applying this law is part of the UK’s constitutional settlement, and a key feature of the separation of powers. Any Parliamentary intervention in this jurisdiction, either to its substance, or by way of codification, would be an unprecedented step of enormous constitutional significance and uncertain consequences. It needs to be conducted with exceptional care.
12. The IRAL webpage states that the Government intends to guarantee that judicial review is available to protect the rights of the individuals against *“an overbearing state”* whilst ensuring that it is not *“abused”* to conduct *“politics by another means”*. It also states that the IRAL Panel will consider whether *“the right balance is being struck”* between the rights of citizens to challenge executive decisions and the need for *“effective and efficient government”*.
13. There is no explanation of what these phrases are intended to mean, and ALBA is concerned that the IRAL webpage could be read as suggesting that it is the Government’s position that it, and other executive bodies, should in the future be entitled to act in a way that would currently be unlawful because, if they were

¹ *The Rule of Law*, Tom Bingham, 2010, Ch 6, 60.

able to do so, governing would be more ‘effective and efficient’. The IRAL webpage might also be read as implying that the Government considers that the fact that action is unlawful under the law as it currently stands does not of itself mean that it constitutes the type of ‘overbearing’ state action that citizens should be able to challenge in the courts, and that it is an ‘abuse’ for persons or bodies who disagree with executive action on political grounds to challenge it in the courts.

14. If this were to be the justification for considering changes to the law of judicial review, it would be a matter of grave concern, as it would exhibit scant understanding of the constitutional importance of judicial review in upholding the rule of law in England and Wales, or of the extent to which the law of judicial review is intertwined with the rest of the legal system.
15. The rule of law has been explicitly recognized as a constitutional principle by both Parliament² and by the courts, and it has been described as the ultimate controlling factor on which the constitution is based.³
16. At the heart of the rule of law is the concept that society is governed by law: Parliament exists primarily in order to make laws for society; democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes representatives who are democratically elected by and accountable to citizens; courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. If the courts cannot perform that role, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.⁴

² See the Constitutional Reform Act 2005, s 1.

³ *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, §107 *per* Lord Hope. See also *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, §51 *per* Lord Hope DPSC, §§97, 142-143, 152-153, 169 *per* Lord Mance JSC; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, §34 *per* Lord Dyson JSC, §221 *per* Lord Collins JSC.

⁴ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, §68 *per* Lord Reed JSC.

17. As such, the role of the courts in enforcing the rule of law is a constitutional norm.⁵ In particular, the supervisory jurisdiction of the High Court, exercised by way of judicial review, is fundamental to the rule of law: its very object is to maintain the rule of law.⁶ The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law,⁷ and the courts have no more important function than to ensure that the executive complies with the requirements of Parliament as expressed in a statute.⁸
18. It has hitherto always been left to the courts, as the guardians of the standards of legality to which this constitutional role is entrusted,⁹ to develop and apply the principles of judicial review as part of the common law. The supervisory jurisdiction of the High Court has an ancient common law pedigree,¹⁰ and judicial review is one of the great historic artefacts of the common law.¹¹
19. In this respect, the principles of what is now known as judicial review have always operated as common law protections,¹² and they have been developed flexibly in order to ensure that the rule of law is upheld in changing circumstances.¹³ Indeed, it has long been recognised that the common law of judicial review has evolved over time “*to preserve the integrity of the rule of law despite changes in*

⁵ *R (G) Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 1 WLR 1445, §§12-13 *per* Lord Phillips MR.

⁶ *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, §37 *per* Lady Hale JSC.

⁷ *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 1 WLR 1445, §§12-13 *per* Lord Phillips MR.

⁸ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453, §47 *per* Lord Neuberger PSC and Lord Toulson JSC.

⁹ *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120, §35 *per* Sedley LJ for the Court of Appeal.

¹⁰ The origins of judicial review lie in the prerogative writs that were developed by the Royal Courts, in the exercise of their inherent jurisdiction, to prevent inferior courts from exceeding their jurisdiction or to require such courts or public officers to perform their public duties. The present judicial review jurisdiction of the High Court derives directly from those original common law powers: s 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 gave the High Court a power to make prerogative orders equivalent to the prerogative writs in any case where it could previously have issued a writ, and s 29 of the Senior Courts Act 1981 merely recognises the High Court’s pre-existing powers in this respect.

¹¹ *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] 1 QB 120, §§20 and 24 *per* Sedley LJ for the Court of Appeal.

¹² *R (Beeson) v Dorset CC* [2002] EWCA Civ 1812, [2004] LGR 92, §17 *per* Laws LJ.

¹³ *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, §89 *per* Lord Phillips PSC.

*the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities”.*¹⁴

20. It follows that any proposal to codify, limit or otherwise alter the scope of judicial review by legislation inevitably enters deep constitutional waters. This was expressly recognised by the Law Commission as long ago as 1969:¹⁵

“The reconciliation of the requirements of efficient government with the rule of law is so vital an issue that it calls for the judgment of a body which includes members with legal, administrative and political experience. We would, therefore, envisage an inquiry by a Royal Commission or by a committee of comparable status.”

21. It has been the consistent view of the Law Commission that it should not consider the substantive law of judicial review, which is more appropriately left for judicial development.¹⁶
22. However, with great respect to the individual members of the IRAL Panel, who are distinguished in their particular fields, it is unclear that the Panel as a whole has all of the expertise and experience that the Law Commission considered necessary in order properly to navigate these deep constitutional waters.¹⁷
23. Any proposals for statutory intervention in the scope of judicial review must address and explain the constitutional implications of altering the current delicate balance between the executive’s freedom to act and the courts’ duty to uphold the rule of law that has gradually evolved over time,¹⁸ always bearing in mind that the courts’ role in upholding the rule of law itself promotes good administration.¹⁹ In particular, insofar as any proposals might be thought to be

¹⁴ *R v IRC, ex parte National Federation of the Self-Employed* [1982] AC 617, 639-640 per Lord Diplock.

¹⁵ Law Commission, *Administrative Law: Submission to the Lord Chancellor under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 20, 1969), §10.

¹⁶ See, for example, Law Commission, *Remedies in Administrative Law* (Working Paper 40, 1971), §83; Law Commission, *Fifth Programme of Law Reform* (Law Com No 200, 1991), page 3.

¹⁷ We do not know how the members of the IRAL Panel were selected, or what criteria were applied when considering whether particular individuals were suitable for appointment.

¹⁸ We note that the IRAL Panel expressly contemplates recommending that the balance be altered: *“the panel is interested in understanding whether the balance struck is the same now as it was before, and whether it should be struck differently going forward”* (*Call for Evidence*, page 4).

¹⁹ A point made by the Government Legal Department in *The judge over your shoulder – A guide to good decision making* (5th ed., 2016), page 31.

justified on the basis of perceived impediments to ‘effective and efficient government’, there would have to be clear evidence of such impediments and an investigation into whether they in fact arise out of matters such as poor quality executive decision-making, an absence of proper internal reviews or appeals, insufficient resources, an expansion in the scope of executive powers, complex and/or badly-drafted legislation, or a failure by the executive to engage appropriately with court processes.

24. It is wholly unclear whether the IRAL Panel intends to undertake the necessary comprehensive inquiry into these matters and, if it intends to, whether it has the requisite breadth of experience and expertise properly to equip it to do so.

Practical concerns

25. The Review is said to form “*part of the Lord Chancellor’s duty to defend our world-class and independent courts and judiciary that lie at the heart of British justice and the rule of law*”.²⁰ Even if it were appropriate in principle for the IRAL Panel to embark upon the Review, in order to achieve that aim and to ensure that Parliament is fully apprised of both the significance and the consequences of any reforms the Government may propose, the Review would require:
 - a. adequate time;
 - b. clarity in its scope and aims; and
 - c. independence from Government.
26. ALBA is concerned that the Review lacks these essential features. In particular, ALBA is concerned that the Government has not adopted a mechanism which will address questions of law reform and codification methodically, comprehensively, authoritatively and without any appearance of executive interference.
27. ALBA notes that the Law Commission, whose statutory functions under section 3 of the Law Commission Act 1965 encompass the systematic reform of the law including codification, simplification and modernisation of the law, has

²⁰ <https://www.gov.uk/government/groups/independent-review-of-administrative-law>

periodically reviewed the procedures for judicial review. For example, it reviewed procedures and relief as part of its Fifth Programme of Law Reform, announced in 1991.²¹ That led, following research and investigation, to a consultation paper in 1993²² and a report in 1994.²³ Even after a lengthy two-year period of research, the Law Commission explained in its consultation paper the importance of a generous period for consultation. The Law Commission's thirteenth programme of law reform was published in 2017 and is underway. It received 1315 submissions on areas suggested for law reform (see §1.8); Administrative Review was one of the areas identified for examination (to promote better decision-making – see §2.5), but not judicial review. Consideration of just this area of examination is expected to take 18-24 months. These thorough processes, adopted by a body with long experience of law reform, contrast with those that have been adopted by the IRAL Panel.

28. ALBA has responded to the Call for Evidence below, as fully as possible in the time-frame available. We do not believe, however, that it is possible to properly conduct a review of the breadth described by the ToR adequately in this time period. We believe the type of approach taken by the bespoke statutory body for reform and codification, the Law Commission, even in the context of a consideration only of procedural reforms, is a clear demonstration of the need for significantly more time and care to be taken in this sensitive area of the UK's constitution.
29. For example, any proposals for statutory intervention in the scope of judicial review must comprehensively address the risk that they would undermine the bases on which Parliament itself has legislated. This risk arises in two main ways.
30. *First*, it is well-recognised that when Parliament legislates to confer powers on the executive, it does so in the knowledge that the courts will exercise their

²¹ (1991) Law Comm No 200.

²² Administrative Law: Judicial Review and Statutory Appeals, Consultation Paper No 126.

²³ (1994) Law Com 226.

supervisory jurisdiction over the exercise of those powers.²⁴ As the Law Commission has recognised:²⁵

“The public interest in the rule of law underpins the very existence of the prerogative jurisdiction and its supervisory role over inferior courts and decision-makers. The conferral of decision-making powers on lower courts, tribunals, ministers and administrators is to a certain extent premised upon the residual jurisdiction of the High Court to supervise and correct errors.”

31. Accordingly, any review of the scope of judicial review must address and explain the implications for the nature and scope of the executive’s existing decision-making powers. It is wholly unclear whether the IRAL Panel will undertake the necessary comprehensive inquiry into these matters and, if it intends to do so, how it would be able properly to carry it out within the limitations of the procedure that it has adopted and the timescale set by the Government.
32. *Secondly*, any limitation or alteration of the scope of judicial review would have knock-on consequences in other contexts. For example:
 - a. Parliament has expressly legislated that the principles applicable on a claim for judicial review should be applied in different contexts;²⁶
 - b. The principles of judicial review form the basis for establishing whether an error of law has been committed in a wide range of statutory contexts;²⁷
 - c. The principles of judicial review form the basis for establishing whether a public law defence can be mounted to a criminal prosecution²⁸ or a civil claim brought by a public authority;²⁹

²⁴ *R (Cart) v Upper Tribunal* [2011] 1 QB 120, §20 per Sedley LJ for the Court of Appeal.

