Ministry of Justice

Reform of judicial review
Proposals for the provision and use of financial information

Government response
and
Request for further views on the provision of financial information to other parties

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Reform of judicial review: proposals for the provision and use of financial information

Government response

and

Request for further views on the provision of financial information to other parties

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2016

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Foreword

Judicial review is a crucial means by which people can challenge the lawfulness of public authorities' decisions, actions and omissions. This government is, and has always been, absolutely clear that reforms to judicial review will not undermine that.

There is, nonetheless, a need to make sure that those who bring and control judicial reviews face a proper measure of the costs liability arising from their actions.

In last year's Criminal Justice and Courts Act, Parliament legislated for some sensible and proportionate changes aimed at doing just that. This document sets out how the government intends to proceed to implement aspects of those reforms, following a consultation which closed towards the end of last year, and to seek further views on an aspect of its proposals.

The first area of reform is the new requirement on an applicant for judicial review to provide specified financial information about the funding for the judicial review before permission can be granted. The government has set out an approach which makes sure that claimants are not under too onerous a burden to provide details of their and others' finances but also ensures that judges have much more helpful financial information available to them when they come to make decisions about costs.

We received representations from some respondents that financial information provided by the claimant should be served on the other parties, otherwise it would give rise to concerns about "equality of arms". Doing that would allow those parties to make better informed representations on costs, assisting the court. The government can see that there is force in this argument, and invites further views on the point.

The second area of reform is the introduction of a new type of order in judicial reviews called a costs capping order ('CCO') to replace protective costs orders. When made by the court, these orders will give claimants a measure of costs protection should they not succeed in the case, and will only be available in cases of general public importance. The government intends that when applying for a CCO an applicant will provide fuller financial information than on an application for permission, allowing the court to consider whether the applicant has met the requirements which Parliament has set.

The implementation of these reforms will not undermine the important role of judicial review, but will prevent claimants from avoiding liability for their costs and passing these on to the taxpayer.

Shailesh Vara MP

Parliamentary Under Secretary of State

About the invitation to provide further views in Part B of this report

To:	Those interested in judicial review and associated reform in England and Wales.
Duration:	From 7 July 2016 until 18 August 2016.
Enquiries (including requests for the paper in an alternative format) to:	Judicial Review Reform, 3.38 Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: judicialreviewreform@justice.gsi.gov.uk
How to respond:	Please send your response by 18 August 2016 to: Judicial Review Reform, 3.38 Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: judicialreviewreform@justice.gsi.gov.uk

Introduction and contact details

Part A of this report is the post-consultation response to the consultation paper 'Reform of judicial review: proposals for the provision and use of financial information'. It sets out an analysis of the responses to the consultation and the government's proposed way forward.

Part B of this report seeks further views on the provision of financial information to other parties.

Further copies of this report and the consultation paper can be obtained by contacting the **Judicial Review Reform team** at the address below:

Access to Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

Telephone: 020 3334 3555

Email: judicialreviewreform@justice.gsi.gov.uk

This report is also available at https://consult.justice.gov.uk/

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Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

1. Background

The consultation paper 'Reform of judicial review: proposals for the provision and use of financial information' was published on 21 July 2015. It invited views on proposals for the rules setting out the financial information required with an application for permission to bring a judicial review claim and an application for a costs capping order.

In particular, the consultation requested views on proposals for rules to set out:

a. that a claimant must provide a declaration about the funding of their case on an application for permission to bring a judicial review;

b. that a claimant need not include in the declaration details of a third party's contributions or likely contributions unless they exceed a threshold of £1,500; and

c. that a more detailed picture of an applicant's financial circumstances is required on application for a costs capping order than on application for permission to bring a judicial review.

The statutory framework relating to these reforms is contained in sections 85 and 86 and 88 to 90 of the Criminal Justice and Courts Act 2015 ('the 2015 Act'). Further detail on that may be found in the July 2015 consultation paper.

The consultation period closed on 15 September 2015 and Part A of this report summarises the responses received and sets out how the government intends to proceed. Part B of this report invites further views on the provision to other parties of financial information provided under section 85 of the 2015 Act. We proposed in the consultation paper that the financial information would be available to the court but would not be made publicly available or provided to the defendant, in line with existing practice when the courts deal with information which concerns personal finances, or is otherwise confidential. Following responses to the consultation and subsequent discussions with senior stakeholders, we now seek further views on an alternative approach.

A summary of the responses to the consultation questions is at Annex A.

A list of respondents is at Annex B.

Part A

2. Summary of responses and way forward

1. A total of 39 responses to the consultation paper were received, including from legal practitioners and their representative bodies, charities and their representative groups, the senior judiciary and members of the public. The responses are summarised at Annex A and a full list of respondents is at Annex B.

2. The government has considered each of the responses received carefully in determining how it intends to proceed. The government remains of the view that the reforms for which Parliament legislated should be implemented.

3. As set out in the following chapters, the government intends to retain the same general approach upon which it consulted whilst amending some points of detail, including changes to:

   a. the information a claimant, which is a corporate body which is unable to demonstrate that it is likely to have financial resources to meet liabilities arising in connection with the claim, must provide on an application for permission;

   b. the suggested threshold amount; and

   c. the court's ability to make a costs capping order when not all of the financial information required by the relevant rules has been provided by the applicant.

4. Following the consultation, and discussions with senior stakeholders, the government has decided to invite further views on one aspect of the reforms, regarding the provision to other parties of financial information provided under section 85 of the 2015 Act. The invitation to provide further views is at Part B of this report. The invitation to provide further views does not affect and is distinct from our proposals on costs capping orders under sections 88 to 90 of the 2015 Act.

5. The government is satisfied that the approach set out in Chapter 5 on costs capping orders is an appropriate balance between providing the court with information that it requires to inform its decisions on costs capping orders and not placing claimants or others under an unduly onerous burden. The government has invited the Civil Procedure Rule Committee to make rules to give effect to the proposals on costs capping orders.

3. The Proposals – Financial Information

6. The consultation paper proposed a declaration model for the provision of financial information (pursuant to sections 85 and 86 of the 2015 Act) on an application for permission to bring a judicial review. In the government's view, this strikes the most appropriate balance between providing the court with useful information and avoiding placing claimants under too onerous a duty to provide details about the financing of their applications. As stated previously, these proposals do not change the law on when third parties will be liable to pay costs.

7. Having received and considered the views of respondents, the government is content that the policy in the following pages is proportionate and fulfils the policy aims. As set out above, at Part B of this document the government invites further views on one aspect of the policy. Once the government has finalised its approach to this aspect of the policy, having considered views of respondents, it intends to invite the Civil Procedure Rule Committee and Tribunal Procedure Committee, as appropriate, to make rules on these provisions. The policy would operate in the context of the government's intended approach to the financial information threshold, which is set out in Chapter 4.

8. Some respondents proposed that the government should not seek to implement sections 85 and 86 of the 2015 Act, arguing that the legislation misreads the strength of the link between financial contributions and control over the conduct of a claim (and hence the potential for a costs order to be made against a third party). The government's view continues to be, as it argued in Parliament, that although funding of a claim alone is unlikely to be a sufficient basis for the court to award costs against a third party, funding can be a strong indicator of control over litigation – and so it is right to ensure that the courts have an appropriate level of information about the funding of an application for judicial review.

9. Whilst the wording of the declaration will be subject to consideration by the Civil Procedure Rule Committee and Tribunal Procedure Committee, the government proposes an approach which would require the claimant to indicate which of the following statements apply to them and, where indicated (in each case at i), provide limited additional information:

    a. the claimant intends to meet liabilities arising in connection with the claim from their own resources only;

        i. there is no requirement for the claimant to provide further information as a consequence of the claimant indicating that this statement applies to them;

    b. the claimant has made an application for legal aid which has not been refused;

        i. there is no requirement for the claimant to provide further information as a consequence of the claimant indicating that this statement applies to them. Where legal aid is granted claimants are already meant to note this on the claim form and provide the legal aid certificate to the court when proceedings are, or already have been, issued (by reference to regulation 38 of the Civil Legal Aid (Procedure) Regulations 2012);

c. the claimant intends to meet some or all of the liabilities arising in connection with the claim from one or more source other than the claimant's own resources or legal aid;

    i. in which case, where the aggregate amount of all contributions and likely contributions from one contributor exceeds or is likely to exceed the £3,000 threshold (see Chapter 4), the claimant would need to provide the name and address of the contributor and the aggregate amount of those contributions; and

d. the claimant is a corporate body that is unable to demonstrate that it has or is likely to have sufficient funds to cover liabilities arising in connection with the claim;

    i. in which case, the corporate-body claimant would need to provide the name and address either of an appropriate person who it anticipates will be able to provide information about its members (e.g. shareholders in the case of a company) and their ability to provide financial support for the purposes of the claim or, if there is no such person, of one of its officers (e.g. a director in the case of a company).

10. Where appropriate, the claimant will tick more than one box to indicate that more than one statement about the funding of the claim applies in their particular case. It is the government's intention that detailed information about third-party funding will only be required where the claimant intends to rely on that funding to meet liabilities arising in connection with the claim.

