

National Bargee Travellers Association

Response to CRT's 'Future of Boat Licensing Review – Terms of Reference'

January 2025

Executive summary

The Canal & River Trust (CRT) announced that a Commission would review the future of boat licensing on 16th December 2024, and published the Commission's membership and Terms of Reference (ToR).¹ This document presents the response of the National Bargee Travellers Association (NBTA) to the ToR. The NBTA is a member-led organisation representing itinerant boat dwellers, founded in 2009.

This document identifies the following key inconsistencies in the ToR:

1. The ToR fail to articulate the need for the Review from the perspective of CRT's charitable objects and beneficiaries.
2. There are significant inconsistencies in the ToR's explanation of the context of and need for the Review.
3. There is a lack of transparency and assurance of the Review's independence and impartiality.

1. Charitable objects

1.1 As a charity, the primary object of CRT is to "preserve, protect, operate and manage Inland Waterways for public benefit" for 1. navigation, defined as including boats used for habitation; 2. walking on the towpath; and 3. recreation.² The challenges highlighted in the Review's ToR ("operational, financial and reputational") are challenges faced by CRT, not by its beneficiaries. It is not sufficient to argue that any challenge faced by CRT is straightforwardly passed onto beneficiaries, as this does not take place in a direct or even manner. The ToR do not sufficiently explain the need for the Review from the perspective of CRT's charitable objects or beneficiaries (which include live-aboard itinerant boaters).

1.2 Further, the ToR do not sufficiently, if at all, reflect the public benefits of the current licence policies. Itinerant boaters who comply with the British Waterways Act 1995 pose no operational impediments, are a source of revenue for CRT, and actively contribute to the canal ecosystem in numerous ways, including:

- Environmental Stewardship: Collecting litter and removing debris from the waterways, protecting wildlife and reporting injured animals to the relevant authorities.
- Providing Passive Security: Occupied moored boats make the towpath a more welcoming and safer space for all users.

¹ Available at: https://cms-admin.canalrivertrust.org.uk/media/document/aR16jOcplroBLCfMeEK3Yg/q0hNS_IGTCcZrdyOIk-DGPImCLa55YeYm2e4E5cPYvg/aHR0cHM6Ly9jcnRwcm9kY21zdWtzMDEuYmxvYi5jb3JlLndpbmRvd3MubmV0L2RvY3VtZW50Lw/0193d048-747c-7d32-a999-6c67f81b60d3.pdf [accessed 10.1.24]

² Canal and River Trust, *Governance Handbook: March 2024*, p.8. Available at: https://canalrivertrust.org.uk/media/document/1gHHtJZE_nCqeV7fFhSCsA/KtZTHPSSaR8wLmSQU_hPieALD8BtLWhl-A_QPpVFjLw/aHR0cHM6Ly9jcnRwcm9kY21zdWtzMDEuYmxvYi5jb3JlLndpbmRvd3MubmV0L2RvY3VtZW50Lw/0189ac9e-2beb-7fb6-a6af-e3d8c0009ff6.pdf [accessed 10.1.24]

- Attracting Visitors: Enhancing the recreational appeal of the canals and boosting local tourism, as emphasised in the Trust's depiction of live-aboard boating in its marketing materials.
- Maintaining Water Quality: Preventing stagnation through continuous movement.

2. Context of the Review

2.1 Legislation

2.1.1 The ToR note that "the Trust's boat licensing legal framework is [...] considered to be in need of review and reform." This pre-emptively anticipates an outcome that points towards legislative change, in spite of the supposedly open-ended nature of the Review.

2.1.2 The ToR point out that the Human Rights Act 1998 and the Equality Act 2010 have "significant implications for the Trust's boat licensing and enforcement approach." By referring to these two pieces of legislation in the ToR, CRT is acknowledging the legal constraints these laws impose on its enforcement actions, particularly when dealing with vulnerable individuals or those with protected rights.³ The ToR imply that the outcome of the Review will point towards additional legislation that permits CRT to circumvent its duties under the Equality Act and the Human Rights Act.

2.1.3 The ToR state that judicial pronouncements have urged CRT to pursue reform and consolidation. However, while one judge did indeed suggest to British Waterways that consolidating legislation might "clarify and set out in more accessible form the extent of BWB's powers and the circumstances in which they may be exercised," the judge also acknowledged the significant resource implications, stating that such an undertaking would be "time-consuming and expensive" and "may be difficult to justify in terms of cost."⁴ Considering the reported financial constraints faced by CRT and the ongoing maintenance challenges within the waterway network, it is questionable whether diverting resources towards a potentially costly and complex legislative reform project is a prudent allocation of funds.