²⁵ Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226, 1994), §2.5.

²⁶ See, for example, s 9(2) of the Terrorism Investigation and Prevention Measures Act 2011 and s 67(2) of the Regulation of Investigatory Powers Act 2000.

²⁷ See, for example, statutory appeals and applications under ss 288 and 289 of the Town and Country Planning Act 1990 and s 204 of the Housing Act 1996

²⁸ See, for example, *Boddington v British Transport Police* [1999] 2 AC 143.

²⁹ See, for example, *Wandsworth London Borough Council v Winder* [1985] AC 461.

- d. The principles of judicial review also form a basis for establishing a claim in restitution;³⁰
 - e. The principles of judicial review apply for the purposes of unlawful detention claims,³¹ and in *habeas corpus* applications;³²
 - f. The principles of judicial review apply for the purposes of deciding whether the interference with a qualified right under the European Convention on Human Rights can be justified as being “*in accordance with the law*” or “*prescribed by law*”; and
 - g. The scope of judicial review is relevant to a determination of whether a decision-making process (including the availability of judicial review) meets the requirement imposed by Article 6 of the European Convention on Human Rights that civil rights and obligations be determined only by way of a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.³³
33. Accordingly, any review of the scope of judicial review must comprehensively identify the potential for knock-on consequences, and thoroughly address their implications. However, whilst the ToR reveal some limited recognition of this (see footnote F), it is unclear how the IRAL Panel will be able to carry out a comprehensive inquiry into this within the limitations of the procedure that it has adopted and the timescale set by the Government.
34. The problem of time is exacerbated by the lack of clarity about the motivation for the Review and why it has been thought necessary for it to be so broad in nature. Those responding to the Call for Evidence are left to guess what the Review’s purpose and motivation is, in an attempt to find some focus for responses that could otherwise on every topic fill entire textbooks. There has been no attempt by the Government to spell out its aims for reform, or to put forward specific proposals for reform, which could then be properly considered by respondents.

³⁰ CPR r 54.3(2) provides that a claim for judicial review may include a claim for restitution.

³¹ See, for example, *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, §66 *per* Lord Dyson JSC.

³² See, for example, *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, 111 *per* Lord Scarman.

³³ See, for example, *Bryan v United Kingdom* (1996) 21 EHRR 342, §40.

ALBA is also concerned that the Review is tainted by the perception that it has been prompted by the Government's loss of the prorogation case (*R (Miller) v The Prime Minister* [2019] UKSC 41, [2020] AC 373) in the last Parliament.

35. We would also urge caution when seeking to draw conclusions based on statistical evidence regarding the operation of the judicial review process. As Professor Sunkin and Dr Tomlinson *et al* conclude in *A Guide to reading the Official Statistics on Judicial Review in the Administrative Court* (October 2020), with specific reference to the operation of the Administrative Court, there are substantial limitations and qualifications which must be borne in mind when seeking to interpret the official statistics, in particular that these:

“... do not show who the claimants are – whether for instance claimants are individuals, pressure or public interest groups, organisations, or public authorities; they do not tell us about the nature of the claims, whether for instance the claims focus on individual circumstances or raise public interest claims; they do not tell us how claims are funded or whether third parties intervened in claims; they do not tell us anything about the nature of settlements, for instance whether claims were settled in favour of claimants or defendants; they do not reveal the remedies granted by the court; and nor do the statistics tell us anything about what happened after the litigation” (§21).

36. It is also important to note – given the central concern about ‘politicisation’ of court proceedings which appears to underpin the present consultation exercise – that the United Kingdom’s current approach to the separation of powers and judicial review in fact confers significantly less far-reaching powers on the courts than is the case in most Commonwealth jurisdictions. In this regard it is entirely standard as a matter of basic constitutional theory for what is known as a ‘supremacy clause’ to confer on the courts the power to strike down legislation where it is found to be incompatible with the relevant Constitution including (but not only) in cases where fundamental human rights are in play. In the United Kingdom, of course, the Human Rights Act 1998 only confers power on the Courts to grant declarations of incompatibility, leaving the underlying law in force and placing the responsibility on Parliament to reconsider the matter and

respond appropriately. It is, in other words, the sign of a mature, functioning democracy operating an effective system of ‘checks and balances’ for the Courts to be able to enter terrain which might be characterised as ‘political’ in one way or another whenever fundamental rights are in issue.³⁴

Summary

37. For all these reasons, ALBA believes that if the IRAL Panel does indeed conclude that there are areas of judicial review that warrant an investigation with a view to reform, that investigation would need to be undertaken by a body which has the requisite expertise and experience properly to consider the matters referred to above, and which would do so in a timescale and pursuant to procedures which would permit such proper consideration.
38. These are not arid theoretical objections. Judicial review is an important, and sometimes the only, mechanism by which individuals can ensure that the state does what the law requires it to do, and does not do what the law prohibits it from doing. Contrary to what might be thought in some quarters, it is not a campaigning tool for liberal elites; it is a vital source of protection for the most vulnerable and disadvantaged in society (including children)³⁵ and it is a crucial

³⁴ The balance struck in the United Kingdom is similar to that which applies in New Zealand, but in many other jurisdictions the Court’s powers are significantly more far-reaching. A few examples among many may be provided from each region of the world. In South Africa, s 2 of the Constitution provides that “*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”, and s 167 confers express and final authority on the Constitutional Court to determine whether an Act of Parliament is constitutional and valid. In India, the largest democracy in the world, s 13 of the Constitution provides: “*The State shall not make any law which takes away or abridges the rights conferred by this Part [of the Constitution relating to fundamental rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void.*” In Singapore, widely seen as one of the most conservative jurisdictions in the Commonwealth, enumerated fundamental rights, and the role of oversight on the part of the Courts in respect of those rights, are also protected by a supremacy clause. Section 4 of the Constitution of Singapore provides: “*This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void*”. In the Caribbean all leading jurisdictions contain supremacy clauses: by way of example only, s 1 of the Constitution of Barbados provides that the Constitution is the “*supreme law of Barbados and ... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other laws shall, to the extent of the inconsistency, be void.*” In Canada, s 52(1) of the Constitution Act 1982 grants Courts the power to hold legislation null and void where it is inconsistent with the Canadian Charter of Rights and Freedoms.

³⁵ For example, local authorities’ decisions concerning vulnerable children under the Children Act 1989 and vulnerable adults under the Care Act 2014 and Housing Act 1996 often have the effect of leaving these people without support, and in some cases, homeless and destitute. The complaints procedures under these statutes are inadequate as they are slow and cumbersome and not designed to deal with

mechanism by which individuals and businesses can prevent unwarranted state interference in their affairs. It should not be tinkered with lightly.

CODIFICATION AND CLARITY

39. ToR paragraph 1 asks whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute. ToR paragraph 2 asks whether the legal principle of non-justiciability requires clarification.
40. Question 3 of the Call for Evidence asks whether there is a case for statutory intervention in the judicial review process. If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used? Question 4 asks whether it is clear what decisions/powers are subject to judicial review and which are not. Should certain decisions not be subject to judicial review? If so, which?

Codification

41. ALBA does not consider there to be a case for statutory intervention in the judicial review process. It does not consider that either the amenability of public law decisions to judicial review (including on grounds of non-justiciability) or the grounds for public law illegality should be codified.
42. At the level of principle, as mentioned elsewhere in this response, jurisprudence concerning both amenability and grounds has developed over a significant time, consistently with the principled development of the common law. The courts' role is to act as a check on executive power and, in a Westminster system in which the executive plays a significant role in the legislative process, legislative power. The danger is that by seeking to limit, by statute, the courts' ability to check executive power, the executive and legislative branches of government would thwart the very function of the courts in a democracy. It is part of the delicate balance in the UK constitution, upon which both democratic governance and the rule of law

urgent situations. The only remedy available is the threat of, or issuing of, judicial review proceedings for injunctive relief for the provision of support or accommodation.

depend, that the courts will respect all acts of the executive within its lawful province, and the executive will respect all decisions of the courts as to what its lawful province is.³⁶

43. On a practical level, while codification may, at first blush, appear to create certainty, ALBA is concerned that it will not do so in the case of either amenability (including non-justiciability) or the grounds for judicial review.
44. If the purpose of codification is to set out the grounds for judicial review in very broad terms (for example, by reference to the classic categories of illegality, irrationality and procedural impropriety, identified by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] 1 AC 374, 410), then codification would serve no purpose and would be a waste of time.
45. If the purpose of codification is to attempt to enumerate the grounds for judicial review in great detail, then there is a risk that this will give rise to a proliferation of expensive satellite litigation aimed at determining the meaning of the statutory provisions. Even if it does not, the risk in this form of codification is that certainty and clarity will come at the price of the law being insufficiently flexible to take account of future developments.³⁷
46. If the purpose of codification is to seek to limit or constrain the courts' judicial review jurisdiction, then ALBA would be strongly opposed to such 'codification' (which could not properly be described as mere codification). This would offend against fundamental constitutional principles. It is also unlikely to achieve its aim, as demonstrated by the example of the modern development of judicial review in Australia (described below).

What decisions or powers are subject to judicial review?

47. The courts have adopted two sufficiently clear approaches to determining whether decisions or powers are subject to judicial review, namely:

³⁶ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365, §35 per Sedley LJ.

³⁷ TH Jones, "Judicial Review and Codification" 20(4) *Legal Stud* 517 (2000), 532-533.

- a. whether the legal source of the power exercised by the decision-maker is statutory or prerogative;³⁸ and
 - b. if the answer to the first question does not yield a clear answer, whether the characteristics of the function being performed are public (in the sense of governmental) in nature.³⁹
48. In relation to the source of power, it is well known that the court now presumes that if the source of power is a statute, or subordinate legislation, the body in question will be subject to judicial review. Indeed, it has been noted that there must be some compelling reason not to apply that presumption.⁴⁰ This is a straightforward test which would not be improved upon by statutory intervention. Commentary and experience demonstrate that in the vast majority of situations, there is no doubt that the decision in question is susceptible to review because the source of power exercised by the decision-maker is statutory.⁴¹
49. Where the source of power is the prerogative, the courts themselves have already carefully considered the extent to which the exercise of prerogative powers is subject to judicial review. In the *CCSU* case, decided in 1984, the House of Lords held that executive action was no longer immune from judicial review merely because it was carried out pursuant to a power derived from the prerogative, and that a minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly in the exercise of the prerogative power as when exercising a statutory power.⁴² The reason for this is clear: as Sedley LJ observed in *Bancoult (No 2)* at §36,⁴³ if the prerogative were to be excluded from the purview of judicial review:

“... we would be creating an area of ministerial action free both of parliamentary control and of judicial oversight, defined moreover not by

³⁸ *De Smith’s Judicial Review*, 7th ed., 2013, [3-027].

³⁹ *Id.*, [3-038].

⁴⁰ *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, §20 per Lord Bingham.

⁴¹ *De Smith’s Judicial Review*, *op. cit.*, [3-028].

⁴² *Council of Civil Service Unions & ors v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374.