11. The government proposed that this declaration approach should apply to all claimants. However, a number of respondents raised concerns over the potential burden of these reforms on charities. In particular, it was argued that requiring charities to provide details of third-party contributors and contributions would be unduly onerous, and that such bodies are already regulated effectively, for example by the Charity Commission.

12. The government has fully considered these arguments but does not agree that they are a sufficient basis to exclude charities from these provisions. Parliament legislated to ensure greater transparency in how judicial reviews are funded and to limit the potential for third-party funders to avoid appropriate liability for litigation costs. The government agrees with the senior judiciary that the application of exceptions would be difficult, some charities are well-resourced and represented and that the better course is for a light touch approach. The government is of the view that these aims apply equally to judicial reviews brought by charities as to all other types of judicial reviews.

13. The government considers that its approach is practicable and not unduly onerous for any claimant, including charities. It anticipates that it will be a straightforward process for claimants to complete the declaration and, when further information is required, it should not be onerous to provide it. For example, a claimant will only have to provide details of a third-party contributor if the claimant intends to rely on that third-party's contributions to fund the claim and those contributions exceed the level of the threshold (see Chapter 4).

14. If a claimant is funding the claim entirely from its own financial resources, it would not have to provide details of any third-party contributors. When considering whether funds constitute the claimant's own resources, the government considers that this would not include funds which are held by the claimant conditionally – such as, for example, where funds have been provided on the condition that the claimant conducts the litigation in a particular way.

15. Arguments were made that Aarhus Convention claims should be excluded from the rules. There is a special costs regime for these environmental challenges at Section VII of Part 45 of the Civil Procedure Rules ('CPR'). Some respondents argued that providing the information would be unnecessary as costs are capped in these cases, that claimants are generally not seeking personal benefit (making it unsuitable to require funding information) and that the proposals could potentially cause a 'chilling effect' on organisations seeking to bring environmental judicial reviews. The government remains of the view that it is appropriate to require this information from all types of claimant, as the type of case – and whether there is a cap on costs liability in that case – does not mean that a third party could not attempt to avoid appropriate liability for costs. The government also notes that its approach is intended to avoid placing claimants under too onerous a duty to provide details about the financing of their applications.

16. Arguments were also made against the requirements associated with statement (c) more generally, including that it would be disproportionate to require details of contributions and that it would be difficult to comply with the requirement to provide details of 'likely contributions' (irrespective of Parliament having legislated in this area). The government remains of the view that the use of the threshold is an appropriate and proportionate way to ensure that claimants only provide the court with information which the court might find useful; and that claimants will relatively easily be able to identify sources of likely future support based on interactions between them and those persons, such as whether that person has communicated an intention to provide them with an amount of funding in the future or in the event that a specified event should happen. Claimants will not be under a duty to reveal likely funding of which they are honestly unaware, and will be able to update the court if it transpires that their initial assessment of likely funding was inaccurate.

17. The government's original proposal for requirements associated with statement (d) was that where the statement is met the claimant would have to provide specified details of all of its members and their interests in the claimant. Many respondents argued that this could be an onerous burden to discharge and would flood the court with unhelpful information. The government accepts the strength of that argument and instead intends to invite the Civil Procedure Rule Committee and Tribunal Procedure Committee to make provision for the approach at paragraph 9(d)(i) above. Under that, the claimant would provide contact details either of a person who the claimant anticipated would be able to provide information about its members and their ability to provide financial support for the purposes of the claim or, if there was no such person, of one of its officers (e.g. a director in the case of a company). In appropriate situations, such as where the claimant was no longer operating effectively, the court could then look to the named individual to provide additional information to assist it in determining whether a costs order should be made against a third party. The information might include information on the claimant's members' influence over the course of the litigation.

18. When determining whether they are likely to be able to meet liabilities arising in connection with their claim from their own resources, claimants may need to estimate the level of those liabilities. The consultation proposed that claimants would not have to provide their estimate of total costs likely to arise in connection with the claim to the court. There was some support for this proposal on the basis that, particularly for self-represented litigants, a requirement to make and provide the estimate in a form suitable for the court might create too onerous a burden. Additionally, it was noted by some that the requirement for a Statement of Truth would make sure that the claimant approached this aspect appropriately: in order to sign the Statement of Truth, the claimant will need to hold an honest belief that contents of the document are true.

19. However, some other respondents, such as local authorities, argued that the estimate should be provided to assist the defendant in making more informed decisions about whether to continue with the litigation. The government accepts that the likely costs of litigation are an important factor in determining how to proceed, but remains of the view that to require provision of the estimate on every application would be disproportionate. The government notes that defendants are able to estimate the costs of the litigation themselves, and that if defendants require additional information from the claimant in order to estimate costs properly, they could ask for this in correspondence.

20. The government indicated in the consultation paper that the detailed financial information would not be provided to the defendant or interested parties or made publicly available, in line with existing practice when the courts deal with information concerning confidential information. Many respondents provided their views on this issue in response to Question 5 (‘Do you agree that the financial information requirements and approach to service the government proposes should apply to all applications?’). Some respondents took the view that neither the declaration nor the detailed financial information should be provided to defendants at all. Others argued that there would be no reason not to provide them with the financial information, and it would be useful for public bodies to be aware of the information to take informed decisions over litigation, including taking decisions over whether to seek a costs order against a third party. Other respondents considered it would be acceptable in principle to provide parties with the information, but that the claimant should first have the opportunity to make ex parte submissions. Finally, others considered that the creation of exceptions would mean the creation of loopholes.

21. Following further discussions with senior expert stakeholders, the government accepts the view that to provide in this context that one party and the court have access to information which another party does not would be unusual, could place the court in a difficult position and could raise equality of arms issues. The government invites further views on this point at Part B of this report, where it has set out its proposals for how to proceed.

22. The consultation paper proposed making the claimant "…subject to a duty to update the court if there is a material change to their financial circumstances" (paragraph 59). Some respondents argued that the duty was disproportionate and that once financial information had been provided there should be no duty to amend it, irrespective of any change in circumstances. Some other respondents argued the duty to update should only arise at certain points in proceedings, such as when the substantive case was determined (when costs would usually fall to be determined), while others agreed that there was utility in a continuing duty but were concerned to ensure that the duty would not require a new submission to the court with every minor change to a claimant's circumstances.

23. The government remains of the view that a duty to keep the court updated has merit, in that it will make sure the court has accurate information when it comes to make costs decisions. As costs decisions may be taken at any time in proceedings, the government is of the view that the duty should continue throughout the currency of the claim, and not just arise at the beginning and end. Equally, the government will seek to make sure that the court is not swamped with information unlikely to be of use to the court by limiting the requirement to material changes which make the information previously provided to the court inaccurate.

24. In the government's view, the approach set out above will see that on an application for permission the court will be provided with the information it requires to inform its subsequent decisions on costs appropriately without placing an unduly onerous burden on claimants or others.

4. The Proposals – Financial Information Threshold

25. As set out in Chapter 1, Parliament legislated in section 85 of the 2015 Act to provide that a claimant may not be given permission to proceed with a judicial review until they have provided information about the financing of their claim that is specified in court or tribunal rules. The information specified in those rules may include details of any financial contributions that the claimant has or is likely to receive, but may not require claimants to identify the third parties providing those contributions unless the total value of a third party's contributions exceeds or is likely to exceed a particular threshold. The requirement for a threshold was introduced during the 2015 Act's passage through Parliament in response to concerns that a requirement to identify contributors could have a chilling effect on small contributions made by people who have no expectation of controlling the litigation.

26. The government consulted on the basis of a single threshold of £1,500, having indicated to Parliament that this amount was a basis on which it would be minded to consult (Official Report, House of Commons, 13 Jan 2015, col. 809). The government also raised the possibility of introducing a second threshold expressed as a percentage – perhaps of the funds available to meet the costs of the litigation – but did not propose in the consultation to proceed on this basis. Respondents who did not disagree with implementing the section agreed overwhelmingly with a single threshold expressed as a monetary amount, which, it was argued, would give clarity and avoid the complexity of other possible approaches.

27. The percentage threshold which was suggested prior to the consultation could be complex for claimants to apply, as they would need to consider the financial support provided by each contributor against their estimate of the costs of the case. The approach might also cause contributors uncertainty because they might not know whether their contribution would exceed the threshold. On this basis, whilst there were some arguments that a single threshold would be arbitrary given the potential range of costs of a judicial review, in the government's view a fixed-sum threshold is an appropriate way to proceed, since it simplifies the claimant's task and is likely to capture possible relationships of control without being unduly onerous.

28. The government's suggested figure of £1,500 was based on the limited data then available, which suggested that the average cost of bringing a judicial review appeared to be in the range of £11,000 to £22,000.