2.1.4 The existing legislation (notably s 17(3)(c)(ii) of the British Waterways Act 1995) is clear and applicable. It was intended to protect a variety of patterns of boat use, and provides for a transparent and enforceable 14 day limit on mooring.

2.2 Changes in usage of the waterways

2.2.1 CRT's assertion that the use of the canal network has undergone a considerable transformation within the past three decades lacks empirical support. This claim is undermined by the following critical factors:

³ Article 8 of the Human Rights Act protects the right to a private and family life, including the right to respect for one's home. Public authorities must demonstrate that any actions interfering with a person's home are lawful, necessary, and proportionate. CRT asserts that under Section 8(2) of the British Waterways Act 1983 and Section 13(3)(a) of the British Waterways Act 1971, it has the authority to seize and destroy boats, even when they serve as homes. However, this authority has been challenged under the Human Rights Act (see *Jones v CRT 2017*). The Equality Act 2010 requires CRT to avoid unlawful discrimination against individuals based on their protected characteristics and to make reasonable adjustments to accommodate individuals who have the protected characteristic of disability. Historically, CRT's Equality Policy Statement included examples of reasonable adjustments, such as reduced cruising ranges, extended mooring times, and accommodations for pregnancy or school-aged children. However, between 2017 and 2023, CRT revised the policy, removing specific references to these adjustments, which reduces transparency in how the Equality Act is applied in practice.

⁴ *Moore v British Waterways*, 2012, EWHC 182(Ch) paragraph 236.

- The absence of historical boater census data prior to 2022 precludes meaningful comparative analysis of usage trends.
- CRT's acknowledged inability to differentiate between live-aboard vessels, holiday boats, weekend cruisers, and those with home moorings renders any assessment of usage patterns highly imprecise.⁵
- The lack of data on the average annual cruising distances of these distinct boating categories and reliance on sighting data (which has been proven repeatedly to be unreliable) to determine the intensity of canal navigation.

2.2.2 As the ToR note, there has been a significant increase in licensed boats without a home mooring over the past 30 years. However, this increase in licences does not necessarily equate to a considerable change in the actual usage patterns of the canal network.

The profile and diversity of boaters who live aboard, licensed without a home mooring and using their boats bona fide for navigation has remained largely unchanged since the legislation was passed in 1995. There are of course still boaters who travel the network continuously, trading or working from home in a more modern sense. However, the majority have commitments locally, and, like live-aboards in the 1990s, do not navigate continually around the whole network.⁶

The only change is that in the 1980s and 1990s, there were substantially more boaters who travelled a range of less than 20 miles in a year. Due to changes in CRT's enforcement policy, many more boaters now travel upwards of 20 miles in a year.

2.3 Unlicensed and non-compliant boats

2.3.1 The ToR state that "a significant and growing number of those boats licensed as a continuous cruiser cannot reasonably be said to be genuinely navigating throughout their licence period and, instead, remain in one relatively small part of the network for most if not all of the time, to live and work in that area without obtaining a home mooring."

The assertion that remaining within a relatively confined area of the canal network to maintain proximity to employment, family, or educational institutions constitutes a failure to 'genuinely navigate' is unfounded. This contention has been explicitly rejected by two separate County Court judgments.⁷ Relevant legislation stipulates that a boat must be used "bona fide for navigation throughout the period for which the consent is valid," with a restriction against continuous stationary periods exceeding 14 days, or a longer period deemed reasonable under the circumstances. Notably, the legislation does not prohibit navigation within a specific geographical area of the network.⁸

⁵ This has been made apparent by Freedom of Information Act (FOI) requests: FOI 125.22 and FOI 81.24.

⁶ In the Minutes of the House of Commons Select Committees on the British Waterways Bill 1995, discussion took place regarding a boater without a home mooring who frequented an area to care for his elderly mother (House of Commons Select Committee minutes on British Waterways Bill, day 12, 1st Nov 1993, page.29). There is an example of a self described "bona fide traveller" with children in education and themselves in employment in a fixed location (House of Commons Select Committee minutes on British Waterways Bill, day 6, 1st July 1993, page 23); and further evidence that for the majority of boat dwellers who 'continually cruised' 30 years ago, the need to maintain access to a place of employment was as relevant as it is today (House of Commons Select Committee minutes on British Waterways Bill, day 12, 1st November 1993, page 43).