⁴³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365, a decision overturned by the House of Lords on its facts. Sedley LJ affirmed that this passage is “true of executive acts” generally in *R (Maftah and Khaled) v Secretary of State for the Foreign Office and Commonwealth Affairs* [2011] EWCA Civ 350, [2012] QB 477, §25.

subject matter but simply by the mode of enactment. The implications of such a situation for both democracy and the rule of law do not need to be spelt out.”

50. Instead, it has been held that the ability of courts to intervene should be governed by whether or not, in the particular case, the subject matter of the prerogative power is justiciable. In this regard, in *CCSU*, Lord Roskill said, at 418:

“But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.”⁴⁴

51. Lord Roskill went on to describe the areas listed in the above-quoted passage as “*excluded categories*”.
52. More recently, in *R (Miller) v The Prime Minister* [2019] UKSC 41, [2020] AC 373, the Supreme Court refined and clarified this analysis. It confirmed that where a prerogative power exists and has been exercised within its legal limits, then – depending on the subject matter of the prerogative power – the exercise of the power may not be open to legal challenge. However, the Supreme Court clarified that the separate question of whether a prerogative power exists, and if it does exist, what are its legal limits, are questions of law for the courts to determine under the separation of powers. The Supreme Court held that the question at hand, of whether the Prime Minister’s advice to the Queen to

⁴⁴ See also *per* Lord Fraser at 398E-G.

prorogue Parliament was lawful, was justiciable because it concerned the limits of the power to prorogue Parliament and whether the lawful limits of that power had been exceeded. Viewed in this way, the Supreme Court's conclusion on justiciability was neither revolutionary nor surprising.

53. ALBA does not consider that it is either appropriate or necessary to codify those prerogative powers that are non-justiciable. As with codification of the grounds of challenge, codification of the law as it currently exists is unlikely to promote clarity, and by definition cannot resolve issues which remain unclear. If codification were undertaken with the aim of removing certain types of decisions from the scope of judicial review, that would constitute an inappropriate attempt to exempt executive decision-making from judicial oversight which would, in effect, allow the Government a licence to act unlawfully.
54. In relation to the 'public function' approach, the approach is reflected in CPR r 54.1(2)(a)(ii). The basis for the 'public function' approach was, as stated by the Master of the Rolls in *Datafin* [1987] 1 QB 815, that courts must "*recognise the realities of executive power*" and not allow "*their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted*".⁴⁵ In contemporary British society, public services and functions are not infrequently outsourced to private organisations. ALBA is of the view that the 'public function' approach to determining amenability is a balanced and sensible one which allows for the appropriate degree of flexibility. It enables courts to articulate the modern constitutional role of judicial review, namely, the common law control of public functions, as well as providing redress for grievances where no other remedy exists.⁴⁶ As a result, the supervisory jurisdiction of the Administrative Court ensures that bodies, whether they call themselves public or private, comply with the law when performing public functions.
55. One example of the fact-sensitive nature of the 'public function' approach is to be found in *YL v Birmingham City Council* [2003] UKHL 27, [2005] 1 AC 95, §102, where Lord Mance noted:

⁴⁵ 838-839, *per* Donaldson MR.

⁴⁶ *De Smith's Judicial Review, op. cit.*, [3-041].

“There is, for example, a clear conceptual difference between the functions of a private firm engaged by a local authority to enforce the Road Traffic Regulation Act 1984, as amended, on a public road and the activities of the same firm engaged by a private land-owner or a local authority to enforce a private scheme or parking restrictions of which notice have been given on a private property or estate.”

56. Commentary and experience indicate that this approach has not led to a significant expansion of judicial review. ALBA considers that codification of the ‘public function’ approach would not assist courts, practitioners or the public. The question of whether a decision of a private body is amenable to judicial review will always be fact-sensitive. There are any number of imaginable permutations of outsourcing arrangements. It would be impossible for statute to account for all of these permutations in any meaningful way. Any statutory provision which sought to do so, would need to be so broad as to be of little or no assistance to courts, practitioners or indeed parties to potential public law disputes, or so lengthy as to be of equally little assistance.
57. Over time, courts have identified a number of factors to assist in their application of the ‘public function’ approach, all of which are well-known, namely:
- a. the ‘but for’ test (i.e., whether, but for the existence of a non-statutory body, the government would itself have intervened to regulate the activity in question);
 - b. government ‘underpinning’ (i.e., whether government has encouraged the activities of the body in question);
 - c. whether the decision-maker exercises monopolistic powers;
 - d. whether the persons affected by the decision consented to submit to the jurisdiction of the decision-making body in question; and
 - e. whether the decision-maker received public funds.⁴⁷

⁴⁷ *De Smith’s Judicial Review, op. cit.*, [3-043] – [3-049].

58. Not every factor will be relevant in every case. Their development, together with their flexible application, demonstrate the need for formalism to be eschewed in order to prevent the stymying of the principled development of judicial review to ensure that the rule of law continues to be upheld.

What can we draw from the Australian experience?

59. We are conscious that the ToR indicate that the position in other common law jurisdictions (especially Australia) are to be considered. We wish to sound a further note of caution here. In particular, we do not consider that the experience in other common law jurisdictions can meaningfully be considered within the constraints of this review process.
60. This is because history teaches that the experience of one jurisdiction cannot be expected to achieve identical, or even similar, results were it to be transplanted into another jurisdiction. To be effective, and avoid the risk of unforeseen consequences, such proposals first require that there be a proper evaluation of *“the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction’s cultural, economic, political and legal background”*.⁴⁸
61. While jurisdictions such as Australia, Canada and New Zealand share a common law heritage, their paths have diverged from their inception, drawing upon indigenous legal traditions and adapting to the exigencies of administration in their particular local conditions. Some have codified, or partially codified, constitutions. Many are not single jurisdictions. Some (such as Australia) have become federations; others (such as New Zealand) are now unitary. In Australia, for example, the courts possessing power to grant applications for judicial review are the High Court of Australia, the Federal Court of Australia and the Supreme Courts of nine separate states and territories; the basis and history of those courts’ powers are by no means identical. The same is true of the sources of governmental power (legislative and executive; regional, federal and local). It is impossible to isolate a particular aspect of Australian administrative law and attempt to predict its efficacy or the consequences if introduced to England and

⁴⁸ P De Cruz, *Comparative Law in a Changing World*, 3rd ed., Routledge-Cavendish, Abingdon 2007, 224.

Wales without detailed consideration of how these differences affect the application of that particular rule in the legal and political culture of that particular jurisdiction.

62. It is also not clear to us why the Australian experience in respect of codification is thought potentially superior to the English model of incremental development in light of the changing realities of administration in England and Wales. Indeed, the experience of ALBA members with experience of both jurisdictions is that the Australian experiment in codification has failed to achieve the ends of certainty and clarity, despite codification forming part of the domestic legal order for decades.⁴⁹
63. Thus, ALBA considers that it is simply not possible within the constraints of this review to determine whether the Australian experience has any helpful lessons for England and Wales. However, what is known is that the experience of codification in Australia has not provided clarity or certainty, and to this extent there are good reasons to believe that to seek to replicate it would be counterproductive. This is because, at the level of pragmatism, the Australian experience suggests that codification would likely fail to achieve the aims of certainty and clarity even where such codification sought to limit or abolish the courts' review jurisdiction or any part of it.

⁴⁹ In the Federal Court, judicial review is codified in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which came into force in 1980, very shortly after the establishment of the Federal Court, pursuant to s 76 of the Australian Constitution, in 1976. The effect of the 1977 Act was to repeal Federal privative clauses enacted before 1 October 1980 (when the 1977 Act came into force) - see M. Aronson, M. Groves & G. Weeks. *Judicial Review of Administrative Action and Government Liability*. 6th ed., 2017, [18.280] and G. Weeks, "ADJR at 40: In its prime or a disappointment to its parents?" (2017) AIAL Forum No. 92 103, 103.

STANDING

64. Question 13 of the Call for Evidence concerns standing, and asks in particular whether “*the rules of public interest standing are treated too leniently by the courts*”. ALBA’s firm view is that they are not and that no statutory reform is required.

The role of standing and conclusions reached following the Government’s 2013 consultation

65. The current test for standing, set out in s 31 of the Senior Courts Act 1981, requires a claimant to demonstrate a “*sufficient interest in the matter to which the application relates*”. The test has been interpreted so as to include those who have a direct and personal interest in the decision under challenge, and also to ensure that it is possible to bring a challenge in cases where it is in the public interest for an issue to be examined.
66. As we have already observed, judicial review is crucial in a democracy governed by the rule of law. In the most recent consultation on proposals for further reform of judicial review in September 2013,⁵⁰ the Government recognised that “*Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful*”.
67. The current President of the Supreme Court, Lord Reed, has likewise observed that the essential function of the courts is the preservation of the rule of law, which extends beyond the protection of an individual’s legal rights.⁵¹ There is a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual. For these reasons, a narrow, rights-based approach to standing is incompatible with the performance of the courts’ constitutional function of preserving the rule of law. The exercise of the Court’s

⁵⁰ Cm 8703, Judicial Review: Proposals for further reform https://consult.justice.gov.uk/digital-communications/judicial-review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf

⁵¹ In *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, §§169-170 *per* Lord Reed JSC.

supervisory jurisdiction necessarily requires the court to go beyond the protection of private rights, and requires an approach to standing founded on the public interest. This approach recognises that the function of the court’s supervisory jurisdiction is not limited to redressing individual grievances, but includes the constitutional role of maintaining the rule of law.

68. In the September 2013 consultation, the Government had expressed concern that the broad approach to standing was vulnerable to “*misuse*” by those who wish to use judicial review to “*seek publicity or otherwise to hinder the process of proper decision-making*” (see §79). The consultation therefore sought views on whether the existing test should be narrowed. The suggestion was largely opposed by those responding to the consultation. The evidence confirmed that there were few such claims brought (as a percentage of overall applications) and that Government figures indicated that those cases that were brought were more successful than on average. In February 2014, the Government published its response to this consultation.⁵² The Government confirmed that it did not consider it necessary to amend the law relating to standing and would not make a change to the test for standing (see §35). The Government was satisfied that what it considered to be unmeritorious judicial reviews could be addressed by reforms to certain financial aspects of judicial review, with the aim of deterring claimants from beginning or persisting with weak cases.
69. We are not aware of any new factors that have emerged in the intervening period so as to cast doubt on the conclusion that the law relating to standing did not require reform. We agree with that conclusion and do not consider that any further reform to the law of standing is required. In our view, a Government which is committed to the rule of law should not be seeking to “load the dice” in its favour by changing the rules of standing so that it will be more difficult for certain types of challenger to bring meritorious claims.
70. It must always be recalled that the effect of restrictions on standing is that unlawful decisions might be made immune from challenge because no challenger

⁵² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761798/judicial-review-proposals-further-reform-government-response.pdf

can be found able to bring a claim, leading to a “grave lacuna” in the law.⁵³ Taking an overly narrowly or rigid approach to standing would undermine the important constitutional functions served by judicial review as explained above (in particular, to uphold the rule of law, and to improve the standard of decision-making by ensuring that proper processes are followed). We consider that the current multi-factorial approach, which we explain below, is applied appropriately by the courts and should not be disturbed.