29. The government sought further data on the cost of bringing and defending a judicial review, and several respondents kindly provided data from their own management information or experience. The government has not been in a position to independently verify the data set out in the following paragraphs. There was considerable variance in the figures reported, which included:

a. Deighton Pierce Glynn Solicitors, who estimated that in recent judicial reviews without legal aid which had proceeded to full trial and in which costs had been awarded between the parties, the costs had tended to fall in a range of between £40,000 and £85,0000, whilst noting that in particularly complex cases the figure could be higher;

b. Liverpool City Council, who estimated that each claim against them costs in the region of £12,000 to £15,000;

c. the London Borough of Hillingdon, who estimated that the typical cost of judicial reviews against them were in the region of £20,000 and £40,000;

d. Kent Legal Services estimated that defending a social care judicial review to the permission decision would usually cost between £5,000 and £12,000 (including counsel's fees), whilst the cost of a social care judicial review which reached the substantive stage would usually be estimated at up to £24,000;

e. Greg Callus, a barrister, estimated that a judicial review in the High Court would usually see total costs of around £30,000–£50,000 incurred by the parties, although in some types of claim (such as major regulatory disputes) the costs could be much higher;

f. Leigh, Day and Co solicitors, noting the difficulty in arriving at even a broad estimate of the costs in judicial reviews, stated that they advise clients to budget between £15,000 and £30,000 to cover the defendants' costs and disbursements, although that might vary with the nature of the case. Additionally, the firm would usually advise that the claimant's own legal costs could be considerably higher; and

g. the Constitutional and Administrative Law Bar Association estimated that, in their experience, the minimum cost of a judicial review which goes to a substantive hearing is £20,000, although more complex cases could run into hundreds of thousands of pounds.

30. This data demonstrates that there is a range of estimates of the costs of a judicial review and no consistent view. The data does, however, tend to indicate that the estimate of the costs of a judicial review in the consultation was low.

31. Varda Bondy, and Maurice Sunkin kindly provided excerpts from their research[1] work (collaborating with Professor Lucinda Platt), which includes material on the costs of judicial review. The study is based on responses by claimants in around 200 of 500 judicial reviews selected for study and which reached a final hearing between July 2010 and February 2012 inclusive. That analysis found that in around one in five of the privately funded judicial reviews studied, costs were at £15,000 or below.

32. The government welcomes this contribution to the debate, but notes that the study does not include cases which did not reach final hearing. Costs may, however, be awarded prior to a final hearing, and the government is of the view that the threshold must take account of that.

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[1] Bondy V, Platt L, Sunkin M (2015), '*The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences'*, http://www.publiclawproject.org.uk/, accessed 2 December 2015.

33. More generally, many but not all respondents were concerned that the suggested figure of £1,500 appeared too low and so would capture contributions made without any expectation of control and render it likely that the courts would be provided with large volumes of ultimately unhelpful information. Those who responded to this point and their suggestions for the level at which the threshold should be set included:
    a. the Civil Justice Council, who suggested a figure of £2,500;
    b. the senior judiciary, who suggested a figure of "at least £3,000";
    c. the London Borough of Hillingdon, who suggested a figure of between £3,000 to £5,000;
    d. Varda Bondy and Maurice Sunkin (see paragraph 31 above), who suggested that the figure might lie between £5,000 and £8,000;
    e. the Constitutional and Administrative Law Bar Association, who suggested a minimum of £5,000, and were of the view that £10,000 might be more appropriate; and
    f. Irwin Mitchell solicitors, who suggested a threshold of £15,000 plus VAT (at 20% that would be £18,000).

34. Few respondents suggested methodologies for setting the level of the threshold. Kent County Council acknowledged the lack of a robust dataset and an agreed methodology. They suggested an alternative approach of setting the figure at a low level and, over time, the potential desirability of subsequent increases could be tested. That might be seen as appropriate to make sure that no attempts to circumvent proper costs liability were missed.

35. The government is concerned that adopting that approach is likely to see the court provided with unacceptably large amounts of unnecessary material. Indeed, it is persuaded by the weight of expert judicial experience and opinion that a higher than suggested threshold will provide the most appropriate balance and, taking into account the available data, proposes a threshold of £3,000.

36. In the government's view, that figure will capture many situations in which there are relationships of control without being unduly onerous on claimants or the court. Additionally, it is of the view that this represents a significant amount of money to most people – and on that basis it will capture many cases where there is an expectation of controlling the litigation – while eliminating relatively minor contributions and avoiding overloading the court with information it does not require to make a decision. In the government's view, this amount is sufficiently significant for most people that there will be an expectation in many cases that those contributing in excess of this amount will be involved in the running of the claim. Therefore, it is right that the court be made aware of people making contributions of this scale and is able, if it deems necessary, to make further enquiries.

37. The government will, however, keep this under keen review and may seek changes if it appears that the threshold is not working appropriately.

5. The Proposals – Costs Capping Orders

38. Parliament legislated at sections 88 to 90 of the 2015 Act to create a new type of order called a costs capping order. Costs capping orders will limit or extinguish an applicant's liability to pay another party's costs irrespective of the outcome of the case in non-environmental claims in the High Court and Court of Appeal. Where a court makes a costs capping order limiting or removing the applicant's liability to pay costs, the order will include a 'cross-cap' limiting or extinguishing the other party's liability to pay the applicant's costs should they lose. The court will consider the financial resources of the parties when determining whether to make a costs capping order and, if one is appropriate, what the terms of that order should be.

39. Where the applicant wants the court to make a costs capping order they will have to apply to the court setting out information to support the application including financial information. Section 88(5) of the 2015 Act allows for rules of court to specify information that must be contained in the application including:

    a) information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application; and

    b) if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

40. The government consulted on the financial information which applicants will have to provide when making an application for a costs capping order. Having considered the responses received, the government has invited the Civil Procedure Rule Committee to make rules to provide that:

    a. an applicant will be required to give more detailed financial information on an application for a costs capping order than is required on an application for permission to proceed with judicial review. This should include any funding provided by or likely to be available from a third party. It will not be necessary to detail every aspect of the applicant's finances. Instead the information would include a breakdown of the applicant's significant assets, liabilities, income and expenditure;

    b. the applicant should not be required to provide supporting documents in every case, but will be required to provide a schedule of costs. The court will be able to order the applicant to provide additional documents as appropriate;

    c. where the applicant is a corporate body unable to demonstrate that it is likely to have resources available to meet its liabilities arising in connection with the claim, the court will consider whether it is appropriate to give directions requiring information to be provided about the applicant's members (e.g. the shareholders in the case of a company) so the court could, for example, consider whether an appropriate alternative to a costs capping order would be for the members to provide the applicant with further capital if it were to face costs at the end of the proceedings; and

d. the financial information should be served on the defendant and any interested parties unless the court directs otherwise.

41. The government anticipates that applications for costs capping orders will generally be made on or accompany the claim form.

42. As set out in the consultation paper, a separate regime exists for costs protection for certain environmental judicial reviews at Section VII of Part 5 of the Civil Procedure Rules. The provisions described in this chapter will not apply to those types of case.

43. Generally, respondents did not disagree that, for the court to have the information it requires in order to determine whether a costs capping order should be made, applicants will have to provide it with more detailed financial information than is provided on an application for permission. This will help make sure that costs protection is not given in inappropriate cases, which could have an effect on the public purse. However, some respondents, particularly legal practitioners, charities and charities' representative groups, were concerned that the government makes sure that the requirements do not go beyond those necessary for the court to properly apply the 2015 Act provision, arguing that to do so would create an unduly onerous administrative burden.

44. The government's view remains that it is appropriate for an applicant for a costs capping order to provide a more detailed picture of their financial situation than on an application for permission and that this is required in order for the court to apply the 2015 Act properly. The government's approach will enable the court to determine whether the criteria for making a costs capping order, such as whether it would be reasonable for the applicant to withdraw the judicial review application without costs protection, are met.

45. The approach the government will take is to require information only about the applicant's assets, liabilities, income and expenditure which are significant. This will limit the requirement to information which the court will need in order to understand the applicant's financial resources and to apply the 2015 Act properly; and it will limit the weight of the burden on applicants in providing this information. The government does not intend to mandate the form in which this information should be provided and an applicant could provide additional information if it was relevant.

46. The government considers that details of any third-party funding should be provided but that a light-touch approach is sufficient, whereby an applicant is required only to provide details of the total amount of actual third-party funding received and the total amount of likely third-party funding. The court could seek additional information if needed.

47. Some concerns were raised about the requirement to provide details of likely funding, which is provided for at section 88(5) of the 2015 Act. The government considers that it is appropriate for applicants to provide details of funding likely to be available, as the courts will require this in order to understand the financial resources likely to be available to the applicant to fund the litigation and it is an important element in determining whether costs protection should be granted and, if so, the level at which the parties' costs liability should be capped. For example, without this information, the court might not be able to determine whether it would be reasonable for an applicant to withdraw from proceedings without a costs capping order.

48. A key concern respondents raised in this regard was that applicants might not know what future funding might be likely to be provided. As with the information required on an application for permission (see Chapter 3), the government is of the view that claimants will be able to identify this information relatively easily, and will not be under a duty to reveal likely funding of which they are honestly unaware. The government also takes the view that, in the event that likely funding which was expected during the course of the proceedings does not in fact materialise, the applicant might perhaps make another application for a costs capping order or apply to have an existing costs capping order varied.