⁷ *British Waterways v Davies 2011* - unreported, Bristol County Court and *Canal & River Trust v Mayers 2013* - unreported, Chester County Court.

Therefore, CRT's contention that boaters residing within a particular area of the network are not fulfilling their navigational obligations and should be compelled to acquire a 'home mooring' lacks legal or historical precedent.

2.3.2 The ToR state that an increase in the number of boats licensed without a home mooring has caused an increase in "high levels of non-compliance". No definition of "non-compliance" is put forward in this document, and no evidence is provided to support such a correlation.

2.3.3 The ToR state "These vessels [have] created challenges for the Trust both from an operational, financial and reputational perspective." However, this claim is unsubstantiated, since:

- Itinerant boaters not only pay the standard boat licence fee, but also a significant surcharge specifically levied on those without a home mooring. This surcharge was initially introduced on the premise of addressing CRT's financial needs. A substantial sum was allocated for an external consultation to inform this policy decision.
- The persistence of itinerant boaters despite CRT's efforts to discourage this way of life (such as through water safety zones and chargeable moorings) might suggest that, in fact, itinerant boaters represent a consistent and reliable source of revenue.
- The apparent contradiction whereby itinerant boaters are celebrated as icons of canal life in CRT's marketing materials, and simultaneously targeted as a problem to be addressed through restrictive legislation, raises serious concerns about potential discriminatory practices.

2.4 The future of the waterways

It is impossible to accurately forecast the future usage patterns of the canal network. Altering existing legislation designed to safeguard the rights and protections for boaters to reside on their vessels as they deem appropriate (within the confines of the law), based on speculative projections of future usage, constitutes a significant threat to the itinerant boating community.

3. Approach and Governance

3.1 Nature of the review

It is unclear whether CRT is conducting a public consultation or an internal review. If this is a public consultation, this should be made clear from the outset, and the proper measures put in place to ensure that it is a valid public consultation compliant with the binding Sedley (Gunning) Criteria. If it is an internal review, this should also be made clear, to ensure it cannot be misused as verified evidence or background during any future attempts to change legislation. There has been no consultation with stakeholders on the need for a review; on whether a commission rather than a public consultation would be appropriate; nor on what the appropriate terms of reference of a review might be.

3.2 Independence and neutrality

3.2.1 The ToR state that the Commission will be "independently led". The basis of this claim is unclear, because the chair will be appointed and funded by CRT. The ToR provide no explanation as to how and why the reviewers have been selected. This lack of

⁸ During Parliamentary discussions concerning the enactment of this legislation, the Select Committee acknowledged the existence of boaters who reside within a limited section of the canal network. This practice was not deemed to be in contravention of the intended purpose of the legislation. See fn. 5 above.

transparency leaves stakeholders with no guarantee that the Review will be independent or objective.

For example, CRT has appointed legal consultant Andrew Cowan as chair. Andrew Cowan was previously presented a National Housing Federation (NHF) 'Lifetime Achievement Award' by the Trust's chair David Orr, then chair of the NHF, and is thus well known to CRT's Chair. Cowan's previously published opinions show that he is likely to be aligned with prioritising financial objectives over charitable objectives.⁹

3.2.2 The inclusion of a CRT trustee as one of three commission members further compromises the Review's neutrality, especially since the Review is already overseen by CRT's Board of Trustees via its newly formed Boating Sub-Committee, and CRT Trustees will also make final decision how to proceed following the Review.

3.2.3 Critically, boaters without a home mooring, the group most affected by the Review, lack any formal representation. No itinerant boaters are present in either the Commission, or the overseeing Board of Trustees. The final paragraph of the Press Release suggests the Commission will engage with boaters and other stakeholders, but lacks specific mention of itinerant boat dwellers. No communication has been issued to boaters or boater organisations by CRT on this matter. Exclusion of the most affected group contradicts a globally recognised policy-making principle: "nothing about us without us."

Conclusion and recommendation

Taken together, the inconsistencies in the Review's ToR suggest that CRT is pre-emptively seeking to obtain legislation that would endanger the existing rights and protections for itinerant live-aboard boaters, making this way of life unviable. This is in spite of the fact that this community of boaters contributes significantly to the vitality of the canal system, pays substantial licence fees to enable CRT's operations, and has historically played a crucial role in maintaining the waterway network since the decline of its industrial use.