71. ALBA members have had experience of litigation where issues of standing have arisen. Some members have acted for Government departments where ministers have expressed frustration that challenges have been brought by public interest groups who do not have a direct interest in the matter under challenge. Frustration has been expressed about (1) the fact that the Government decision is being challenged at all, and (2) the Government’s ability to recover costs from the public interest group should the claim fail. Neither of these concerns justify reforming the rules of standing, for reasons we now explain.

The appropriateness of public interest challenges

72. Our experience supports the evidence presented to the earlier consultation, namely that claims brought by public interest groups have a higher success rate than claims brought by individuals. Such cases are better prepared, and save time and money, by presenting the issues to a court in one case rather than through a series of individual challenges.
73. As to the risk of unmeritorious or futile claims being brought, there are already filters in place to target these, including under the current approach to standing.
74. First, the permission stage acts as a general filter preventing unmeritorious claims from going forward.

⁵³ To use the words of Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed Small Businesses Ltd* [1982] AC 617, 644E: “It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

75. Second, following the consultation outlined above, s 84(5) of the Criminal Justice and Courts Act 2015 introduced the ‘highly likely to make no difference’ clause. It is therefore already the case that permission must be refused “*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*”. There is an exception in cases of “*exceptional public interest*”. Accordingly, it is already impossible for any person to bring a challenge which would not make any difference to the outcome of the case or which otherwise has exceptional public interest value.
76. Third, in practice, the courts have already over the years developed a line of case-law which assesses the question of ‘sufficient interest’ in a multi-factorial manner, to ensure that it responds to the demands of the rule of law but that undeserving claims brought by ‘busybody’ parties which have little connection with the issue do not proceed. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386, DC, 392-396 the Divisional Court held that a non-partisan pressure group and charity had standing to challenge a decision to fund the Pergau Dam project in Malaysia, in a pure public interest challenge on behalf of potential recipients of overseas aid. Rose LJ proposed a number of factors to consider when assessing whether there is a public interest in granting standing: (1) upholding the rule of law; (2) the importance of the issue raised; (3) the possibility that there will be another responsible challenger; (4) the nature of the breach of duty against which relief is sought; and (5) the role of the applicants (in that particular case) in giving advice, guidance and assistance regarding the matters at hand (at 395H). He further observed (at 395G) that “*the merits of the challenge are an important, if not dominant, factor when considering standing*”, quoting the words of the leading constitutional law scholar, Professor William Wade: “*the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved*”. The merits and importance of the claim are thus already considered by the courts when determining whether a claimant has standing to bring the claim.
77. In our view, and in our collective experience, the rules of public interest standing are not treated too leniently by the courts. The courts show appropriate regard to

relevant factors in each case. Further, as a matter of practicality, it is highly beneficial (including for judicial review defendants) for certain types of claim to be capable of being brought by public interest groups. In our experience, for the reasons developed above, the quality of government decision-making benefits very substantially from the public-spirited efforts of NGOs who are able to engage with government departments by writing letters before action and, where necessary, bringing judicial review claims.

Standing and costs

78. As for concerns about costs, these are also addressed under the current procedural regime (including by reforms made following the 2013 consultation). First, any concerns about whether a public interest challenger (e.g. an unincorporated association or a body incorporated for the purpose of bringing the claim) can pay a defendant's costs should the claim succeed can be met by way of an application for security for costs. Second, while costs-capping orders limit the ability of a defendant to recover their costs should the claim fail, these are available only in "*public interest*" proceedings and have the *quid pro quo* of a reciprocal costs cap for the defendant. Costs-capping orders are now placed on a statutory footing (ss 88 to 90 of the Criminal Justice and Courts Act 2015). They are considered in more detail in the relevant section below. In the context of public interest challenges and standing, a number of points arise as a result of these reforms.

- a. A costs-capping order can only be made if permission to apply for judicial review has been granted (so a public interest challenger who does not succeed in obtaining permission is liable to pay a defendant's costs).
- b. Rules of court now require an application for a costs-capping order to contain a summary of the claimant's financial resources, including details of the claimant's assets, income and expenditure, and any financial support which any person has provided or is likely to provide to the claimant: CPR Part 46.
- c. The legislation now defines the concept of "*public interest proceedings*" and provides that a costs-capping order may only be made if the proceedings

are public interest proceedings (and if, in the absence of such an order, the applicant would withdraw the application and it would be reasonable for the applicant to do so). Proceedings are “*public interest proceedings*” only if (a) an issue that is the subject of the proceedings is of general public importance; (b) the public interest requires the issue to be resolved; and (c) the proceedings are likely to provide an appropriate means of resolving it.

79. Accordingly, we consider that any concerns about the costs consequences of public interest proceedings are equally misplaced. There are protections in place before costs-capping orders are made, and where they are granted, these are precisely the kind of claims that the courts should be considering in order to uphold the rule of law.

Standing under the Human Rights Act 1998

80. We note, for completeness, that standing under the Human Rights Act 1998 (“**HRA 1998**”) is much more limited where what is at issue is a direct challenge to an act of a public body under s 6 of the HRA 1998.
81. The first type of challenge available under the HRA 1998 is a challenge to an act of a public body as unlawful under s 6 of the HRA 1998. In order to bring a challenge of this type, the claimant must be a “*victim*” for the purposes of Article 34 of the European Convention on Human Rights (by s 7(3) of the HRA 1998) (unless the claimant is the Equality and Human Rights Commission, to which special rules apply).
82. Generally, NGOs acting in the public interest cannot be “victims”. That is so even though before the HRA 1998, NGOs would have been able to bring human rights claims in their own name: see *R v S of S for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 375. See, on this:
- a. *R (The Children’s Rights Alliance for England) v S of S for Justice* [2012] EWHC 8 (Admin), §§212-225 (a charity founded to protect the rights of children did not have standing to bring a challenge concerning the rights of

vulnerable children subject to unlawful restraint at Secure Training Centres – even though this was “*very unfortunate*”);

- b. *Norris and National Gay Federation v Ireland* (1985) 44 DR 132, ECommHR (the National Gay Federation did not have standing to challenge laws criminalising consensual homosexual acts in private – such a claim could only be brought by an individual);
 - c. *Re Medicaments and Related Classes of Goods (No 4)* [2001] EWCA Civ 1217, [2002] 1 WLR 269, §§18-19 (a trade association did not have standing to bring a claim on behalf of its members); and
 - d. *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175 (Admin), [2012] 2 All ER 1175, §2 (the National Secular Society did not have sufficient standing on its own, and a former councillor had to be joined as the “*victim*”).
83. Sometimes, unusually, an NGO may be able to bring a challenge on the basis that it qualifies as a “*victim*” in its own right. For example, we note that Liberty has previously brought challenges in respect of bulk surveillance and data sharing under the UK’s surveillance regime which have raised points under the European Convention on Human Rights; see, for example, the claims brought under the HRA 1998 discussed in *R (Liberty) v S of S for the Home Department* [2019] EWHC 2057 (Admin), [2020] 1 WLR 243. No standing issue arose in that case because Liberty could itself claim to be a “*victim*” of an interference with its communications.
84. The second type of challenge available under the HRA 1998 is a challenge invoking ss 3 or 4 of the HRA 1998. Such challenges are not subject to the “*victim*” requirement and the normal rules of standing apply, as Lord Mance confirmed in the leading case, *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, [2019] 1 All ER 173, at §62. Even then, establishing standing may be difficult for NGOs. Speaking for the majority on the standing issue in that case, Lord Mance held that the Northern Ireland Human Rights Commission did not have standing to bring a claim. It was not a victim which had suffered an unlawful

act, and so could not bring a s 6 claim. Meanwhile, the Commission did not have the power under its enabling statute to bring a complaint that primary legislation was incompatible with the European Convention on Human Rights (under s 4 of the HRA 1998) in circumstances where there was no unlawful act.

DISCLOSURE AND THE DUTY OF CANDOUR

85. ToR paragraph 4 states that the Review should consider:

“Whether procedural reforms to judicial review are necessary, in general to “streamline the process”, and, in particular: (a) on the burden and effect of disclosure in particular in relation to “policy decisions” in Government; (b) in relation to the duty of candour, particularly as it affects Government.”

86. ALBA notes that the Panel have not in their Call for Evidence asked questions about this part of the ToR. Given the importance of the issue, ALBA nonetheless sets out its response to the ToR.

87. As explained below, insofar as the ToR suggest that Government is subjected to an excessive burden in relation to disclosure in public law proceedings, including those relating to policy decisions, as a result of the duty of candour, and should be relieved of any such burden, that suggestion is ill-founded. The duty of candour imposes a far less onerous obligation on defendants than the alternative, which is standard disclosure on the grounds of relevance in accordance with CPR Part 31, and cross-examination of witnesses. As Girvan J stated in the Matter of an Application by Brenda Downes for Judicial Review [2006] NIQB 77 at §31:

“...The judicial restraint on matters such as discovery [disclosure in England and Wales] and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications.”

88. The Court of Appeal has recently re-iterated the rules on disclosure and duty of candour in judicial review (see R (Citizens UK) v SSHD [2018] EWCA Civ 1812,

[2018] 4 WLR 123, §§105-6). In that judgment the Court expressly incorporated the reasoning and summary of principles set out in a judgment of the Divisional Court, *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), §§9-23.

89. As the Court explained in *Hoareau* (§§8-24), the principles on the application and interpretation of the duty of candour and co-operation which apply in judicial review proceedings are well-established. They can be found in case-law stretching back to *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, and have been tested in courts at all levels, including the House of Lords, Privy Council and Supreme Court. As the courts have made plain in judgments from the Privy Council in *BACONGO*⁵⁴ to the Supreme Court in *Bancoult (No 4)*,⁵⁵ those principles derive from the distinct role of public authorities who, in judicial review are “not engaged in ordinary litigation, trying to defend their own private interests” but “in a common enterprise with the court to fulfil the public interest in upholding the rule of law” (*Hoareau*, §20).
90. Since that is their role, public authorities are expected to assist the court with full and accurate explanations of all relevant facts, and co-operate with it by themselves drawing attention to any defects in their case (*Hoareau*, §20). That means that ordinarily witness statements will need to be produced explaining the relevant facts (*Hoareau*, §17, citing *BACONGO*). It also means those drafting witness statements must make sure that the statements do not deliberately or unintentionally obscure matters of central relevance, be ambiguous, or economical with the truth, or employ ‘spin’ (*Hoareau*, §22). The statements must contain ‘the good, the bad and the ugly’. It is difficult to see how this could be described as an onerous obligation.
91. The duty of candour is not complied with by off-loading large amounts of documentary material on claimants’ representatives (*Hoareau*, §21). Equally, however, the duty of candour and co-operation will not be complied with if public authorities are selective in their disclosure (§21) or the court is misled by the non-disclosure of a material document or fact, or the failure to identify the significance

⁵⁴ [2004] UKPC 6, [2004] Env LR 38, §86.