49. A small number of respondents argued that there should be a requirement on all applicants to provide documents supporting and verifying the financial information, and for the court, defendants and interested parties to have access to them. This would, it was argued, assist the court in determining whether a costs capping order should be made and assist the other parties in determining whether and how to make representations. Many other respondents considered it unnecessary, being of the view that signing a Statement of Truth would be sufficient and, if the court required further information, it could request it from the applicant.

50. The government remains of the view that it is not necessary to require applicants to provide supporting documents as a matter of course, not least as the court could order that those documents be provided if it deemed it appropriate in the context of the application at hand. The government considers that to require supporting documents in every case would be overly onerous on the applicant and the court and, instead, that it is sufficient for the applicant to set out their financial resources in evidence endorsed with a Statement of Truth.

51. Some respondents considered it inappropriate to require an applicant which is a corporate body unable to demonstrate that it is likely to have financial resources available to meet liabilities in connection with the judicial review to provide information on its members. They argued that the requirement might cause the applicant to have to provide a large amount of information unlikely to be relevant to the proceedings. That, it was argued, would be burdensome on both the applicant and the court. Some respondents commented that details of company members should only be provided if the member is seeking to drive or benefit financially from the litigation.

52. The government takes the view that, where the applicant is a corporate body unable to demonstrate that it is likely to be able to meet liabilities in connection with the judicial review, it may be appropriate for the court to be provided with information about its members. This might, for example, allow the court to consider whether an appropriate alternative to a costs capping order would be for the members to provide the applicant with further capital. The government notes, however, that it is likely to be rare in practice that this type of applicant seeks a costs capping order; and that when this does occur, information about the applicant's members may not always be relevant and information which is relevant may vary from case to case. The government has invited the Civil Procedure Rule Committee to make rules so that, when this type of situation arises, courts will consider whether to request information about members.

53. Some respondents were concerned about the proposal that the financial information provided with an application for a costs capping order would be served on the defendant and interested parties. The issue here largely turned on a concern over applicants not wishing to provide financial material to those parties. A number of other respondents stated that the applicant should be able to ask the court not to serve the information on the other parties.

54. The government remains of the view that it will generally be appropriate and necessary for the other parties to be provided with the information in order for them to be able to respond appropriately to an application for a costs capping order. However, the government recognises that, exceptionally, there may be circumstances when provision to the parties would not be appropriate (perhaps where this might impact sensitive commercial agreements) and has invited the Civil Procedure Rule Committee to make rules allowing the claimant to apply to the court for permission not to serve some or all of the financial information on one or more of the parties. Whether to allow this would be a matter for the court in an individual case.

55. Some respondents, including public authorities, thought that the package of proposals should apply to all applications for costs capping orders without exception, stating there was no justification for treating applications differently. One remarked that costs capping orders have the ability to significantly skew how public bodies use their resources. Other respondents, including those representing the charitable sector, considered that the proposals on costs capping orders should not apply to charities. Respondents raised similar arguments to those raised for why there should be exceptions for charities when providing financial information on an application for permission (Chapter 3), including about the adequacy of existing regulatory provision and the need to make sure that the burden placed on charities is not unduly onerous. The government considers that charities should not be excluded from the requirement to provide financial information on an application for a costs capping order. The logical basis for providing the financial information applies to all types of applicant. Without information on the funding of the claim, the court cannot distinguish between those claims which genuinely merit costs protection and those that do not.

56. Some respondents thought that, where the charity is a corporate body unable to demonstrate that it is likely to have resources available to meet its liabilities arising in connection with the claim, it was not appropriate to require information about the corporate body's members. Respondents thought that, as charitable bodies may only act in a way that furthers their charitable purpose and are already subject to regulation, including by the Charity Commission, a means to address abuse was already in place. The government, however, is of the view that there may be circumstances where information about the members of a charitable corporate body will be relevant to a court which is considering making a costs capping order. Therefore, it does not propose to exclude charitable corporate bodies from the rule which will mean that, when this type of situation arises, courts will consider whether to request information about members. The government is satisfied that the light-touch approach to providing details of third-party funding, whereby an applicant is required to provide details of the total amount of actual third-party funding received and the total amount of likely third-party funding is the most appropriate way forward.

57. The government is persuaded that there may be some exceptional circumstances in practice where it is not possible to provide all of the financial information which will be required by the implementing rules. To take account of that, the government invited the Civil Procedure Rule Committee to make provision for the approach set out in paragraph 105(a) of the consultation paper, allowing the court in an individual case to consider the application without all of the financial information. The government anticipates that this will only be used sparingly.

58. Another argument raised by respondents is that it could be difficult to collect the relevant financial information to support an application for a costs capping order if the application was made alongside an application for permission to appeal to the Court of Appeal, given the time limits for doing this. The government accepts this, and does not intend for strict requirements about when an application for a costs capping order should be made to be imposed, meaning in some cases an application for a costs capping order could be made at a later stage.

59. The government is of the view that the approach set out in this chapter is a proportionate and appropriate one which will make sure that the court has the information it requires to apply the 2015 Act properly and determine appropriately whether a costs capping order should be made. The government consequently invited the Civil Procedure Rule Committee to make rules on the basis set out here.

6. Costs Benefits Analysis, Equalities Impact and Family Test

Cost Benefit Analysis

Summary

60. This cost benefit assessment provides an overview of the anticipated impact of implementing the requirements relating to provision and use of financial information proposed in the government response to the consultation document number 9117.

61. Costs and benefits of the proposals have not been quantified in this analysis as there is limited germane information available. Many of the benefits of the reforms, including increased transparency and a fairer allocation of the costs of judicial review, would be very difficult to quantify. An attempt to calculate an overall representative Net Present Value figure for the reforms might be inaccurate. The following sets out the main consequences of the reforms and outlines why the impacts are likely to be small.

Benefits

Benefits to society

62. The introduction of the codified costs capping order regime will make sure that claimants who can provide evidence of their suitability for an order will be given an appropriate measure of costs protection.

63. Mandating that claimants for judicial review reveal their funding sources when making an application, will provide the court with a clearer picture of the claimant's financial situation. Third parties could be liable to meet defendants' costs in more cases, where it is appropriate, although this number is expected to be small. As the defendant in almost all judicial review cases, this would act as a saving to the government and, ultimately, the taxpayer.

Costs

New cost information arising from consultation

64. The costs associated with defending a judicial review can be substantial. Indicative figures from the Government Legal Department (previously Treasury Solicitors) at the time of publication of the Impact Assessment MoJ210[2] was that legal costs for defendants in judicial review cases they have been involved with range from £8,000 to £25,000 for non-immigration and asylum cases and from £1,000 to £15,000 in immigration and asylum cases We sought information relevant to these costs assumptions in the consultation. We received details from one respondent of a

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277808/reform-judicial-review-rpc-ia.pdf

Nuffield Foundation funded study, now published, providing evidence relating to costs in both legally aided and privately funded cases.[3]

65. This study contains data on judicial reviews that reached final hearing during a 20 month period from July 2010 to February 2012 inclusive. Questionnaires asked solicitors who acted for claimants about the level of costs in their cases, how cases were funded, and what orders was made in relation to costs. Responses were received from claimant solicitors in respect of 198 of the 502 cases reaching hearing in the period considered. Note that costs are often awarded at other stages of the case than at final hearing, and this could affect the level at which average costs fall. As to the level of costs, solicitors were asked to identify whether the costs of their claimant's cases fell into various bands.

66. As the respondent notes, the figures show that around one in five privately funded cases reaching final hearing cost less than £15,000. In 29% of privately funded cases the costs were said to have been £50,000 or above.

67. In the sample, publicly funded cases were generally of lower value and in around 24% of cases the costs incurred were said to have been less than £15,000. In 17% of publicly funded cases the costs were said to have been £50,000 or above.

68. These figures show that the costs to claimants of judicial review, at least those reaching a final hearing, can be more than assumed in the costs benefit analysis section of the original consultation document, published in July 2015. This supports the Ministerial decision to increase the threshold imposed on third-party contributions before they must be declared to the court.

69. A couple of respondents did suggest lower thresholds, such as £500 or that the threshold be proportionate to the claimant's salary to a maximum of £1,500. The government, however, considers that both of these suggestions would place an onerous burden on claimants and the court.

Costs to claimants following introduction of the financial information threshold

70. Based on the information received in the consultation, the government has decided to set to £3,000 the threshold above which, on an application for judicial review, third party funding must be declared. This is higher than the original threshold of £1,500 proposed in the consultation.

71. A small increase in the administrative burden on claimants would be expected from the proposals set out in Part B of this document, as the claimant would be required to serve the documentation on more parties than originally intended. We do not, however, consider this to be an onerous burden, as the declaration and further information (where applicable) would be provided to parties at the same time as the claim form is served.

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[3] Bondy V, Platt L, Sunkin M (2015). The Value and Effects of Judicial Review: The Nature of Claims, their Ouctomes and Consequences. http://www.publiclawproject.org.uk/, accessed 2 December 2015.

