

## THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW: CALL FOR EVIDENCE

### RESPONSE OF ALEX POTTS QC

1. I am a barrister, fully admitted to practice at the Bars of England and Wales (2000, Queen's Counsel 2018), Bermuda (2007), and the Cayman Islands (2005).
2. A significant part of my litigation practice in Bermuda and the Cayman Islands involves public and administrative law, including judicial review, constitutional claims, and statutory appeals before the Courts and other statutory tribunals in those two jurisdictions.
3. In that context, I have represented both claimants and appellants (individual, charitable, and corporate), as well as defendants and respondents (both governmental departments, and independent public authorities and regulators).
4. Bermuda and the Cayman Islands are self-governing British Overseas Territories.
5. These jurisdictions share many similarities amongst themselves (and with English law), but they each have their own unique (and sometimes substantial) differences and local characteristics (given applicable UK legislation, local Constitutions, local legislation, local case law, and local political, judicial, fiscal, and socio-economic considerations).
6. Each of these jurisdictions has its own local Court system (at both first instance and at intermediate appellate level), but each of these jurisdictions also has final rights of appeal to the Judicial Committee of the Privy Council, sitting in London.
7. In the context of judicial review and public law claims, English law (including English practice and English procedure) is often treated as persuasive in jurisdictions such as Bermuda and the Cayman Islands.
8. Each of the British Overseas Territories of Bermuda and the Cayman Islands has a Governor, appointed by the UK's Foreign and Commonwealth Office, who has legal responsibility for certain reserved matters which have not been assigned to the local parliaments or governments of Bermuda and the Cayman Islands, under their respective constitutions.
9. The Governor's activities are, in certain respects, amenable to judicial review or constitutional review by the Courts, and there have been a number of cases in which the public law actions of local Governors (acting on the advice on, or with the authority of, the Foreign and Commonwealth Office) have been the subject of judicial review, or constitutional review, in the local Courts of Bermuda and the Cayman Islands<sup>1</sup>.

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<sup>1</sup> There is also some scope for argument as to whether the public law actions of local Governors, when reflecting acts of the UK Government, may be susceptible to judicial review in the English Courts. See the discussion in *Quark Fishing Ltd, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 (13 October 2005), *Bancoult, R (On The Application of) v Secretary of State For Foreign and Commonwealth Affairs* [2008] UKHL 61 (22 October 2008),

10. I note that, by the IRAL Panel's Terms of Reference and Call for Evidence:

*“the IRAL are considering **public law control of all UK Wide and England and Wales powers only**. The panel are therefore interested in receiving evidence in relation to judicial review in its application to reserved, and not devolved, matters ...*

- ***The Panel of experts will not consider any changes to devolved policy. Instead, the Panel will look at judicial review in relation to UK-wide policy, and England and Wales policy.** Any wider implications for the devolved administrations will be carefully thought through and we will continue to engage at all stages of the process, as appropriate. ...*
- ***In addition to recommending changes to UK-wide powers, the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies.** Any such recommendation would follow careful consideration of any relevant devolved law and devolution matters arising, and also engagement with the Devolved Governments and courts...*

*Note A: **Scope of the Review:** (1) The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers.*

*(2) The review will consider whether there might be possible unintended consequences from any changes suggested.*

*Note B: **Experience in other common law jurisdictions outside the UK.** The position in other common law jurisdictions, especially Australia (given the legislative changes made there), will be considered.”*

11. I note that the references to “all UK wide” and “England and Wales” and “devolved” policy and matters are not defined terms: but that they do not, by their context, appear to take into account the positions, or the legal systems, of the British Overseas Territories.
12. While the British Overseas Territories might be said to be “other common law jurisdictions outside the UK”, that is not a correct characterisation of their legal status, given their constitutional and legal relationship with the United Kingdom.

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*Barclay & Ors, R (on the application of) v Secretary of State for Justice & Ors (Rev 1) [2009] UKSC 9 (01 December 2009), and Barclay & Anor, R (on the application of) v Secretary of State for Justice & Ors [2014] UKSC 54 (22 October 2014).*

13. I do not propose, for present purposes, to set out in any detail the pros and cons of the current system for judicial review in Bermuda and the Cayman Islands, or potential improvements that might be made in the public interest, in each jurisdiction.
14. I would simply submit, however, that it is regrettable that the IRAL Panel's Terms of Reference and Call for Evidence appear to overlook the positions of the British Overseas Territories (notwithstanding the direct and indirect consequences for each of those jurisdictions in the event that English law is materially changed in the area of judicial review, whether substantively or procedurally).
15. I would, therefore, invite the IRAL Panel to conduct appropriate investigations and consultations into the position of the British Overseas Territories, before making any final recommendations to the UK Government with respect to potential reforms.

ALEX POTTS OC

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