⁵⁵ [2016] UKSC 35, [2016] 3 WLR 157, §§183-4.

of a particular fact or document (§23). Ordinarily significant documents should be exhibited to any statement (§24). In *Hoareau*, the Court also emphasised that the duty of candour was self-policing, and that a particular obligation falls on both solicitors and barristers acting for public authorities to assist the court in ensuring these “*high duties on public authorities have been complied with*” (§18).

92. As these principles reveal, the duty of candour does not ordinarily involve large volumes of disclosure, even if there is voluminous relevant documentation. Indeed under the current approach to the duty of candour, public authorities are placed in the extremely privileged position of being able to police their own disclosure and candour obligations. With that privilege, however, comes responsibility. It is necessary for Government bodies and their legal representatives to be fully acquainted with all the relevant documents so as to be able prepare full and accurate witness statements which comply with the principles in the authorities, and to select the most significant documents for disclosure alongside the statements.
93. It is difficult to see what objection there could be to this. Firstly, any failure to comply with these principles risks the court being misled and the rule of law undermined. There have been extremely serious examples of this, in cases like *Bancourt (No 4)*⁵⁶ in 2016, which led to an application to set a Supreme Court judgment aside, only just averted, and *R (Al Sweady) v Ministry of Defence* [2009] EWHC 2387, [2010] HRLR 2, which led to an entire set of proceedings being aborted during a hearing, with indemnity costs, because it had become clear the Secretary of State for Defence could not be sure all material matters had been disclosed. The very serious criticisms of the Government made by the Court in *Al Sweady* led to the production of Treasury Solicitors Guidance on the Duty of Candour in 2010, which provides useful practical guidance on how lawyers and government departments should go about discharging the duty of candour.
94. Secondly, the need to comply with the duty of candour promotes better decision-making and accountability within government. That is because, at its heart, the purpose of the candour process is to permit the Court to have an accurate understanding of the Government’s reasons for adopting a particular policy or

⁵⁶ [2016] UKSC 35, [2016] 3 WLR 157.

for taking a particular decision. The knowledge that it may be necessary to identify the reasons for a decision, and defend that decision in court, acts to promote good decision-making in Government.

95. Thirdly, provided there is a proper evidential basis for a decision or policy and a proper paper trail, the burden of complying with the duty of candour should not be onerous. In the event of a challenge, the decision makers ought to be able accurately to summarise the reasons for the decision and to disclose the relevant documents. Where it does not occur, the solution lies not in reducing the duty of candour or the limited disclosure obligations described above, but improving record-keeping. Addressing this problem presents an opportunity to improve the quality of decision-making in Government more generally.
96. The experience of ALBA members who regularly act for Government is that the quality of record-keeping and maintenance of institutional knowledge varies considerably between departments and organisations. Those organisations which keep good records are, in our experience, able quickly and with very limited resource cost, to comply with the duty of candour. Those organisations whose practices are lacking, by contrast, may need to engage in more detailed and searching disclosure exercises. By taking steps to encourage better record keeping, the Government can reduce any burden of defending challenges and improve the quality and effectiveness of its systems.
97. For all these reasons ALBA suggests that the focus should be on putting in place better systems within Government and its legal departments to ensure compliance with the duty of candour. Overall, ALBA does not consider that it is unduly onerous for the Government to comply with the duty of candour; to the contrary, the duty of candour is far less onerous than the alternative.

TIME LIMITS AND DELAY

98. ToR paragraph 4(d) asks whether procedural reforms to judicial review are necessary in relation to time limits for bringing claims. Question 6 of the Call for Evidence asks whether the current judicial review procedure strikes the right balance between enabling time for the claimant to lodge a claim and ensuring effective government and good administration without too many delays.

The current time limit

99. The current time limit for judicial reviews in the Administrative Court is set out in CPR r 54.5(1):

“The claim form must be filed-

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.”

100. An equivalent, although differently worded, time limit applies to judicial reviews in the Upper Tribunal (rule 28(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

101. A shorter time limit of 6 weeks applies to judicial reviews under the Planning Acts (CPR r 54.5(5)) and to some planning-related statutory reviews. A 14-day time limit applies to challenges to the decisions of public inquiries (section 38 of the Inquiries Act 2005). There is also a 16-day time limit for ‘*Cart*’ judicial reviews of decisions of the Upper Tribunal refusing permission to appeal (CPR r 54.7A(3)).

102. Except in cases involving EU law, a claim can be refused on the ground of lack of promptness even if it was brought within the 3-month time limit: *Finn-Kelcey v Milton Keynes Borough Council* [2008] EWCA Civ 1067, [2009] Env LR 17. Section 31(6) of the Senior Courts Act 1981 also gives the Court an explicit discretion, inter alia, to refuse permission if the granting of the relief sought “*would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*”

103. The 3-month longstop time limit is actively enforced by the Administrative Court, and applications to extend time are scrutinised rigorously. The courts have recognised for decades that public law litigation is unlike ordinary civil litigation and that strict adherence to time limits is required (*R v ICAEW ex parte Andreou* (1996) 8 Admin LR 557).

104. Nonetheless, the Administrative Court does retain a discretion to extend time, where, for instance, the claimant was unaware of the decision and acted promptly once they became aware of it, and/or the claim raises issues of exceptional public importance (see for instance *R v Secretary of State for the Home Department ex parte Ruddock* [1987] 1 WLR 1482). The relevant law was summarised in *Shamlou v Blackpool and Fleetwood Magistrates* [2011] EWHC 2874 (Admin):

“[T]he court does have the discretion to grant an extension of time to bring proceedings, but it would have to be satisfied that there was good reason to do so and, in particular, that there is a good reason or adequate explanation for the delay and that extending the time limit would not cause substantial hardship or substantial prejudice to the defendant or interested parties or be detrimental to good administration.”

105. It can be seen that this is a rigorous test. For example, a mistake by the claimant’s lawyers is not necessarily treated as a good reason for the delay (see for instance *R v Secretary of State for Health ex parte Furneaux* [1994] 2 All ER 652).

106. A perusal of the case law of the Administrative Court makes clear that claims which are brought late without any satisfactory explanation may be swiftly and robustly refused, especially if the underlying merits of the claim are weak, and that the courts are alive to the harm that delay can cause to good administration. See for instance *R (Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin), [2019] 1 CMLR 8, §20, where the Divisional Court, refusing permission, said:

“There is no conceivable – let alone good – reason for extending time. This is a paradigm instance of a claim needing to be made promptly and within the applicable time limit... [T]here has been undue delay and that to grant

the relief sought would give rise to the clearest possible detriment to good administration.”

107. See also *Allan Rutherford LLP v Legal Services Commission* [2010] EWHC 3068 (Admin), §60:

“Permission to apply for judicial review is refused because the grounds have no substance and, furthermore, because the claim has not been brought promptly in circumstances where third party interests and good administration would be prejudiced by the grant of any relief. There is no good reason to extend time.”

108. In short, the obligation to bring claims promptly and within 3 months is well understood, is regularly enforced and is not extended without good reason. Even a claim brought within the time limit may be refused on the ground of lack of promptness. In all cases the courts are alive to the effect of delay on good administration, and they give this factor substantial weight in making decisions on permission. The courts are robust and are prepared to refuse permission if there is no good reason for extending time, especially if the underlying merits of the claim are weak. Specific exceptions already exist for cases adjudged to require greater expedition.

Reasons why a shorter time limit would be inappropriate

109. A shorter time limit would not strike the right balance in the full run of cases and could undermine effective access to justice, for the following reasons.
110. First, it can take time to obtain high-quality legal advice on what are often extremely legally and factually complex matters. Unlike other forms of litigation, judicial review is very much a “front-loaded” process, and it takes time to ensure thorough and effective preparation of the claim, the legal grounds and the evidence in support of it. Curtailing the time frame risks compromising the quality of the work undertaken which is essential for facilitating the efficiency and effectiveness of the process and assists both the defendant and the court in identifying the legal issues and their merits.

111. Second, many claimants are reliant upon legal aid, and the courts do not automatically extend time limits where delays in the grant of legal aid are responsible for the delay (see, in another context, *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286, [2015] 1 WLR 723). Accordingly, if the time limit were shorter, a delay in granting legal aid might cause irreparable prejudice to a claimant, unless their lawyers were willing to work pro bono at cost to themselves. In our experience this problem does arise at present in '*Cart*' judicial reviews, for which the time limit is much shorter.
112. Third, these problems are particularly acute for vulnerable claimants who may have little or no familiarity with the legal system – some may be disadvantaged by disability, history of abuse or other social or cultural factors which inhibit access to lawyers; for example, victims of domestic violence facing homelessness, prisoners denied a place in a mother and baby unit, asylum seekers facing refusal of fresh claims, a child excluded from school, or a disabled or elderly person refused community care. Others are located in places that make access to lawyers difficult and time consuming such as in a prison, or detention centre or secure hospital. Some may need the involvement of the Official Solicitor or a litigation friend which delays the process of obtaining instructions and bringing the claim to court.
113. Fourth, the imposition of any additional restrictions or shorter time limits would inhibit the effectiveness of the pre-action protocols and risks being counterproductive, forcing claims to be made before fully investigated and/or responded to in detail by the proposed Defendant. It also risks curtailing pre-action disclosure which if made may also lead to cases not being brought at all or compromised at the earliest possible stage without the need to lodge claims. This is confirmed by the significant number of cases where the defendant concedes the claim in the summary grounds having not responded to the pre-action protocol at all or in any detail before the claim had to be lodged. This is a particular feature of immigration and asylum cases where the Home Office is the defendant.

114. Finally, as explained above the court's ability to refuse permission for lack of promptness provides a tailored basis to protect the interests of third parties, and the interest of public bodies in good administration, on a case by case basis.
115. We would, therefore, recommend no changes to the current general time limit although we would suggest review of the foreshortened 16-day time limit in '*Cart*' judicial reviews to take account of the practicalities of obtaining legal funding and the complexity of the issues they cover.

REMEDIES AND RELIEF

116. ToR paragraph 4(e) asks whether procedural reforms to judicial review are necessary on the principles on which relief is granted in claims for judicial review. Question 9 of the Call for Evidence asks whether the remedies granted as a result of a successful judicial review are too inflexible. If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The current position

117. There is a wide range of remedies available in judicial review, which are infinitely flexible. The remedies currently available to claimants in a claim for judicial review are as follows.
 - a. Quashing order – an order quashing a decision has the effect of rendering the decision null and void, as if the decision had never been made. When a court quashes a decision, it will normally remit the matter to the court, tribunal or authority which made the decision with a direction to reconsider the matter. In limited circumstances, the court may substitute its own decision for the decision in question. See s 31(1)(a) and (5) and (5A) of the Senior Courts Act 1981.
 - b. Mandatory order – an order requiring a person or body to act in a particular way. See s 31(1)(a) of the Senior Courts Act 1981.
 - c. Prohibiting Order – an order prohibiting a person or body from taking a particular intended action. See s 31(1)(a) of the Senior Courts Act 1981.