72. An additional increase in the administrative burden on claimants who receive or are likely to receive third-party funding of more than £3,000 is expected. However, having considered the information received, the government remains of the view that the burden is modest and justifiable, including because:

    a. where the claimant is a corporate body, it is likely that most of the information that they will be required to provide will already be available to them so they will incur negligible costs to provide this information; and

    b. the government has decided that where the claimant for judicial review is a corporate body unable to meets its liabilities, it needs only provide the contact details of a designated contact or contacts. The designated contact must be a person in a position to provide this information to the court or, if there is no such individual, an officer of the company with executive control.

Costs to applicants related to cost capping orders

73. Under the new costs capping order regime, once an order is made, it will often apply, as now, to all costs from both before and after permission. However, a costs capping order will only be granted after permission has been granted. This could increase the financial risk involved for those who rely upon such an order to bring the claim. Furthermore, in those cases in which previously applicants may have qualified for a protective costs order but a cost capping order will henceforth not be awarded, the applicant will potentially have a greater liability for costs. The volume of cases involved, however, is quite minimal:

    a. an internal MoJ review of a sample of judicial review case files suggested that protective costs orders are awarded in a small number of all judicial review cases;

    b. between January 2010 and August 2013, the Government Legal Department have indicated that in the judicial review cases with which they were involved only 17 protective costs orders were awarded. Three related to non-environmental cases;

    c. Varda Bondy and Maurice Sunkin[4] responded to the consultation on proposals for further reform of judicial review in 2013. In that response they suggested that, in relation to their sample of judicial review final hearings between July 2010 and February 2012, only seven cases involved protective costs orders – of which three cases were non-environmental;

    d. where the applicant is a corporate body, it is likely that most of the information that they will be required to provide will already be available to them so they will incur negligible costs to provide this information; and

    e. the government has decided that where the applicant is a corporate body unable to meets its liabilities, details of its members and their ability to provide funds need not be given in every case. Rather the intention is for the court to consider in each case whether further information is required.

[4] http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

Transitional costs for legal services providers and the judiciary

74. The cost to lawyers and judiciary of becoming familiar with the new procedural rules and their implications is assumed to be minimal and could be easily absorbed through common professional development requirements.

Administrative costs of implementing the procedural rules

75. The cost of reviewing and amending application forms, guidance and legal documents to account for the procedural rule changes are expected to be minimal.

76. The new procedural rules will add a small burden to the operations of HMCTS administrative staff in the Administrative Court and to the Upper Tribunal. The changes proposed in the consultation would necessitate some extra administrative duties through the receipt of further and/or updated financial information, but this would not be substantial. Financial declarations are likely to be incorporated into the claim form or an attached annex and, where further information is required, this may be added to the papers or passed straight to the judge, depending on the status of the claim and point of receipt.

Equalities Impacts

77. Under the Equality Act 2010, public authorities have an ongoing duty to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics. As part of this obligation, the government has undertaken an assessment of the estimated impact of these proposals on people with protected characteristics.

78. There is little centrally held data on court users and so to help the government fulfil its duties under the Equality Act 2010 in the consultation we asked for information and views to help us gather a better understanding of the potential equalities impacts that each of the proposed reforms might have.

79. Specific concerns raised by respondents to this consultation included that groups with protected characteristics will have a greater interaction with public services and thus are more likely to be involved in judicial review cases. We accept that this is a reasonable assumption to make, and it is possible that those groups may be affected by these proposals. However, we remain of the view that our approach is a proportionate means of achieving the legitimate policy aim of increasing transparency and fairness in the allocation of judicial review costs.

80. Nearly half of respondents to the consultation did not answer the questions on equalities. Of those who did answer these questions, some respondents considered that there was little evidence for the government's position that the proposals would not have a disproportionate impact on groups with protected characteristics and that the proposals could have a 'chilling effect' on cases being brought as the proposals could amount to a barrier to such persons bringing cases, or for example, for charities to bring cases on their behalf. Several respondents did agree with the government's position on this and welcomed the statement that the proposals are expected to affect only a small number of cases.

81. A number of stakeholders responded to the previous consultation – Judicial Review: proposals for further reform in September 2013 – have expressed concerns that our proposals on financial information will have a differential impact on some groups with protected characteristics as they are over represented in low income groups (e.g. people from a BAME background and those with disabilities).

82. Protective costs orders presently tend to benefit groups with protected characteristics or organisations which represent them who are considered to be acting in the public interest. Therefore the new costs capping regime may result in fewer cases representing the interests of those with protected characteristics due to the increased financial risk of liability on those representing them. The government considers that this should only occur in cases where the requirements for a costs capping order are not met.

83. Having considered these responses, as well as responses to the previous consultation we consider that the proposals are unlikely to disproportionately disadvantage people with protected characteristics. The proposals are intended to limit abuse and evasion of proper costs liability and will apply to all cases whether or not they are brought by those with protected characteristics. Meritorious cases will still receive the protection they need to continue. We believe that if there is any differential impact on those with protected characteristics that these proposals are a proportionate means of achieving the legitimate policy aim of increasing transparency and fairness in the allocation of judicial review costs. Furthermore these proposals will improve the speed with which all judicial reviews are heard and therefore have a wider benefit for groups with protected characteristics and without.

84. We do not consider the revised proposals in Part B of this document, to change our assessment of the equality impacts as the policy continues to apply equally to all types of claimant and focuses on those aiming to avoid proper costs liability. Once responses have been received, however, we will consider publishing an updated equality statement in the government response to Part B.

Family Test

85. The Family Test is an internal government challenge to departments to consider the impact of their policies on promoting strong and stable families. As part of the consultation we asked respondents to provide views on the impact of the proposals might have on families. Some respondents answered this question commenting that it could have an impact on families as they will be involved in judicial reviews for example, where the matter concerns adoption, housing, immigration and custody of children. The government has considered the impact on the proposals on families and believes that the proposals will not have a disproportionately adverse effect on families and that any requirement to provide financial information will be justified by the policy aims of increasing transparency and fairness in the allocation of judicial review costs.

86. As with our assessment of equality impacts, we do not consider the proposals outlined in Part B to change our assessment of the family test. The policy does not directly impact family formation, the ability of claimants to play a full role in family life, separations or families at risk of deterioration. The policy could affect families undergoing key transitions. This could include the challenge of decisions made by authorities on marriage, adoption and caring provisions and responsibilities. In these cases the policy will apply equally to judicial reviews which relate to family issues and those which do not.

Part B

7. Request for further views on the provision of financial information to other parties

Introduction

87. This part of the report relates only to financial information provided in relation to section 85 of the 2015 Act and not to our proposals on costs capping orders under sections 88 to 90 of the 2015 Act.

88. The government proposed in the consultation paper that the financial information provided under section 85 of the 2015 Act would be available to the court but would not be made publicly available or provided to the defendant. That approach was, however, challenged by some respondents to the consultation and other senior experts. The government sees considerable sense in these arguments, and is inviting views on an alternative approach as set out below.

Rationale

89. The government now considers that providing detailed financial information to defendants and interested parties at the same time as it is provided to the court will offer equality of arms and will allow those parties to make fully-informed representations to the court about costs at any point in the proceedings. It also avoids placing the court in the unusual position where information of this type would be in the possession of the court but would not be available to all of the parties.

Proposal

90. The government proposes that both the financial declaration and any more detailed financial information will be filed at court and served on defendants and interested parties at the same time as the claim form. This will make sure that the court and all parties will be able to consider the same information ensuring equality of arms in this respect. In appropriate cases, existing processes would allow claimants to apply to the court to ask it to consider placing restrictions on the way in which the other parties handled the information. The government recognises that there may be exceptional circumstances when it may not be appropriate for the claimant to provide the financial information to the other parties. We would welcome views on this point, and also whether in those circumstances the court should be able to direct that some or all of this information is not served on the other parties.

91. The government also proposes that the public will not be given unfettered access to the declaration or the detailed financial information from the court file. Under CPR 5.4C(1), there are circumstances in which members of the public may freely obtain copies of certain types of documents – such as statements of case – that are held on the court file, and we are of the view that this rule should not apply to the declaration or the detailed financial information. Instead, we are of the view that CPR 5.4C(2) should apply if a person who is not a party to the case wants to access this information. Where CPR 5.4C(2) applies, a person has to apply for the court's

permission to obtain a copy of a document. Each application is considered by a judge on a case-by-case basis and, if the judge does decide to grant an application, it might be made subject to appropriate conditions. We consider that judicial discretion exercised in this manner is an appropriate safeguard to protect the information. Again, we would welcome views on this point.

Equalities and Family Test

92. In Part A of this report, the government sets out its view that the approach detailed in Part A for implementing the reforms is unlikely to disproportionately disadvantage people with protected characteristics or those bringing claims related to family issues. We believe that if there is any differential impact on any of these types of claimant that the proposals outlined in Part B are also a proportionate means of achieving the legitimate policy aim of increasing transparency and fairness in the allocation of judicial review costs. The government's view is that those points are not affected by this proposal, as they apply equally to all and remain focused on those who are avoiding proper costs liability. The proposal to provide the information to other parties does not change what the claimant may be required to provide. However, we would welcome views and evidence on that analysis.