We recommend that the Commission declines to operate under the current ToR.

⁹ Here, Andrew Cowan appears to lobby on behalf of housing associations to oppose social-housing rent caps, and instead advocates that state-welfare should cover rising costs: <https://www.housingtoday.co.uk/comment/what-the-rent-cap-will-mean-for-social-landlords/5119034.article>. This mirrors a justification the Trust recently used when it introduced an additional 'Continuous Cruiser' licence fee surcharge in 2024, similarly claiming that welfare and state benefits would compensate for resulting unaffordability.

APPENDIX 1.
Statement of Simon Greer

Simon Greer was one of the Petitioners against the Private Bill that became the British Waterways Act 1995. Mr Greer states that:

I did not contribute to the work done by the House of Lords as I had missed the deadline for becoming a petitioner. This was not the case when the Bill was presented to the House of Commons. This latter Select Committee was Chaired by George Mudie, MP for Leeds East supported by Bill Etherington, MP for Sunderland. Two other MPs came and went during the Hearings.

As a petitioner in person, I attended most of the Commons Hearings with other petitioners. Lord Burton, Janice Christianson, Chris Leah, Lindy Foster and several others. The rules governing petitioners' contributions to the Hearings meant contributions could only be made about the specific phrases, clauses or extracts within the Bill that each petitioner had objected to.

I was the only petitioner that, unchallenged, could free range across all topics as I had opposed the need for the entire Bill, arguing that there was already enough waterway legislation on the statute book and that more would be tiresome, burdensome, and unnecessary.

The important feature today is that I was a first-hand witness in person and contributed to the ultimate outcome. That is the British Waterways Act 1995. It was nearly five years in the making which represented a great deal of meticulous, almost forensic, examination by both Parliamentary Committees, British Waterways (BW), and petitioners against the Bill.

I wish, from a position of first-hand knowledge, to challenge the rationale of what appears to be a new examination of the canal network and its users, particularly regarding Continuous Cruisers and Live-aboard boaters. I wish to challenge the published rationale for the proposed Review by CRT.

It is suggested the law regarding Continuous Cruising, Casual Mooring, and Living on a Boat, needs to be reviewed to reflect today's changed circumstances.

IT IS NOT CORRECT TO RATIONALISE THAT THERE WERE VERY FEW CONTINUOUS CRUISERS IN 1995 AND NOW THERE ARE MANY. I knowingly resist saying "too many" as the term is relative.

What can be said is that... THERE WERE SUFFICIENT NUMBERS TO IDENTIFY THE CONTINUOUS CRUISER AS A SPECIFIC CATEGORY OF BOATER, AND THEIR MOVEMENT REQUIREMENTS, SUCH THAT PARLIAMENT INTRODUCED THE LEGISLATION WE HAVE TODAY. (eg. THE 14 DAY RULE)

THIS LEGISLATION ONLY EXISTS AS A CONSEQUENCE OF UNDERSTANDING THEIR NUMBERS AND THEIR NEEDS. Nothing has changed today.

These issues were discussed and examined forensically by the Select Committee. Nothing has materially changed. Indeed the seeming vagueness of some of the legislation was knowingly and deliberately introduced, against the wishes of BW, to protect boaters from the clear over-zealousness of BW. For example, "14 days or such longer time as is reasonable in the circumstances." Also the absence of any prescriptive distance needed to be travelled.

BW was always unhappy with this and I see the Review as a way to return to these old instincts of more prescription and more draconian penalties. For example, £100 a day fines for every day overstayed! As was their original intention, which was also refused by Parliament.

May I ask, for example, why when there is such a massive national shortage of affordable housing does our publicly subsidised regulating Authority and national charity not want to contribute to help solve this dreadful housing problem?

Instead, CRT removes water points, showers and rubbish collection facilities across the network. Indeed CRT makes it ever more expensive, difficult and rule-bound to navigate a boat outside occasional holiday and weekend use. We live-aboard itinerant boaters have a legitimate nomadic lifestyle which CRT seemingly wants to stop.

In 1994 I witnessed a proposal by BW that each boat should carry its individual identity as a barcode on its roof that could be read by barcode readers on every bridge. Thereby knowing where every boat was 24/7. This indicates a controlling mindset. Such surveillance of their customers would be as inappropriate today as it was in 1994 when it was first mooted.