- d. Declaration – a statement by the Court as to what the law is on a particular issue or as to what is the legal effect of a particular decision or act. See s 31(1)(b) and (2) of the Senior Courts Act 1981.
 - e. Injunction – an order to act or refrain from acting in a particular way. See s 31(1)(b) and (2) of the Senior Courts Act 1981.
 - f. Damages – a monetary remedy, which is awarded in very rare cases. See s 31(4) of the Senior Courts Act 1981.
 - g. Declaration of incompatibility – a declaration that a provision of primary or secondary legislation is incompatible with the European Convention on Human Rights. See s 4 of the Human Rights Act 1998.
118. Generally (subject to what is said below), it is a matter for the court’s discretion whether to grant relief, and if so, as to the form of relief. There are a number of well-developed principles and rules relating to the exercise of the court’s discretion to grant relief. Where a decision has been found to be ultra vires or illegal, it would be exceptional for a court not to grant relief by quashing the decision.⁵⁷ However, the courts may refuse to grant relief where, for example, a procedural failure has caused the claimant no harm or prejudice;⁵⁸ where the remedy would serve no useful practical purpose (because, for example, the issue has become academic);⁵⁹ or where the claimant has unduly delayed in making the judicial review claim, and the court considers that the granting of relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration.⁶⁰
119. The test of ‘detriment to good administration’ continues to protect the interests of the Government at the stage of considering relief. For example, in a recent challenge to the legality of the EU referendum on the basis of electoral law violations established by the Electoral Commission three years after the referendum took place, the High Court and Court of Appeal rejected the

⁵⁷ See *R (Edwards) v Environment Agency (No 2)* [2008] 1 WLR 1587, [2008] Env LR 34, §63 per Lord Hoffmann; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 608D per Lord Bingham and 616F per Lord Hoffmann.

⁵⁸ See, e.g., *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, §112.

⁵⁹ See *Baker v Police Appeals Tribunal* [2013] EWHC 718 (Admin), §32.

⁶⁰ See s 31(6)(b) of the Senior Courts Act 1981.

claimants' claim, finding that even if they had accepted the claimants' substantive arguments, they would not have granted relief because "*quashing and/or declaring unlawful the EU referendum and the notification of withdrawal – would obviously involve detriment to good administration of the most serious kind*": see *R (Wilson & ors) v Prime Minister* [2019] EWCA Civ 304, [2019] 1 WLR 4174, §64 *per* Hickinbottom LJ.

120. The rules for granting relief have been the subject of recent reforms. Section 31(2A) of the Senior Courts Act 1981, inserted by s 84 of the CJCA 2015 with effect from 13 April 2015, requires the Court to refuse to grant relief on an application for judicial review where "*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*". The court may only disregard this rule if the court considers it is appropriate to do so for reasons of "*exceptional public interest*".
121. The new statutory test modifies the position at common law (established in the case of *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25, §42) in three ways. First, the matter is not simply one of discretion, but becomes one of duty provided the statutory criteria are satisfied. Secondly, whereas under the common law, the court's discretion to refuse relief was triggered if the outcome would "*inevitably*" have been the same, the statutory provision lowers the hurdle to merely "*highly likely*". Thirdly, whereas previously it had to be shown that the outcome would have been exactly the same, it now suffices that it is highly likely that the outcome would not have been "*substantially different*" for the claimant.
122. There has been a limited period of time to assess the effects of this statutory reform. There are some signs, for example, that the courts are reluctant to speculate on counterfactuals (i.e., on what would have happened if the illegality had not occurred) because it can require the courts to stray into the 'forbidden territory' of assessing the merits of a public body's decision.⁶¹ However, there have been cases where the Court has refused to grant relief, pursuant to s 31(2A)

⁶¹ See, e.g., the comments of the Court of Appeal in the recent case of *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, §273.

of the Senior Courts Act 1981, where it is clear that the error would have made no difference to the outcome. So, for example, in *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179, the Court of Appeal refused to grant relief quashing a planning decision for the building of a school in circumstances where the county council had failed to have due regard to its public sector equality duty in respect of the effect of aircraft noise from a nearby airfield on children with protected characteristics, saying that the defect in the relevant planning decision would have made no difference to the outcome. The Court of Appeal noted at §38:

“It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31(2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic.”

123. ALBA considers that, overall, the 2015 reforms are achieving their intended purpose, i.e., that flaws in the decision-making process do not prevent effective government, while ensuring that judicial review continues to provide an effective means of upholding the rule of law.
124. ALBA does not believe that remedies granted as a result of a successful judicial review are too inflexible. The principles for the grant of relief ensure that there is sufficient flexibility in the grant of relief. For example, to avoid the consequences of quashing a decision, the court can issue a declaration instead, as it did in the Heathrow third runway case (*Plan B Earth*). However, ALBA acknowledges that where a court makes a quashing order, this will have the effect of rendering a decision null and void, as if it had never been made. ALBA recognises that this can create difficulties for public authorities. For example, in the case of *Ahmed v Her Majesty’s Treasury* [2010] UKSC 5, [2010] 2 AC 534, the Supreme Court’s

decision that the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 were *ultra vires* and should be quashed took immediate effect. This led to the Government needing to enact legislation with retrospective effect to deem the Orders to have been validly made, while the defects were being rectified.

125. ALBA does not consider that new or alternative remedies are necessary. We believe that the range of available remedies and the principles by which relief is granted are sufficient to achieve just outcomes. We do not believe that reform is necessary or appropriate in this area of administrative law.

PERMISSION AND RIGHTS OF APPEAL

126. ToR paragraph 4(f) asks whether procedural reforms are necessary on rights of appeal, including on the issue of permission to bring JR proceedings. The Call for Evidence does not raise any questions about permission or rights of appeal. However, Question 10 asks what more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review.

Permission

127. The current position is that permission is required to bring a claim for judicial review: CPR r 54.4. The threshold for the grant of permission is arguability: in essence, the Court will grant permission where it is satisfied there is an arguable ground for judicial review having a reasonable prospect of success and not subject to any discretionary bar (such as delay or alternative remedy): see *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780 (PC), §14(4).
128. Applications for permission are determined, in the first instance, by a judge on the papers. Where permission is refused, the claimant has a right to request reconsideration at an oral hearing: CPR r 54.12(3). Any request for reconsideration must be filed within 7 days after service of the refusal decision: CPR r 54.12(4). Where the claimant is granted permission, the costs will generally be costs in the case. Where permission is refused, the defendant will generally recover its costs of the acknowledgement of service/summary grounds.

However, the successful defendant does not generally recover its costs of attending the oral renewal hearing: see *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2017] PTSR 1166, §76. Once permission has been granted, neither the defendant nor any other person served with the claim form may apply to set aside an order granting permission: CPR r 54.13.

129. Two recent reforms have further streamlined the process. From 1 July 2013, where the court refuses permission and certifies that the claim is totally without merit (interpreted to mean ‘bound to fail’), claimants no longer have the right to request reconsideration of that decision at an oral hearing: CPR r 54.12(7). With effect from 13 April 2015, by virtue of the Criminal Justice and Courts Act 2015 reforms, the court must refuse permission if it appears to be “*highly likely*” that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, unless there are reasons of exceptional public interest for proceeding: see s 31(3C), (3D) and (3E) of the Senior Courts Act 1981.
130. Overall, ALBA considers that the permission procedure works reasonably well in practice. The permission stage protects public bodies against having to spend time and resources dealing with weak or vexatious claims. In the last five years, on average, around 20% of total claims lodged were granted permission, with the majority of cases being filtered out at the permission stage: see Civil Justice Quarterly statistics.
131. ALBA would not support raising the threshold for granting permission. This would risk filtering out meritorious claims, which would undermine the purpose of judicial review. ALBA would not support removing or further modifying the right to request an oral renewal hearing. A small but significant proportion of cases receive permission at the oral renewal stage (around 3-4% of total claims lodged, but around 20% of those receiving permission), so this acts as an important safety net.

Rights of appeal

132. Where permission to apply for judicial review has been refused in a civil case at a hearing in the High Court, a claimant may apply for permission to appeal to the

Court of Appeal: CPR r 52.8(1). Such applications must be made within 7 days of the decision of the High Court refusing permission. There are also specific rules permitting applications to be made to the Court of Appeal from High Court decisions refusing permission to apply for judicial review of decisions of the Upper Tribunal, or refusing permission on the papers and certifying a case as totally without merit, as well as from refusals made by the Upper Tribunal itself: CPR r 52.8(2) and 52.9. Again, such applications must be made within 7 days. The Court of Appeal may grant permission to apply for judicial review, and if so, the claim will proceed in the High Court in the usual way unless the Court of Appeal orders otherwise: CPR r 52.8(5) and (6). There is no further right of appeal to the Supreme Court against a decision of the Court of Appeal refusing permission to apply for judicial review.

133. ALBA considers that the ability to appeal to the Court of Appeal against a refusal of permission is an important and valuable safeguard. There have been a number of significant cases where, permission having been refused by the High Court, the Court of Appeal has gone on to grant permission. A recent high-profile example is the challenge brought by the End Violence Against Women Coalition to the CPS rape prosecution policy and practice. In July 2020, the Court of Appeal granted permission for judicial review of an alleged covert change to CPS rape prosecution policy which led to a collapse in rape prosecutions, in circumstances where the High Court had refused permission.
134. Parties may also appeal a substantive judicial review decision to the Court of Appeal and the Supreme Court in the ordinary way. Such appeals are subject to the same rules for obtaining permission to appeal as any other type of decision. ALBA can see no justification for modifying or removing this appeal right. There is no basis for singling out judicial review appeals for exceptional treatment. To the contrary, given the constitutional significance of judicial review, it is important for the senior appellate courts to adjudicate on judicial review cases where the threshold for appeals is met.
135. We note that, in any event, the total number of judicial review appeals (excluding immigration and asylum appeals, which are in a separate category) filed in the Court of Appeal and the Supreme Court has decreased over the past five years. In

2015, there were 241 judicial review appeals filed in the Court of Appeal; by 2019, there were only 133. In 2015, there were 37 judicial review appeals filed in the Supreme Court; by 2019, there were only 10.⁶² In these circumstances, ALBA can see no justification for further limiting the right of appeal in judicial review cases.

Minimising the need to proceed with judicial review

136. Question 10 of the Call for Evidence is potentially extremely broad in its scope. However, focusing on the narrow question of procedure, ALBA considers that the current requirement for the parties to comply with the Judicial Review Pre-Action Protocol works well in practice, and will often have the effect of either persuading the potential defendant to reconsider its decision or of persuading the potential claimant not to issue a claim for judicial review.

COSTS

137. Call for Evidence Question 7 asks whether the rules regarding costs in judicial reviews are too lenient on unsuccessful parties or applied too leniently in the Court. Question 8 asks whether the costs of judicial review claims are proportionate and if not, how proportionality would best be achieved. Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

Preliminary points

138. In answering Questions 7 and 8, ALBA does not consider the position of publicly funded claimants in detail, save to note that a costs order against a publicly funded claimant should remain enforceable only with the permission of the court.