Questions

1. **Do you agree with the proposal to serve the financial declaration and any more detailed financial information on the defendant and interested parties at the same time as the claim form? We would welcome your views on whether there may be exceptional circumstances when the court should be able to direct that some or all of this information is not served on the defendants and other parties.**

2. **Are there any alternatives approaches available as to the stage in the proceedings when the financial information is provided to defendants and interested parties? If so, please describe them briefly and provide your reasoning.**

3. **Do you agree that it is appropriate not to allow this information to be provided to the general public under CPR 5.4C(1) and to leave any decision on this to the discretion of a judge on application?**

4. **We would welcome views on our assessment of the impacts of the further proposals set out in Part B on equality or the family test. We would particularly welcome any evidence or data to support those views.**

Part C

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

https://www.gov.uk/government/publications/consultation-principles-guidance

Annex A – Responses to specific questions

Respondents were able to answer each question with a comment. Due to the complex nature of the policy, the comments would often deal with a number of issues and were not always wholly negative of positive.

FINANCIAL INFORMATION

Question 1: Do you agree that a multiple choice declaration is appropriate? Please provide reasons.

1. The consultation paper proposed a multiple choice declaration model as the means for the claimant to provide information about the funding of their claim. Of the 39 responses to the consultation, 30 respondents answered this question. Of those responses, 25 were in favour of the proposal while four did not agree and one stated that they were maybe in agreement. Some respondents provided additional comments which expressed mixed views on support or opposition for the proposals.

2. Those who supported the proposal generally agreed that it was the least burdensome approach which made clear to the claimant what was required. Some respondents, however, were concerned that providing the information generally would be burdensome.

3. The main arguments and views expressed by respondents were:

- that a multiple choice declaration is the least intrusive option and strikes the right balance without requiring unnecessary provision of information;
- disagreement with a requirement to provide financial information at all, arguing that it will make the judicial review process more onerous for claimants and is an unnecessary extra burden, in whatever form the information is to be provided;
- a multiple choice declaration within an Annex to the claim form can act as an indicator for a claimant as to their position and whether they are required to provide additional information;
- rules need to be clear and consistent with the relevant provisions of the Criminal Justice and Courts Act 2015; and
- respondents considered that the definition of the options in the declaration were insufficiently clarified, such as the definition of a ‘member’, ‘interest’ and ‘likely funding’.

Question 2: Do you agree with the government’s proposed approach at paragraph 51(a)–(e)? Please provide reasons.

4. Paragraph 51 of the consultation paper sets out the proposed content of the multiple choice declaration and the further information which the government proposed would be required when certain part(s) of the declaration were applicable. Of the 39 responses to the consultation, 31 respondents answered this question. Of those

responses, 10 were in general favour of the proposal while 14 were not. Seven respondents provided a comment which expressed mixed views on support or opposition for the proposals.

5. Generally, concerns were raised around the wording and clarity of the proposals, including the definitions of 'interest', 'member', 'likely costs' and the type of assets expected to be included in estimations. In this regard, respondents who raised issues with the proposals tended to have concerns with options d) and e) which referred to:

   d) funding other than from the claimant's resources or legal aid; and

   e) the claimant is a corporate body that is unable to demonstrate that it has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review.

6. Some respondents considered that these options would be problematic for charities and public interest groups, voicing concerns that providing third-party details was not appropriate as those third-parties were not parties to the action and the requirement could have an impact on third-parties' willingness to provide funds, or in the case of charities, support and donate to charities.

7. The main arguments and views expressed by respondents were that:

   - disagreement about claimants having to provide information about sources of likely funding as well as about actual funding;
   - there was some support for claimants having to provide details of third party contributions under option d) and details of members under option e);
   - it would be very burdensome for groups such as charities to have to provide information about all their contributors, donors and funding sources. It would also overwhelm the court with information;
   - the information requested from corporate bodies might be unduly burdensome. Details of a contact person such as an executive of the body should suffice;
   - respondents suggested that third-party funding should only be declared and the details of the third party disclosed when the financial support is provided expressly for the purposes of the legal action;
   - some respondents expressed concerns around a 'chilling effect' on potential claimants and contributors;
   - some respondents suggested alternatives for charities and companies including that a charity could tick a box noting it was a charity and providing its registered charity number, that details of a designated contact could be provided or that information on companies should only be provided where information indicated that the company had been set up for the purpose of the litigation, or that if the claimant was a corporate body unable to meet its liabilities, it could just tick a box to that effect and the court could ask for further information if it required it;
   - with regard to a statement of truth, some respondents commented that the claimant may not be in the best position at the start of the claim to assess likely costs, particularly in relation to the defendant's position, and therefore the statement of truth should reflect that the information is provided to the best of the claimant's knowledge;

- many respondents criticised the focus on finances received from third parties as an indicator of control with comments that this went beyond the purpose of the legislation. Respondents disagreed that a person who provided funding should be identified when that person did not control the litigation, would not from it and there was no possibility of a costs order made against that person. Respondents commented that this would just be providing unnecessary information to the court and add to the administrative burden without any gain; and
- some respondents thought that the issues outlined above would engage Articles 6 and 8 of the European Convention on Human Rights.

Question 3: Do you agree that there should be no requirement for the claimant to provide their estimate of costs? Please provide reasons.

8. Of the 39 responses to the consultation, 30 respondents answered this question. Of those responses 26 largely agreed that a statement of costs should not be provided while four generally disagreed. Generally respondents thought that this would be too burdensome or difficult.
9. The main arguments or views expressed by respondents were that:
    - this would be burdensome to the claimant and be onerous for the court to consider and decide if they were realistic at the permission stage;
    - a claimant would only be able to estimate their own costs and would find it difficult to estimate what costs the defendant might have, particularly if the claimant is self-represented;
    - at the stage of applying for permission to proceed with judicial review, when the estimate would need to be provided, the claimant would not have any knowledge of whether the defendant would defend some or all of the grounds, or what the defence might involve or whether things like expert witnesses are needed. It would be very difficult to provide meaningful estimates of likely costs;
    - a minority of respondents thought it should be provided as the claimant will have an idea of the costs of their legal representation or could also provide a list of unknowns.

Question 4: Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 60? Please provide reasons.

10. This question asked respondents whether the claimant should be under a duty to update the court if, after the claimant provided the required financial information, there was a material change in their financial circumstances. Of the 39 total responses to the consultation, 27 respondents answered this question. Of those responses 13 stated they were in favour of the proposal while 14 by and large did not agree. Some respondents also provided comments from which it was not entirely clear whether they were in favour or not.

11. Many respondents agreed that the claimant should be under a duty to update the court if there were significant changes. Several respondents expressed concern over the

duty overburdening a claimant, particularly where they would have to update information about members or third-party funding.

12. The main arguments and views expressed by respondents were that:

- this could be burdensome to claimants if they had to provide an update every time even a trivial aspect changed. It would also be an administrative burden on the court to have to deal with the information and contrary to the overriding objective in the Civil Procedure Rules;
- it would be an unbearable burden on charities where information on many members would have to be provided and updated perhaps on a weekly or even daily basis. Charities could not afford the administrative work this would require;
- some respondents queried whether there was a need for the duty and questioned how useful the court might find the information;
- others agreed there should be a duty but it should only apply to a significant change; and
- others considered that the duty to update should not apply if the litigation was at the appeal stage and the appeal had been brought by the defendant.

Question 5: Do you agree that the financial information requirements and approach to service the government proposes should apply to all applications? Please provide reasons.

13. Of the 39 responses to the consultation, 32 respondents answered this question. Of those responses 10 were mostly in favour of the proposal while 19 were, in general, opposed. Three respondents provided a comment which also demonstrated mixed views on support or opposition for the proposals.

14. Some respondents agreed that the information should not be provided to the defendant or other parties, although others argued that provided the information to the defendant would be required for the defendant to effectively manage their litigation caseload and to decide when and how to petition the court for a costs award to be made against a third party. Many respondents thought that charities should not be required to provide the financial information, nor should those claims deemed to be environmental under the Aarhus Convention.

