Annex 1: Excerpt from the Bar Council's response to the *Judicial Review: proposals for further reform* consultation paper, October 2013

Questions 9 to 11: "Standing"

9. These questions relate to the important issue of the basis on which claimants are to be judged to have "sufficient interest" or "standing" to bring a claim for judicial review challenging an alleged breach of the law by a public body. The Consultation Paper rightly observes, in paragraph 74, that the courts have taken a more expansive approach over recent years. However, the Bar Council regards this development as one of the cornerstones of a modern system of administrative law, and an important constitutional guarantee that there are not areas of activity by the executive which are beyond the reach of judicial control because no one is in a position to challenge alleged illegality. Lord Diplock is widely regarded as one of the most influential judges in the development of this modern system; two landmark judgments of his in the GCHQ case and in *ex parte IRC* are careful expositions of the fundamental principles involved. In *ex parte IRC* [1984] AC 617 he said (at p644):-

> "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of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

10. The Bar Council regards this as a fundamental statement of constitutional principle. For the reasons set out below, it considers that a change in the "standing test" to any of the alternative formulations set out in the Consultation Paper would either create "fundamental lacunae" or achieve nothing. Put shortly, it is unacceptable to create a class of executive action which cannot be challenged because no claimant meets the new test for standing to bring a judicial review.

11. The point can be illustrated by one of the leading cases on standing, *ex parte World Development Movement* [1995] 1 WLR 386, cited in paragraph 76 of the Paper. The subject matter of the challenge was a grant of overseas aid to the Government of Malaysia. To state the obvious, the grant was payable out of UK taxation. But if the WDM had not been held to have had standing to bring a challenge there would have been no alternative claimant. It is apparent that the Court regarded the absence of any other responsible challenger as an important factor in deciding that WDM did have a sufficient interest, as it had done in the earlier case of *ex parte CPAG* [1990] 2 QB 540, in a social security context to which this response returns shortly below.

12. The modern approach to standing has enabled challenges to be brought in a large number of contexts, from a wide variety of different social and political perspectives. The challenge brought by Lord Rees-Mogg, referred to in paragraph 68 of the Paper, was to the entry into the Maastricht Treaty. As is well known, Mrs Gillick instigated important proceedings intended to clarify the ability of a health authority to give contraceptive advice to girls under 16. In Mrs Gillick's case Lord Scarman commented:

> "Mrs Gillick, even though she may lose the appeal, has performed a notable public service in directing judicial attention to [these] problems... of immense consequence to our society".

Mr Blackburn had standing to challenge the approach of the GLC to obscene publication, there are many other examples.

13. In social security, the willingness of the courts to award standing to an NGO has had a real utility. There is a class of case which can be described as "the disappearing claimant". A government department adopts an approach to the time taken to decide a claim which is arguably unlawful. Whenever an individual claimant complains, his claim is settled, but the underlying practice is unchanged. The legality of the practice itself never reaches the court. This was the concern that lay behind the CPAG case referred to above, in which CPAG was able to challenge the underlying practice. There are other contexts in which similar issues arise – delay in issuing status papers to refugees, for example.

14. It is possible to deal with some "disappearing claimant" issues if the court is willing to continue to hear a challenge brought by an individual even though that challenge has become academic on the facts of the case. But it is difficult to see why this approach should be regarded as any more acceptable than the recognition of standing by an NGO. It leaves the individual claimant with the burden of litigating an issue in which s/he has no continuing interest. And if some solution is not found, one is back at the basic issue – the existence of a class of executive decision which is beyond the reach of the courts and the rule of law.

15. Lord Diplock's remarks in *ex parte IRC*, set out above, refer to relator actions brought by the Attorney General. It seems unlikely that the Attorney would welcome a situation in which his relator was the only solution to this kind of problem or that in practical terms the widespread use of relators is likely to actually come about.

16. The last sentence of paragraph 80 of the Paper indicates that the changes it proposes *"should require a more direct and tangible interest in the matter to which the application for judicial review relates. That would exclude persons who had only a political or theoretical interest, such as campaigning groups.*" This objective, if attained, would reverse the approach taken by Lord Diplock in *ex parte IRC.* It would create his "grave lacuna".

17. The Bar Council does not believe that any of the alternatives canvassed in the Paper overcome this fundamental objection. The Paper itself dismisses a general test of standing such as that required by the ECJ in relation to challenges to EU measures – see the last sentence of paragraph 84.

18. The next alternative canvassed by the Paper is the "victim" test. The adoption of this test was highly controversial at the time of its use in the HRA, for precisely the reasons set out above. There would be no "victim" in the WDM case. CPAG would not be a victim in the disappearing claimant class of case.

19. The Paper (paragraph 81) recognises that NGOs could not be refused standing in environmental cases because of Aarhus and EU law obligations. But a dichotomy between "environmental" and other public law cases would produce an incoherent position; and would be likely to produce fraught and wasteful disputes as to the boundary between the two classes.

20. The final test proposed by the Paper is the adoption of some formulation such as "person aggrieved". If this is intended to exclude claimants such as the WDM, it is open to the basic objection set out above.

21. It is also inherently uncertain. It would be open to judicial interpretation if applied in contexts remote from that in which it is presently used, which classically involve a decision making process including a right to make representations and a subsequent inquiry. It seems likely that the Courts would give it a wide meaning very similar to that presently accorded to "sufficient interest" precisely to avoid the "grave lacuna". It is easier (in general rule of law terms) to justify a slightly narrower approach to standing where there has been a systematic collection of representations, followed by inquiry and ministerial decision, than it is where there would be no "person aggrieved" at all. In the first case, a large number of people who have made representations or attended the inquiry can claim to be a "person aggrieved" by the decision – on the existing case-law. If the term is translated into the WDM context, then either it can be given a wide enough meaning to encompass WDM; or the "grave lacuna" returns.

22. The Bar Council would accordingly answer Questions 9-11 as follows:-

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

23. No. The Bar Council is not aware of an existing problem – which should be addressed - with judicial reviews being brought by claimants with little or no interest in the matter.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

24. No

Question 11: Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?

25. No. The Bar Council does not consider that there is a current problem with

interventions being used as a "campaigning tool". It is very difficult to think of any interventions which have not been regarded as helpful by the Court, even if they have not been accepted. The Bar Council is not aware of any adverse judicial comment on difficulties caused by interventions. On the other hand, it is aware of many cases where the Court has expressed gratitude for the intervention. It is to be noted that the Paper does not give any actual examples of interventions being used as an illegitimate "campaigning tool". Please also see our comments below on questions 31-35.