139. Nor does ALBA consider in detail Section VII of CPR 45 (“**the Aarhus Rules**”), introduced on 1 April 2013. These provisions meet the UK’s obligations under the UNECE Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental

⁶² Civil Justice Quarterly.

Matters (“**the Aarhus Convention**” by providing for a system of costs capping in environmental claims. Not only are the Aarhus Rules necessary to comply with the UK’s international obligations under the Aarhus Convention, but they were also substantially amended with effect from 28 February 2017. The amendments: (a) extended the rules to appeals brought under s 289(1) of the Town and Country Planning Act 1990 and s 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990; (b) require the claimant to be a “*member of the public*” within the meaning of the Aarhus Convention in order to invoke the rules; (c) require the claimant to file a statement of financial means; and (d) empower the court to vary the maximum costs liability of any party to proceedings (the default caps being £5,000 for individual claimants, £10,000 for certain other claimants, and £35,000 for defendants). ALBA’s view is that it would be premature to revisit the Aarhus Rules whilst these reforms are still bedding in. In any event, there is no obvious need for further reform, since the rules appear to work well in practice in the experience of ALBA members (including those who work for claimants, defendants and interested parties in environmental and planning cases).

140. ALBA’s response therefore concentrates on privately funded judicial review claims, other than environmental and planning cases. ALBA’s principal concern is that the review panel is ill-equipped to undertake a review of costs in such claims. The problems attendant upon this review, including the time and expertise deficits, are addressed above. These criticisms apply with particular force in relation to costs, for the following reasons:

- a. First, the costs rules inevitably influence litigants’ decisions as to whether to bring or defend judicial review claims. This is particularly true of the risk of having to meet adverse costs orders, but is also compounded by the likelihood of incurring costs which cannot be recovered from the other side. It is also compounded by the fact that the cost of legal services in this country is undeniably high, at least relative to the means of ordinary citizens.⁶³ Consequently, the costs rules have the potential to profoundly

⁶³ By way of illustration, the present Guideline Hourly Rates vary between £111 (for a Grade D trainee solicitor working in the cheapest areas of the country) and £409 (for a Grade A fee earner working

affect the ability and willingness of litigants to pursue their claims or defences, even if they are apparently meritorious. Any reforms to the rules must therefore be approached with real care, so as not to undermine the ability of both claimants and defendants to vindicate their rights before the courts.

- b. Second, if access to justice in judicial review was undermined by the unintended consequences of costs reforms, this is arguably more serious than in other types of litigation because of the constitutional significance of such litigation. Consequently, it is not just reform of the substantive law of judicial review that enters deep constitutional waters; any foray into matters which *de jure* or *de facto* affect parties' ability to enforce the substantive law, such as the costs rules, also strays into such waters.
- c. Third, because the impact of the costs rules depends to a large extent on how litigants respond to those rules in practice, any reforms should only be adopted on the strength of clear and robust empirical evidence as to: (a) the effect of the current costs rules on litigant behaviour, and (b) the effect the proposed reforms are likely to have in practice. ALBA struggles to see how the review panel is in a position to undertake the kind of empirical research required in the time available to it.

141. Sir Rupert Jackson considered the question of costs in judicial review claims in detail in his reviews of civil litigation costs: first in 2009-10,⁶⁴ and again in 2017.⁶⁵ In the 2009-10 review, he proposed that a form of One-Way Qualified Costs Shifting ('QOCs') be adopted in judicial review claims.⁶⁶ That recommendation was not taken up by the Government, though it was never

in central London), whereas the average household income in the UK in 2019/20 was £30,800, according to the Office for National Statistics: see <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyearending2020provisional>.

⁶⁴ Sir Rupert Jackson, *Review of Civil Litigation Costs: Interim Report* (London: Judicial Office, 2009); Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London: Judicial Office, 2010). Hereafter *Interim Report* and *Final Report*, respectively.

⁶⁵ Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report* (London: Judicial Office, 2017); hereafter *Supplemental Report*.

⁶⁶ *Final Report*, Ch 30.

formally accepted or rejected. In the later 2017 review,⁶⁷ he recommended that the Aarhus Rules be extended to all judicial review cases where the claimant is a privately funded individual (or individual who is a representative of a number of natural persons with a similar interest).⁶⁸ He also recommended that the costs budgeting provisions in Section II of CPR 3 and Practice Direction 3E be extended to certain ‘heavy’ judicial review claims, namely those where the costs of any party were likely to exceed £100,000.⁶⁹ The former proposal was rejected outright by the Government in its consultation paper of 28 March 2019 on the grounds that the present system (discussed further below) is adequate to ensure access to justice in judicial review proceedings.⁷⁰ The latter was provisionally accepted and is presently the subject of an ongoing consultation process by the Ministry of Justice.⁷¹

142. Sir Rupert had the following advantages over the present review panel: he was a distinguished judge who acted independently of government at all times; he had adequate time in which and resources with which to complete his task; he consulted widely, over prolonged periods and in a variety of fora (including by receiving written submissions, holding public conferences, and attending meetings with key stakeholders); and he undertook in-depth empirical research. His reviews were also recent. It would be odd if, against this background of recent activity and despite lacking the advantages which Sir Rupert’s reviews enjoyed, the IRAL Panel saw fit to recommend substantial reforms in the area of costs.
143. Subject to the foregoing, ALBA makes the following observations on the themes identified by the IRAL panel in its Call for Evidence – namely proportionality, and the position of unsuccessful parties and unmeritorious claims. Insofar as the rules on standing are relevant, in that costs-capping orders are available in certain public interest proceedings under ss 88–90 of the Criminal Justice and Courts Act 2015, this has been addressed above in the section on standing.

⁶⁷ On the supposition that QOCs was unlikely to be instituted in judicial review: see *Supplemental Report*, Ch 10, §1.6.

⁶⁸ *Supplemental Report*, Ch 10, §§2.7 and 3.1-3.6.

⁶⁹ *Supplemental Report*, Ch 10, §§2.7 and 4.1-4.6.

⁷⁰ Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals* (London: HMSO, 28 March 2019), Ch 6, §2.4.

⁷¹ See <https://www.gov.uk/government/consultations/extended-recoverable-costs-consultation>.

Proportionality

144. ALBA is unclear what is meant by Question 8, asking whether the costs of judicial review claims “*are proportionate*”. The rules of court currently require the Court to award only those costs that are reasonable and proportionate, at least where costs are ordered on the standard basis: CPR 44.3(2). Where costs are ordered on the indemnity basis, reasonableness is the only consideration: CPR 44.3(3). Thus, costs awarded on the standard basis must be taken to be “proportionate”, as that term is presently understood, because such costs orders are already conditioned by the requirement of proportionality.
145. That said, ALBA does observe that the concept of ‘proportionality’ is not always easy to apply in cases involving issues of public law generally, and in judicial review proceedings in particular. In commercial or personal injury litigation where a sum of money is sought, or even in chancery proceedings where non-monetary relief is sought but a financial value can be placed on the right or property at issue, the proportionality assessment is relatively straightforward. By contrast, judicial review claims rarely involve a sum of money but rather involve a challenge to a decision or policy. If it is subsequently shown that a public authority has erred in its decision making, the remedy typically involves the quashing of a decision itself rather than the award of a sum of damages. Judicial review claims are also frequently complex. Consequently, in public law cases the assessment of ‘proportionality’ needs to take account of factors which are more abstract than just the amount of damages in issue – such as the complexity of the case, the importance of the public authority’s decision, the number or class of people who are affected by it, and the significance of the decision for the individual (for instance, a homeless person’s access to accommodation).⁷² But although these factors are not always straightforward to apply, they are well understood by practitioners and the Courts, who have amassed a good deal of experience in operating the ‘proportionality’ test in judicial review claims and beyond in the years since the CPR came into force.
146. On the other hand, if what is meant by Question 8 is whether the costs actually incurred by parties in judicial review claims are simply too *high*, then ALBA does

⁷² See CPR 44.3(5).

not consider there to be a significant problem at present. As noted above, the cost of legal services in this country is undeniably high, at least when assessed by reference to the means of ordinary individuals. However, if this is a problem, it is not one that rules of court can be expected to resolve, nor is it a problem isolated to judicial review. Indeed, costs in judicial review claims tend to be *lower* on average than in other types of proceeding (for instance, because the pleadings are less elaborate than in ordinary CPR 7 claims, and because of the absence of standard disclosure in judicial review). ALBA's view is that judicial review claims are not on the whole prohibitively expensive, especially when compared with other types of proceeding, except perhaps for individual claimants of limited means who cannot access public funding. So far as 'heavy' judicial reviews are concerned, where any party's costs are likely to exceed £100,000: (a) these are few and far between (fewer than 24 per year, according to the Government);⁷³ and (b) as noted above, the Government is already consulting on proposals to introduce costs budgeting in such cases in order to keep the overall costs in check.

147. For these reasons, ALBA does not consider that any steps are required at present to make the costs of judicial review claims proportionate.

Unsuccessful parties and unmeritorious claims

148. ALBA does not agree that the costs rules as presently framed are too lenient on unsuccessful parties, or are applied too leniently by the courts. As present, in common with most other kinds of civil litigation, unsuccessful parties on both sides of the Court in judicial review claims can expect to pay their opponent's reasonable and proportionate costs.⁷⁴ It is not the experience of members of the Working Group, including those who act frequently or mainly for defendants, that the courts refuse to apply this rule or do so in a way that waters it down. In the vast majority of cases where permission is refused on paper, the court will order that the claimant pay the defendant's costs of the Acknowledgement of Service, and in the vast majority of cases where the defendant succeeds at trial, they will receive a costs order in their favour against the claimant.

⁷³ Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals* (London: HMSO, 28 March 2019), Ch 6, §3.5.

⁷⁴ Or their reasonable costs, if an indemnity costs order is made.

149. The rule that unsuccessful parties pay their opponent's costs is subject only to limited exceptions specific to judicial review, unless a costs-capping order is imposed; these aspects are discussed further below. It should also be noted that any concerns as to whether a judicial review claimant can pay a defendant's costs should the claim fail can be met by way of an application for security for costs under CPR 25, on the same basis as in other civil cases. It is therefore not clear to ALBA on what basis unsuccessful parties in judicial review claims (as opposed to other species of civil litigation, where the same principles apply) have been singled out, or what evidence there is to support the suggestion that the Courts for some reason apply the relevant principles more "leniently" in judicial review than in other types of case.
150. The principal exceptions to the normal costs rules in judicial review claims are as follows:
- a. Where a judicial review claimant is unsuccessful at the permission stage, the claimant will generally be liable to pay the defendant's costs excluding the costs of attending any oral permission hearing: *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2017] PTSR 1166. The rationale underpinning this principle is that defendants are not generally obliged to attend such hearings, it being for the claimant to satisfy the Court that its claim meets the threshold for granting permission. Accordingly, this exception will not apply where the defendant's attendance was required by the Court. Moreover, the rule is not inflexible. Where there are other countervailing factors, the defendant's attendance costs may properly be ordered: for example, where the claim was hopeless, or the defendant's attendance was of real assistance to the Court, or where the claimant raises new matters after the acknowledgement of service which need to be addressed at the oral permission hearing.⁷⁵ ALBA's view is that this approach strikes an appropriate balance between the interests of claimants and defendants in relation to the costs of oral permission hearings. It is to be noted that the same approach applies to hearings of applications for permission to appeal: see Practice Direction 52B §8.1.