15. The main arguments and views expressed by respondents were that:

- there was a need to make sure that there was an appropriate degree of confidence in how detailed financial information would be dealt with;
- some respondents thought the information should be provided to the other parties as there was no reason not to disclose it and public bodies needed to be aware of their potential costs liability;
- if the information was provided to others there were concerns over misuse of the information or it being disclosed by the defendant to other parties;

- if the court decided that the information was to be served on the defendant, some respondents argued that the claimant should be able to make *ex parte* submissions about why this should not happen;
- in relation to whether there are types of applications which should be excluded from these financial information requirements, the following responses were made-
    - charities should be excluded for several reasons, respondents stating:
        - the potential for a chilling effect on contributions to charities, charities bringing meritorious judicial reviews and/or individuals willing to become trustees (if there was a requirement to provide their details);
        - charities litigate in the public interest and cases brought by charities have resulted in beneficial changes to law and policy which otherwise would not have happened;
        - requiring private financial information about a contributor/trustee/member's ability to bear costs would most likely result in a conflict between a trustee's duty to the charity and their own private interest in separating their personal finances;
        - it does not follow that a person who agrees to be a member of a charity is agreeing to provide funds for litigation or exerting any control over that litigation;
        - charity members/donors may not even be aware of litigation or intend that their donation or funds are going to be used for the litigation;
        - charities are already regulated by the Charity Commission and required to act (and litigate) in a way that furthers the charitable purpose, consequently charities should be excluded; and
        - there is no evidence that there is a problem with charities bringing judicial reviews without funding or to shield third-party funders;
    - environmental claims should be excluded as it would breach the Aarhus Convention, respondents stating that:
        - the proposal is unsuitable for environmental cases where claimants are generally not seeking to achieve any personal benefit;
        - the government acknowledges the public interest that environmental claims serve by having a separate costs capping regime;
        - there is the potential for a chilling effect on organisations bringing environmental judicial reviews; and
        - it is unnecessary for information to be provided as costs are capped in environmental cases;
    - other claims that respondents suggested should be excluded were legally aided individuals, claims involving families, claims brought in the public interest, human rights, discrimination or equalities;
- some respondents, however, argued that the provisions should apply to all claims or claimants and that exceptions would create loopholes;
- there may be difficulties in making exceptions, and in any event many charities are well resourced and represented. There may be far greater difficulties for litigants in person, and so there must be an emphasis on delivering a light touch approach.

FINANCIAL INFORMATION THRESHOLD

Question 6: Do you agree with the proposal for a single threshold expressed in monetary terms? If not, please provide reasons and, if possible, an alternative.

16. Of the 39 responses to the consultation, 29 respondents answered this question. Of those responses, 15 were in favour of a single monetary threshold while 14 expressed views which generally suggested they were either not in favour of the information requirement being triggered by a contribution or not in favour of a single monetary threshold. Some respondents also provided comments from which it was not entirely clear whether they were in favour or not.

17. Generally, respondents were in favour of a single, monetary threshold stating that this was the most practical approach. Where there was disagreement this was often because of disagreement with declaring third-party support at all or disagreement that a monetary contribution was any indication of control of or benefit from the litigation.

18. The main arguments and views expressed by respondents were that:

- a single, monetary threshold is the most practical and simple way of setting a threshold;
- a percentage threshold would be impractical. Respondents noted that it would be difficult for claimants to accurately estimate what percentage of the overall likely costs any contribution would amount to;
- many respondents objected to a threshold of any sort stating that mere finance does not indicate whether a third party controls or might benefit from the litigation;
- respondents argued that third-party details should only be provided where a third party is controlling or benefiting financially from the litigation;
- the potential for having their details declared to the court and possible costs exposure could deter people getting involved with charities and making donations;
- having to provide details of third parties would be an administrative burden for claimants, particularly charities, and could be a burden for the court;
- a percentage threshold would make sure that disclosure was proportionate to the cost of the claim; and
- a percentage threshold may be suitable and capture the precise information needed if the requirement to provide financial information was imposed at the conclusion of the proceedings.

Question 7: Do you have any data on typical legal costs in the context of judicial reviews or typical contributions to judicial reviews? Please provide details.

19. Of the 39 total responses to the consultation, 28 respondents answered this question. Of those responses 13 said they had data, 15 said they did not.

20. Generally respondents provided anecdotal examples rather than studied data. A range of estimates were provided, many of which are at Chapter 4 of the Consultation. Data included:

    - contributions to charities tend to range from £10 to £5,000. It is rare to have bigger donations;
    - charities may have to fundraise to £50,000 – £60,000 to bring a judicial review. They may not need to use it all for a piece of litigation but due to the impracticalities of predicting costs at the start of a case there would be implications for advising potential donors that their information might be declared if a percentage threshold was used;
    - academics Varda Bondy and Maurice Sunkin provided details of an unpublished, independent study containing data on 502 judicial reviews that reached final hearing from July 2010 – February 2012. As part of this study questionnaires asked solicitors who acted for claimants to provide details of the level of costs, how cases were funded and what costs orders were made. 198 questionnaires were received. The study indicated that in 21% of privately funded cases the costs incurred by claimants were below £15,000 and in 79% of cases the costs were £15,000 or above. 29% of cases the costs were said to have been £50,000 or above; and
    - a judicial review concerning Cairngorm National Park where the court ordered the claimants to pay costs of £38,000.

Question 8: Do you agree with the proposed threshold of £1,500? If not, please provide reasons and, if possible, an alternative.

21. Of the 39 total responses to the consultation, 35 respondents answered this question. Of those responses three generally agreed that £1,500 was appropriate, 29 largely did not agree. Three respondents provided additional comments which demonstrated mixed views.

22. Generally, respondents thought that the threshold was too low, particularly if it was to be used to indicate that a third party might control or benefit from the litigation. Respondents also disagreed with the costs data used in the consultation to suggest the threshold. Some respondents suggested an alternative level.

23. The main arguments and views expressed by respondents were that:

    - £1,500 is a very low amount to indicate that a third party might control or benefit from litigation;
    - it is unlikely that costs orders would be made against someone who contributes £1,500;

- the threshold should be set at a level where it could support an inference that the funder is looking to control or benefit; a higher threshold would reduce the administrative burden on claimants, especially charities, and the court;
- too low an amount would capture crowd-funding sources which could be anonymous and a burden to trace;
- too low an amount would deter people from contributing and have a particularly detrimental effect on charities;
- the data on which the £1,500 threshold was based was not sufficiently robust;
- Varda Bondy and Maurice Sunkin again provided details of a study where solicitors responded to questionnaires asking about the costs of their cases. Based on these findings, nearly 80% of judicial reviews incur costs for the claimant above £15,000, meaning the suggested £1,500 threshold was too low. The consultation has arrived at this £1,500 figure by taking approximately one third of the lowest data available – costs of £5,000. Using £15,000 as an estimate of potential costs as indicated by the questionnaires and taking approximately one third of the figure, the respondent suggested a suitable threshold would be between £5,000 – £8,000;
- other suggested thresholds were £500 as a starting point for a threshold which could then be increased over time if needed, £1,000, £3,000 – £5,000, £5,000, £10,000, £15,000; and
- that the threshold should be proportionate to a claimant's wage to a maximum of £1,500.

COSTS CAPPING ORDERS

Question 9: Do you agree with the government's proposal for a more detailed picture of the applicant's finances on an application for a costs capping order than is required with an application for permission? Please provide reasons.

24. Of the 39 responses to the consultation, 28 respondents answered this question. Of those responses, 16 by and large agreed a more detailed picture was necessary while seven generally did not. Five respondents also provided a comment which suggested mixed views on support or opposition for the proposal.

25. The main arguments and views expressed by respondents were that:

- the award of a costs capping order has an impact on the public purse and on the defendant so it is appropriate that a detailed picture is given by the applicant;
- it appears reasonable that if a party is seeking costs protection they should provide adequate information to demonstrate conclusively that they require it;
- the information requested must be proportionate and within the bounds of what is permitted by the legislation;
- the suggested approach goes beyond what is required by the current regime under *Corner House*;
- it is an onerous, administrative burden to provide this information, particularly on charities which may dissuade them from litigating in the public interest;

- one respondent commented that it may be difficult to get the information together if the application for the costs capping order was made alongside an application for permission to appeal to the Court of Appeal and the short timeframe that allows;
- some respondents disagreed that the information to be provided should include funding *likely* to be available; and
- one respondent indicated that with changes to legal aid, other sources of funding are needed. This means claimants looking to third parties or other sources for funding and the proposals here could have a 'chilling effect' on access to justice.

Question 10: Do you agree that the applicant should not be required to provide supporting documents? Please provide reasons.

26. Of the 39 responses to the consultation, 27 respondents answered this question. Of those responses 24 generally agreed that supporting documents did not need to be provided whilst three appeared to disagree.

27. Generally respondents agreed that supporting documents were unnecessary. The main points expressed by respondents were that:
    - the court can request further information or supporting documents if it requires and the defendant or interested parties may apply for disclosure;
    - it would be disproportionate and burdensome to require supporting documents in every case. It would be quite time-consuming to provide these;
    - requiring supporting documents would risk the courts being inundated with papers that in many cases will not be required due to early disposal or settlement;
    - respondents considered that a statement of truth would suffice;
    - there were some concerns over the potential for misuse if supporting documents were routinely provided to the defendant; and
    - some respondents disagreed, however, considering that the applicant should be asked to provide these in order to demonstrate the veracity of their application.

Question 11: Do you agree with the government's proposal for the information on members which an applicant must provide when it is a corporate body unable to demonstrate that it is likely to have the resources available to meet liabilities arising in connection with the application for judicial review? Please provide reasons.

28. Of the 39 responses to the consultation, 28 respondents answered this question. Of those responses 11 by and large agreed with the proposal while 15 did not. Two respondents also provided a comment which demonstrated mixed views on support or opposition for the proposals.