The boating environment becomes ever more reminiscent of the 1960s "No Dogs. No Blacks. No Irish." So, I ask for no more rules, regulations, controls, or restrictions, including price increases of any sort. I SAY ENOUGH IS ENOUGH.

**APPENDIX 2. CRT COMMISSION ESTABLISHED 16-12-2024
WHEN IS A COMMISSION A CONSULTATION?**

**NICK BROWN
13th January 2025**

- 1 On 16-12-2024 CRT published Terms of Reference (“ToR”) for the Commission, the timestamp on the ToR being 10-12-2024. There is a suspicion of impropriety in the construction of the ToR in that the PDF file of the ToR has been manually edited by insertion of text as graphics boxes at several locations implying interference after the event. This raises the question of who is on responsibility for the ToR and this is addressed elsewhere. The task of the Commission is stated as conducting a review of enforcement powers and policies of CRT towards itinerant boat dwellers (the “Review”).
- 2 CRT has a history of engaging in consultation with key stakeholders including the National Bargee Travellers Association (“NBTA”) and the itinerant boat dweller demographic. Examples include providing input into the provision of services (water, bins, black water disposal); mooring restrictions in London; differential pricing between users of moorings and itinerant boat dwellers. It is relevant to note that the NBTA is materially a statutory consultee under s.124 Housing and Planning Act 2016 (in relation to moorings provision, both permanent and transitory) and the NBTA is represented in the Environment Agency (“EA”) National Waterways Advisory Group and the National Waterways Forum. The NBTA was also a petitioner to Parliamentary select committees in January 2018 and June 2018 in relation to legislation cast by the Middle Level Commissioners. Undertakings were given in Parliament by the respective Secretaries of State to Nick Brown or the NBTA relating to obligations under the EA Transport and Works Act Order (“TWAo”) ¹⁰ and the establishment of CRT itself ¹¹.
- 3 However in recent years the NBTA has been specifically excluded by CRT from consultation but has nonetheless “pushed” consultation material into consultations in spite of CRTs efforts to curtail these contributions. At worst where the NBTA has sought to engage in dialogue with other, opposed, demographics with the view of building compromises CRT has actively subverted these efforts. Examples include the dialogue between the NBTA and other boaters with representatives of the hire fleets; discussion over the procedure for boaters with disabilities having their Reasonable Adjustments ratified; and negotiation over the meaning of “bona fide navigation”.
- 4 At 4.1.5 the ToR state “Consider the appropriate legislative vehicle for reform...”. At 5.4 of the ToR there is specific reference to the Commission’s work product being recommendations for legislative reform or other [policy] changes that CRT may wish to promulgate. At 2.6 of the ToR there is reference to judicial urging of “... the Trust to seek reform and consolidation”. At 3.1 of the ToR there is reference to “[the Commission shall] consider what improvements and outcomes should be sought by the Trust” and “[consider] options for reform of boat licensing and enforcement which could be taken forward within existing legislation or by seeking new legislation by the Trust”.
- 5 It is known from the Minutes of the Board of Trustees that a Transport and Works Act Order (“TWAo”) has been in preparation by CRT, with the view of consolidating and reforming waterways legislation, and that this has been in negotiation with DEFRA. TWAos come to life under s.6 of the Transport and Works Act 1992. Upon application by an applicant the Secretary of State (“SoS”) is responsible for laying down (defining) a development process for a given TWAo and then requiring the applicant for the

¹⁰ The Environment Agency (Inland Waterways) Order 2010 (SI 2010 / 699)

¹¹ <https://publications.parliament.uk/pa/cm201213/cmgeneral/deleg1/120626/120626s01.htm> (accessed 13-01-2025)

TWAO to follow that process. CRT has withheld any information relating to (a) the content of the draft TWAO or (b) the process and thus the stage of the process that it has reached. What can be inferred however are as follows:

- (a) CRT has an interest in reforming the legislation;
- (b) the details of those reforms are unknown (or may not yet have been settled);
- (c) no draft TWAO has yet been considered a suitable candidate for proceeding along the process: to do so the SoS would mandate a consultation and no draft TWAO has been published nor consultation launched by way of SoS mandate (by the SoS or CRT); Defra state here that CRT has not made application (with a draft) for an order ¹²;
- (d) conversely there have been discussions of some sort between CRT and the SoS because the Trustees' Minutes refer to a "Transport and Works Act Order proposal" and "discussions with DEFRA"; the Minister has identified that this is in scope of the Review ¹³ and note should be taken that the Minister does not refer to "other mechanisms".