⁷⁵ See *R (Smoke Club Ltd) v Network Rail Infrastructure Ltd* [2013] EWHC 3830 (Admin).

- b. The Courts will not generally order an unsuccessful claimant to pay two sets of costs, i.e., the defendant's costs and the costs of any interested party: *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176. This rule is intended to discourage interested parties from needlessly duplicating work and costs. But where the interested party deals with a separate issue not dealt with by the defendant, or where the defendant and the interested party have separate and distinct interests which require separate representation, the interested party's costs may properly be awarded. Again, ALBA considers that this approach appropriately controls costs in judicial review claims, and strikes an equitable balance between claimants and interested parties.
- c. The Court will not generally order an inferior court or tribunal to pay costs to a successful claimant where the court or tribunal does not appear (except where there has been a flagrant instance of improper behaviour or it unreasonably declines or neglects to sign a consent order). Nor will the courts generally order a court or tribunal to pay costs where it appears only to assist the court neutrally on questions of jurisdiction, procedure, and the like. Where a court or tribunal makes itself an active party to the litigation and actively resists the claim, however, it may be liable to pay costs in the normal way: *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739. This rule is justified on the basis of the special position of courts and tribunals who are defendants to judicial review claims.

151. Consequently, ALBA sees no basis for the suggestion that unsuccessful parties are subject to lenient costs rules, or are treated too leniently in practice by the courts. They are subject to the same rules and principles as unsuccessful parties in other types of civil litigation. Insofar as there are modifications to these principles in judicial review claims, these are limited in scope, are justified as a matter of principle, and work well in practice.

Judicial Review Costs-Capping Orders

152. ALBA considers the present system of Judicial Review Costs-Capping Orders (“JRCCOs”) under ss 88-90 of the Criminal Justice and Courts Act 2015

separately from the normal costs rules. Although JRCCOs have the effect, if granted, of capping an unsuccessful party's liability in costs, it cannot sensibly be said that they result in leniency towards unsuccessful parties. As explained above, they are available only in strictly limited circumstances, and their use is subject to a number of safeguards. Indeed, the experience of ALBA members is that for these reasons, the JRCCO regime is infrequently used in practice. Moreover, where it is used, the proceedings will by definition be "*public interest proceedings*" and are thus important for the court to hear in order to uphold the rule of law.

153. It should be noted that ss 88-90 of the Criminal Justice and Courts Act 2015 were introduced following the Government's September 2013 consultation on proposals for further reform of judicial review.⁷⁶ The stated aim of placing protective costs orders on a statutory footing for judicial review claims was "to ensure they are only used in exceptional cases properly in the public interest". In ALBA's view, and in our experience, this objective has been achieved by the 2015 reforms, and any further changes to the costs-capping regime would be undesirable and premature.

INTERVENERS

154. ToR paragraph 4(g) asks whether procedural reforms to judicial review are necessary in relation to costs and interveners. ALBA has assumed that costs and interveners are intended to be approached as separate, rather than connected, topics. This section of ALBA's response addresses interveners.
155. Intervenors have a distinct role within judicial review proceedings, separate to that of the parties. Intervenors can be of great assistance to the Court and can bring before the court evidence and perspectives which may not be available or apparent to the parties. The benefits of intervention were well summarised by Mr

⁷⁶ Cm 8703, Judicial Review: Proposals for further reform https://consult.justice.gov.uk/digital-communications/judicial-review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf.

Justice Ouseley in R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change [2010] EWHC 1554, §8:

“It has been the practice of this court for a number of years, well established and beneficial, to allow interventions by groups or bodies, or individuals who have particular knowledge and expertise in the area, whether in terms of the effect which the action at issue may have upon them and their interests, or by virtue of the work which they carry out or through close study of the law, practice and problems in an area, or because of the campaigning experience and knowledge which their activities have brought.”

156. For example, in R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2020] EWCA Civ 542, [2020] HLR 30, a case considering a scheme under the Immigration Act 2014 imposing obligations on landlords to take measures to ensure that they did not provide private accommodation to tenants who were disqualified as a result of their immigration status, the Court allowed both the National Residential Landlords Association and the Equality and Human Rights Commission to intervene. Clearly, such organisations can and do assist the Court in a different way from the parties.
157. The current procedural regime on when an intervener may take part in proceedings already acts to prevent unnecessary intervention. Under CPR r 54.17, an intervener requires the permission of the Court to file evidence or make representations, and any application must be made promptly. Further, the Court will not grant permission to intervene simply on the basis of an interest in the proceedings, and the Court will not grant permission if the intervention would be unlikely to have a significant impact on the case (see R (British American Tobacco UK Ltd) v Secretary of State for Health [2014] EWHC 3515 (Admin)). As such, intervention is controlled by the Courts on a case by case basis and is reserved for those cases where the intervention will have a beneficial impact on proceedings.
158. We would also note that in the rare cases where interveners are permitted to make representations in judicial review proceedings, they are doing so in the knowledge that no other party can be ordered to pay their costs unless there are

exceptional circumstances (*per* s 87(3) and (4) of the Criminal Justice and Courts Act 2015). Further, in the event that the intervener has, in intervening, acted as a principal party, has not been of significant assistance to the Court, has submitted evidence the significant part of which relates to matters the Court does not need to consider, or has acted unreasonably, then the Court must order the intervener to pay the costs of an applying party relating to the intervention (*per* s 87(5) of the 2015 Act).

159. As such, where an intervener decides to and is granted permission to intervene, they will almost inevitably have to meet their own costs and they run the risk of paying the costs of other parties associated with the intervention. We would suggest that a costs regime which is weighted so heavily against interveners will already do much to reduce intervention to only those cases where the intervener has significant resources and where the intervener is satisfied that their intervention is absolutely necessary and can add a necessary perspective for the Court.
160. Considering the above, we do not consider that any changes to the procedural and costs regime relating to interveners is necessary. There is no evidential basis to suggest that interveners cause a particular issue for the Court or significantly add to the burden on the parties to advance or defend the claim.

ALTERNATIVE DISPUTE RESOLUTION & SETTLEMENT

161. Question 10 of the Call for Evidence asks about the experience of settlement prior to trial, and particularly at the door of the court. Question 12 of the Call for Evidence asks whether there should be more of a role for Alternative Dispute Resolution (“**ADR**”) in judicial review proceedings, and if so, what type of ADR would be best to use.
162. In the experience of ALBA practitioners, many judicial review claims are settled prior to a hearing. Settlement typically takes place at the pre-action stage or at the stage at which a claim is issued. It is rare, in our experience, for claims to be settled at the door of the court. This is often because judicial review claims will

turn on a question of legal interpretation or a dispute about whether a public body has the power to take a certain step, where there is less scope for settlement or ADR in the same way as commercial or other disputes.

163. In general, ADR is not presently excluded or discouraged. It is available for use in any appropriate case. It is plain from the jurisprudence that the Court expects individuals to use judicial review as a remedy of last resort, and the Court of Appeal has recently emphasised this in *R (Archer) v HMRC* [2019] EWCA Civ 1021, [2020] 1 All ER 716, reiterating judicial guidance in *R (ex p. Cowl) v Plymouth City Council* [2001] EWCA Civ 1955, [2002] 1 WLR 803, in which the court held that alternative means should have been pursued prior to commencement of judicial review proceedings and penalising the claimant in costs accordingly. This appears to suggest that the senior Courts are fully focussed on the issue.
164. The Pre-Action Protocol for Judicial Review (“**PAP**”) emphasises the point, providing at §9 that: *“The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution (ADR) or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered.”* This may be enforced either in costs or by refusal of judicial review on the basis that alternative remedies could and should have been pursued. Under the PAP, any claimant must address the issue of whether ADR is appropriate in the Letter before Claim, and any respondent will reply to this and may propose ADR.
165. ALBA notes the recent examination of ADR and Civil Justice by the Civil Justice Council (CJC) Working Group, which published its Final Report in November 2018.⁷⁷ This considered ADR and civil justice very widely, but made no recommendation directly addressing judicial review. The CJC set out as its recommendation 20, under the heading “*Court/Government encouragement of ADR*” that: *“The terms of claim documents, Court forms, pre-action protocols and guidance documents already contain significant prompts towards ADR but*

⁷⁷ <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>

should be reviewed to ensure that: (a) there is effectively a presumption that ADR will be attempted in any case which is not otherwise settled; (b) that litigants are fully aware of or have been fully informed about the alternatives to litigation.” Other recommendations relate to cost penalties for failure to use/consider alternative remedies, which (as the decision in *Archer* demonstrates) has already attracted abundant recent judicial emphasis. ALBA would note that significant limitations on ADR in civil proceedings were seen to arise from absence of sufficient funding or organisation by Government. ALBA also notes that the CJC did not suggest that codification was desirable to or necessary for a proper use of ADR. Without detailed proposals this cannot be examined further with utility, but it seems possible that codification might create significant unintended consequences where the public interest is better served by the flexibility the common law provides.

166. A further issue relating to judicial review and ADR relates to the extent of access to proceedings where many parties, or indeed the general public interest, may be engaged. A claim for judicial review will frequently concern or affect people or entities beyond the parties to the claim. Those external interests may be very diverse. It would be inappropriate for a claimant to have a privileged position over and above others affected by a decision or policy under challenge simply by virtue of having initiated a claim which was resolved by ADR. Conversely, it would be unrealistic to expect everyone affected by a case, which may be a class as broad as the population at large, to play a part in ADR.
167. This basis for concern would be exacerbated still further if the ADR process were to be conducted behind closed doors. This would be a procedure likely to undermine rather than enhance public confidence in good administration and the rule of law. Such an approach would potentially raise substantial concerns including equity and equality (where those with the resources or know-how to begin a claim can advocate privately for an outcome that favours their particular interests), transparency and natural justice. While equity and equality may also be concerns in relation to judicial review and indeed access to justice generally, they are greatly mitigated in this context by the procedure taking place in public and being determined by a judge.

168. It must also be borne in mind that in some cases a defendant public body may either be *ex functus officio* in the strict sense (where the decision is an adjudication on rights), and so unable to revisit a decision under challenge by means of ADR. Even if not strictly *functus* the interests of good administration and legal certainty may point away from too ready a willingness to consider reversing or amending a previously published decision, at least where the claimant has not demonstrated sufficiently strong reasons to believe that that decision was unlawful. ADR would be unsuitable for such cases. Where a public body considers that it is likely to have acted unlawfully in a case where it cannot revisit its decision, the proper approach is to consent to an order quashing its decision and remitting it for redetermination, thus securing the potential involvement of interested parties and judicial oversight before the decision is nullified.
169. In general, ALBA is of the view that the present system is sufficiently flexible to support and encourage recourse to ADR in any judicial review case in which it is suitable. ALBA does not consider that ADR is underutilised in judicial review at present. Any argument that ADR should play more of a role in judicial review that it currently does should be approached with caution.

ALBA

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