29. There was some agreement that where a body cannot meet its liabilities it is appropriate to look to the members. Some respondents disagreed, stating that it was disproportionate and burdensome to provide the information. In some cases, such as

where the applicant is a charity, requiring private financial information about a contributor/trustee/member's ability to bear costs could result in a conflict between a trustee's duty to the charity and their own private interest in separating their personal finances.

30. The main arguments and views expressed by respondents were that:

- requiring information on members' finances would constitute a breach of the privacy protection in Article 8 of the European Convention on Human Rights. Some also argue that requiring compulsory provision of information in order to gain a remedy breaches the ECHR and is a breach of the overriding objective of the Civil Procedure Rules;
- corporate bodies may not hold all the relevant information so may not be able to produce it in a short timescale;
- although some agreed that it could be appropriate for an insolvent company to seek funds from its members, some argued it would not be appropriate for a corporate body to look to its members for additional funds in this way;
- it would be a conflict between the member's private interest and the company interest and that this may deter people from being involved in an organisation, particularly in the case of charities;
- members of charities do not gain a personal, financial benefit from being involved in the charity so should not be asked to personally cover costs, meaning that charities should be exempt from this provision;
- details of company members should only be disclosed if the member is seeking to drive or benefit from the litigation and the benefit should be a financial one;
- this may deter individuals from becoming members of charities; and
- registered charities are regulated by the Charity Commission, therefore any evidence of a charity being used as a 'shell company' to evade individual liability would be captured under existing regulation, meaning there is no need for details of its members to be disclosed.

Question 12: Do you agree that the financial information requirements and the approach to service which the government proposes should apply to all applications? Please provide reasons.

31. Of the 39 total responses to the consultation, 29 respondents answered this question. Of those responses 10 agreed with the approach to service and that the requirements should apply to all applications, whilst 16 largely disagreed, and others did not express a clear view or did not answer the question. Some provided comments which demonstrated mixed views on support or opposition for the proposals.

32. While some respondents considered that there should be no exceptions, several considered that charities should be excluded from the financial information requirements when applying for costs capping orders. In relation to providing information to defendants and interested parties, some respondents considered this was appropriate, but some considered it should not be routinely disclosed, or that there should be some provision for the applicant to request confidentiality.

33. The main arguments and views expressed by respondents were that:

- charities should be excluded from the requirements. Respondents gave several arguments for this including:
    - charities are already regulated by the Charity Commission, which provides sufficient safeguards to make sure they are acting with a purely charitable purpose;
    - it would be an onerous administrative burden for a charity to identify all of its sources of funding and provide this information to the court;
    - charities bring public interest claims and it would be wrong if they were deterred from doing this by the requirement to provide financial information; and
    - charities cannot anticipate future funding so could not provide accurate information.
- other respondents considered that applications involving families, applications based on public interest matters such as human rights, equalities and discrimination should not be subject to the requirements to provide financial information;
- some respondents however argued that, as a costs capping order has an impact on how public bodies deal with resources, there was no justification for treating different types of applications differently and that there should be no exceptions;
- there should be provision for an applicant to apply to court for some or all of the financial information to be withheld from one or more other parties to the proceedings and/or from the public domain. There should also be the provision for the applicant to withdraw the claim and the costs capping order application before disclosure is made if the confidentiality application is refused;
- these proposals may create a requirement to tell all potential members and contributors that they would be at risk of having their details disclosed or looked to for providing funding for costs of litigation – which could act as a chilling effect on those getting involved or donating to charity;
- it is disproportionate to the purpose of the statute and under Article 8 of the European Convention on Human Rights to require details of all the members of a corporate body or identify contributors who do not have a controlling interest in the litigation; and
- it should be possible for the claimant to receive information of how the defendant is funding its defence of claim and any third-party donations it is receiving.

COSTS BENEFITS ANALYSIS, EQUALITIES IMPACT AND FAMILY TEST

Question 13: Do you agree with the assumptions and conclusions outlined in the costs benefits analysis?

Question 14: Please provide any empirical evidence relating to the proposals in this paper. We are particularly interested in the costs associated with engaging in the judicial review process, the burden that these requirements would place on claimants and information on costs awards in judicial review cases.

34. Of the 39 total responses to the consultation, 20 answered question 13. Of those responses four agreed with the costs benefits analysis while 13 did not. Three respondents provided a comment but had mixed views on the question. In relation to question 14, five respondents gave details of evidence relating to the proposals.

35. Many respondents did not provide data or evidence relating to the proposals in this paper and were unable to provide any information in answer to question 14. Some respondents provided details of costs they had incurred in individual cases or their experience of likely costs. Some legal practitioners explained the advice they would usually provide to clients when discussing costs budgets at the start of proceedings. One respondent – as detailed above – referred to an independent study that looked into costs of judicial review proceedings.

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36. The main arguments and views expressed by respondents were that:

- there is a lack of evidence of third parties evading costs liability;
- a more detailed impact assessment should be completed before proceeding;
- if, as stated in the consultation, the provision of financial information will initiate only a small number of additional costs orders, it is difficult to see how the reforms are of benefit and they could be a disproportionate burden;
- the proposals on financial information and costs orders do not properly consider all potential impacts, such as the structure of membership organisations and corporate governance or the analysis did not consider unquantifiable impact for example applicants deterred from bringing judicial reviews or people contributing to funding;
- the proposals are so broad that they may have a wider impact than intended and would have a ‘chilling effect’;
- other respondents agreed that costs and benefits are difficult to quantify here and that while figures quoted by the government on the costs of judicial reviews are on the low side they are not ‘out of tune’; and
- some respondents agreed that there will be no adverse impacts and welcomed the statement that the proposals are expected to impact on only a small number of cases.

Question 15: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

Question 16: What do you consider to be the impacts on families of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

37. Of the 39 total responses to the consultation, 21 respondents answered question 15 on equality impacts and 10 answered the question on impacts on families.

38. The main arguments and views expressed by respondents were that:

In relation to those with protected characteristics:

- groups with protected characteristics will have greater interaction with public services and therefore may be more likely to be involved in judicial reviews;
- several respondents mentioned specific groups that may be affected including; vulnerable people, ethnic minorities, those for whom English is not the first language, claims involving gender and transgender, sexual orientation, those with physical and mental health issues and disabilities, ethnic and religious minorities (particularly so in immigration and asylum litigation), low incomes, BME and those deprived of their liberty and who have a protected characteristic. Respondents commented that charities and NGOs will often represent these groups and the proposals may adversely affect those groups as a result;
- the proposals could have a disproportionate impact on individuals with protected characteristics. Judicial reviews often relate to local authority decisions about housing, custody of children and immigration. The individuals involved in such proceedings are often vulnerable and may be struggling financially;
- there was little explanation for the government's justification that proposals will not have disproportionately adverse impact;
- respondents considered that if the only way in which people with protected characteristics can access the courts and hold public bodies to account on certain issues is by public interest litigation brought on their behalf by charities or NGOs, any proposals which will have a chilling effect on such cases being brought is likely to have an adverse impact on the elimination of discrimination and the advancement of equality of opportunity for protected groups;
- these proposals will increase barriers to public interest litigation which will only harm the goals set out in section 149 Equalities Act 2010;
- the government should keep under specific review whether a chilling effect is borne out; and
- some agreed that the lack of data made it difficult to assess the impact whilst others thought that the proposed reforms do not overly burden claimants.

In relation to impacts on families:

- judicial reviews often relate to local authority decisions about housing, custody of children and immigration, meaning that the proposals may therefore have a disproportionate effect on families;
- the impact on families would be indirect – any deterrent effect on charitable organisations bringing litigation could indirectly impact on the enjoyment of family life rights;
- the proposals in social service reviews of adoption could impact emotionally on families and not provide a level playing field; and
- there will be an impact on families, but not a significant one.

Annex B – List of respondents

1. The Association of Personal Injury Lawyers
2. Greg Callus (5RB Barristers)
3. The AB Charitable Trust
4. J.D.I. Baker
5. Gordon Johnson MBE
6. Campaign to Protect Rural England
7. Tracy Breakell
8. Richard Buxton Environmental Law
9. Matthew Gold Solicitors
10. Coram Children's Legal Centre
11. Kent Legal Services
12. Leigh Day
13. Wildlife and Countryside Link
14. Welsh Government
15. NAVCA (National Association for Voluntary and Community Action)
16. Constitutional and Administrative Bar Association
17. Bindmans LLP
18. Association of Charitable Foundations (ACF), National Council for Voluntary Organisations (NCVO) and Charity Finance Group (CFG)
19. Association of Chief Executives of Voluntary Organisations (ACEVO)
20. Law Society
21. Irwin Mitchell
22. London Borough of Hillingdon
23. London First
24. Liverpool City Council
25. The Bar Council
26. Varda Bondy and Maurice Sunkin
27. JUSTICE and Public Law Project (joint response)
28. Deighton Pierce Glynn Solicitors
29. Housing Law Practitioners Association
30. Crowd Justice
31. Medical Justice
32. Howard League for Penal Reform
33. Immigration Law Practitioners Association
34. Administrative Court Office, Royal Courts of Justice
35. Civil Justice Council
36. HMRC
37. Transport for London
38. The Senior Judiciary of England and Wales

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