- 6 The basis for the regulatory reforms in consideration appear to be grossly anti the interests of itinerant live aboard boaters:
 - 1 At 2.3 the ToR state "The biggest change of use over this period has been the steadily increasing numbers of boaters licensed as continuous cruisers and use of vessels for full time residential purposes.";
 - 2 2.3 goes on to state "These [alleged non-complaint] vessels tend to be concentrated in areas of high demand ... which has created challenges for the Trust both from an operational, financial and reputational perspective";
 - 3 At 2.4 the ToR state "These trends have resulted in high levels of non-compliance and consequent enforcement action which can result in the Trust removing residential boats from its waters..."; and "... creating tension between the Trust and boaters subject to enforcement action ...";
 - 4 At 2.4 (dup)(sic) the ToR state "The current legislation predates the Human Rights Act 1998 and the Equality Act 2010 which both have significant implications for the Trust's boat licensing and enforcement approach, particularly in relation to continuous cruisers and residential vessels."
- 7 That CRT has engaged in negotiation with DEFRA suggests that a draft TWAO exists (even if in an early form) and is being concealed by CRT. It is also clear that CRT has attempted to conceal this process in itself.
- 8 So it is clear that the target ("the Target Demographic") of the proposed legislation (the "Proposed Reforms") is the itinerant boat dweller demographic; the alleged "mischief" is proposed to be addressed in the Proposed Reforms and the Proposed Reforms are likely to be grossly adverse to the interests of the Target Demographic.
- 9 The NBTA has a 24-strong Casework Team that supports itinerant boat dwellers in matters of enforcement action taken by inter alia CRT against the boaters usually in relation to licensing. The Casework Team has, since inception, handled over 1,000 cases and the workload is rapidly and abruptly rising. There are many cases involving a refusal of CRT to re-license an itinerant boat dweller ostensibly for non-compliance with the obligation to engage in "bona fide navigation". The interpretation of "bona fide navigation" is moot. The NBTA (and some solicitors and Parliamentarians) consider that the interpretation imposed by CRT is prima facie unlawful. The consequence of the enforcement action leads to the seizure and removal of an itinerant boat dweller's home and so the impact of enforcement is severe and is engaging their Convention

¹² See https://www.whatdotheyknow.com/request/canal_river_trust_transport_and (accessed 13-01-2025)

¹³ See <https://questions-statements.parliament.uk/written-questions/detail/2024-12-11/19225> (accessed 13-01-2025)

rights under Art 8 ECHR ¹⁴ and the Human Rights Act ¹⁵ (“respect for home”). CRT has always engineered a route to avoidance of judicial determination. Where judicial determination has been given (see inter alia *CRT v Jones* at [59] ¹⁶) CRT has been proved wrong. The basis of the enforcement action of CRT has therefore always been controversial, dramatic in effect and hotly contested.

- 10 It is clear therefore that CRT is setting out to specifically target the Target Demographic with the Proposed Reforms. This gives the Target Demographic a legitimate expectation in common law to be consulted in the evolution of the Proposed Reforms. In view of the historic consultation habits of CRT (including its conduct to seek to restrict consultation) the NBTA has (as a representative body of the Target Demographic) a legitimate expectation to be consulted on the Proposed Reforms.
- 11 It is clear from paragraph 5 above that the development of the Proposed Reforms is at a formative stage even if it is unclear how far the Proposed Reforms are developed.
- 12 The ToR are quite detailed in terms of laying out the CRT interpretation and assertion of the mischief being addressed. The ToR are also quite detailed in terms of the end point of the trajectory sought (the Proposed Reforms) although there is little by way of the detail and the draft TWAO (paragraph 5 above) is not disclosed (nor is its existence disclosed) either in the ToR or to the Commission members themselves.
- 13 The ToR specify at 6.1 that the process will take 9 months including preparation of a final report. However the timeline is no more specific than this.
- 14 At 4.1.4 the ToR specify that “The Review will ... seek the views of boaters and other stakeholders through consultation and other forms of deliberative engagement.” This does not place a mandatory obligation on the Commission to consult the Target Demographic in the prescribed mandatory structured manner. In particular the ToR do not specify (in detail) the Proposed Reforms sufficient for them to be articulated in a meaningful way to the target Demographic. Nor do the ToR specify when on the timeline the Commission will embrace consultation from the Target Demographic (if at all) in a way that the responses of the Target Demographic have a realistic prospect of influencing the construction of the Proposed Reforms. It does however constitute an express promise to consult (see *Liverpool Taxi Fleet Operators' Association v Liverpool Corporation* ¹⁷ and *Attorney-General of Hong Kong v Ng Yuen Shiu* ¹⁸).
- 16 At 5.1 of the ToR it is clear that the review is being conducted by the Commission and at 5.2 this is overseen by an organ of CRT. It is also implied in 5.3 of the ToR that CRT (and not necessarily anyone else) will provide technical data to the Commission. This implies that if technical information (eg impartial third-party research or, for example, the expert opinion of the NBTA) is provided by a consultee it will be open to the Commission to dismiss it or even possible that the Commission must dismiss it.
- 17 At 4.1.5 the ToR specify that “The Review will ... consider ... the Trust’s approach in meeting any procedural requirements such as consultation and publicity”. This implies that consultation by CRT will not be mandatory: indeed it may (from CRT’s point of view) be optional. Secondly the Commission will be advising on whether consultation is or is not necessary.
- 18 The public law requirements for consultation are as follows:

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, 4.XI.1950

¹⁵ Human Rights Act 1998 s 1(3) and Art 8 of Schedule 1

¹⁶ *Canal & River Trust v Jones* [2017] EWCA Civ 135

¹⁷ *R v Liverpool Corporation, Ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299

¹⁸ *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629

- 18.1 There must be a basis for consultation. This is established in one of three ways:
- (A) by way of statutory obligation; in this instance and should the route finally chosen (as is believed to be the case now) be a TWAO then the SoS may elect to impose consultation through direction; otherwise:
 - (B) a consultation obligation must be established by common law; common law establishment is either by way of:
 - (1) legitimate expectation that this will be done (whether because of a promise (see paragraph 15 above), or a sufficiently consistent past practice (see *Board St. Germain v Visitors of Hull Prison*¹⁹, and paragraph 9 above)); or
 - (2) it would be conspicuously unfair not to consult specifically where a particular identifiable demographic will be adversely affected (see *Eveleigh v SoS Work and Pensions*²⁰) and in particular where it may be assumed that those adversely affected will experience an increased exposure to the proposed legislation (see *National Council for Civil Liberties v SoS for the Home Department*²¹).

19 The terms of the consultation must contain the following 4 properties:

- (3) (“Gunning 1”) The consultation must be undertaken at a time when proposals are still at a formative stage;
 - (4) (“Gunning 2”) The consultation must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;
 - (5) (“Gunning 3”) adequate time must be given for this purpose; and
 - (6) (“Gunning 4”) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.
(see *Gunning v Brent London Borough Council*²²; *Coughlan v North and East Devon Health Authority*²³; *Moseley v Haringey London Borough Council*²⁴)
- Gunning 1 – Gunning 4 are also known as the “Sedley Criteria”.

20 In addition:

- (7) That there is a proposal to make a decision, which, while not [fully formed], is at a sufficiently formative stage that the views of those consulted might influence it; and
- (8) (in terms of the meaning of “formative stage” in Gunning 1, parameter (3) above) the proposal has crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action.
(see *Eveleigh* above and *Civil Liberties* above).
- (9) Alternatives must be presented
(see *Moseley* above)
- (10) The proposals must be fair

¹⁹ *R v Hull Prison Board of Visitors, Ex p St. Germain* [1979] QB 425

²⁰ *R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810 at [85]

²¹ *R (on the application of National Council for Civil Liberties) v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin) at [157]

²² *R v Brent London Borough Council Ex p Gunning* [1985] 84 LGR 168

²³ *R v North and East Devon Health Authority Ex p Coughlan* [2001] QB 213

²⁴ *R (ex parte Moseley) v London Borough of Haringey* [2014] UKSC 56

(see *CCSU v Minister for the Civil Service* (“GCHQ”) ²⁵)

- (11) those adversely affected by the proposals and representative bodies of that demographic must be consulted, especially where:
- (i) the proposals assume an increased exposure to [the proposed legislation];
 - (ii) fundamental rights are engaged
 - (iii) there is a readily identifiable class of adversely affected people; obvious candidates also include representative bodies;
 - (iv) consultation is during the progression of the policy development (which should be able to still offer utility to the process, may not be premature or be close to the conclusion of the process);
 - (v) there is scope for contribution to improve the quality of legislation;
 - (vi) a smaller list of consultees is initially considered but it may be assumed that it is not onerous or disproportionate to consult beyond this closed list;
 - (vii) where there will be Parliamentary scrutiny, this is not a substitute for consultation;
 - (viii) the proposition that consulting might have adverse implications for other cases; conversely if consultation was not required here there would be little daylight left for cases where consultation was required; and
 - (ix) at an elementary level of fairness, if the views of actors that support the proposals are canvassed then so too the views of those negatively affected by the proposals will equally be canvassed.

(see *Civil Liberties* above)

I identify these additional requirements ((1) and (7) – (11)) as the “Additional Criteria”.

- 21 The final question to examine is whether the Commission is conducting a consultation or not. One conclusion would be that the Commission is precisely as described: not a consultation but may or may not contain one. The alternative is to propose that the Commission is actually performing a consultation with some policy development wrapped around it. In other words the process is materially a consultation. In my view this what is present here. In such a case just because the process is labelled as something other than a consultation but has the identity of a consultation does not stop it being identified as a consultation in law and thus must be performed in accordance with the Sedley Criteria and the Additional Criteria (see *Binder v SoS for Work and Pensions* ²⁶ and *FDA, PCSU and PROSPECT v Minister for the Cabinet Office* ²⁷). It follows that the “Review” is in fact nothing of the sort but actually a consultation and the Sedley Criteria and the Additional Criteria are engaged.
- 22 In conclusion and considering each of the 11 requirements above:
- (1) There is a common law right to consultation by way of legitimate expectation based on a clear promise to do so; and
 - (2) the Proposed Reforms are clearly adverse to the Target Demographic and therefore there is a common law right to consultation by way of legitimate expectation.
 - (3) The Review is still at a formative stage (including perhaps a later stage given the potential for a draft TWAO) yet there is no clear definition of how the consultation will be structured including an absence of (a) contact details (b) specific proposals (c) timeline and (d) clear invitation to the Target Demographic and the NBTA to consult. This breaches Gunning 1.
 - (4) Neither the cogent reasons (the “mischief”) behind the Proposed Reforms nor the detail of the Proposed Reforms are particularised in detail. This breaches Gunning 2.

²⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374

²⁶ *Binder & Ors v Secretary of State for Work And Pensions* [2022] EWHC 105 (Admin) at [58]

²⁷ *R (FDA, PCSU and PROSPECT) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin)

- (5) No detailed timeline is specified therefore CRT is unable to assert that adequate time will be available for intelligent responses to be provided. This breaches Gunning 3.
- (6) The enforcement action of CRT is highly contested; in instances where there has been a formal adjudication CRT has been proven wrong; the ToR are from the outset grossly biased and misrepresenting in their wording; the Commission's task master is the same actor responsible for this conduct; CRT has obfuscated, obscured and concealed work already undertaken on the TWAO. It follows that it is reasonable to assume that while the Commission might conscientiously take into account the product of consultation (if the NBTA is consulted at all) it is highly likely that CRT will wilfully ignore the evidence of the NBTA and / or how the Commission reports that evidence, when the ultimate decision is taken; this implies an anticipated breach of Gunning 4 unless the ToR are fundamentally rewritten.
- (7) Given (a) the previous conduct of CRT; (b) the obfuscation, obscuring and concealment of the draft TWAO process by CRT and (c) the construction of the ToR, it is highly likely that the views of the Target Demographic and the NBTA will have no influence over the process as stated so far unless the matter is tried; that in the alternative the ToR must be rewritten.
- (8) It is likely that CRT has a draft TWAO. The designed trajectory of the process is clear. The brief in the ToR given to the Commission is clear. CRT is clear that the Proposed Reforms have crystallised sufficiently that CRT also knows what the proposed decision will be. CRT has failed to articulate the Proposed Reforms to the Target Demographic and has actively withheld the draft TWAO in the face of concerted effort to the contrary. This breaches Gunning 1.
- (9) No alternatives have been presented.
- (10) The proposals are more than unfair: they appear to violate primary legislation that is not in the gift of CRT to modify or set aside (Human Rights Act; Equality Act).
- (11) It is clear that the Target Demographic and the NBTA must (as a statutory obligation) be consulted. That this is not specified in the ToR make the ToR invalid in law and this implies that the ToR can be struck down. The Commission is encouraged to decline to operate under the terms of the ToR and reject the ToR as unlawful. CRT is invited to rewrite the ToR in consultation with the NBTA.

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