Ministry
of Justice

Government response to the Joint Committee on Human Rights:

The implications for access to justice of the Government's proposals to reform judicial review.

July 2014

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The implications for access to justice of the Government's proposals to reform judicial review.

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

July 2014

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Introduction

1. This is the Government response to the Joint Committee on Human Rights' (JCHR's) Thirteenth Report of the 2013-2014 Session, *The implications for access to justice of the Government's proposals to reform judicial review*, which was published on 30 April. The Government is grateful for the JCHR's work on this important topic.

2. The JCHR has made recommendations in relation to how the courts deal with judicial reviews based on procedural irregularities, costs for interveners and Protective Costs Orders. It has also made recommendations in relation to legally aided judicial reviews and the Public Sector Equality Duty, and has proposed alternatives to the Government's own reforms. The Government's response to the JCHR's report and to each of its recommendations is set out below.

3. In writing this response, we have used the clause numbers in the version of the Criminal Justice and Courts Bill introduced into the House of Lords on 18th June 2014. For ease of reference, and in brackets the clause numbers used by the JCHR, these are:
   - Likelihood of substantially different outcome for applicant Clause 64 (Clause 52)
   - Interveners and Costs Clause 67 (Clause 55)
   - Capping of Costs Clauses 68 – 70 (Clauses 56 – 58).

Judicial Review and the Rule of Law

4. **JCHR: Restrictions on access to justice are in principle capable of justification. As Lord Neuberger pointed out in his lecture, the Government is obviously entitled to look at the way judicial review is operating in practice and propose improvements. Discouraging weak applications and reducing unnecessary delay and expense, for example, are clearly legitimate aims, and, to the extent that evidence shows that there exists a need to introduce changes to law and practice to serve those aims, proportionate restrictions which serve those ends will be justifiable. (Paragraph 17).**

5. The Government welcomes the Committee's acknowledgment that it is right to look at the way judicial review is operating and to bring forward improvements. The Government is clear that judicial review is, and must remain, a crucial check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure they are lawful and these reforms will not change that. We are clear that judicial review should be readily available where it is necessary in the interests of justice for these purposes. But the procedure should not leave judicial review susceptible to be used simply to campaign against, frustrate or delay proper decision-making.

6. The reforms the Government is pursuing are aimed at speeding up the process for people who have arguable grounds and a genuine case to put. The Government's view is that the reforms are a proportionate response to the concerns raised in the consultation *Judicial Review – Proposals for further reform*. Some of the original proposals are not being taken forward: we decided not to take forward changes to

standing (who is entitled to apply for judicial review) or limiting local authorities' ability to challenge key planning projects after careful consideration of practical and principled concerns raised by respondents.

7. The Government notes the JCHR's concern about the impact of changes on the ability of vulnerable groups to secure necessary legal protections. In formulating its proposals for reform the Government had due regard to the potential impacts and considers that the reforms will limit abuse and affect weak cases whether or not they are brought by such groups. The reforms should speed up consideration of strong cases (including those properly brought in the public interest) by focussing scarce taxpayer funded court resources on them.

The Lord Chancellor's Role

8. **JCHR: In our view, the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice. This raises issues which should be considered by a number of parliamentary committees, including the Commons Justice Committee and the Lords Constitution Committee. We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice, and of the restructuring of departmental responsibilities between the Home Office and the Ministry of Justice that followed the creation of the new merged office. (Paragraph 23)**

9. The Lord Chancellor has a unique constitutional role in relation to the rule of law, judicial independence and the administration of the courts and tribunals.

10. Section 1 of the Constitutional Reform Act 2005 expressly provides that its provisions do not adversely affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. Furthermore, the Lord Chancellor's Oath specifies that his role is to "respect the rule of law". There is no evidence to suggest that the responsibilities of the Secretary of State as, for example regarding sentencing or prisons, undermine the Lord Chancellor's responsibilities for justice and the rule of law.

11. In key respects, the division of functions between the Lord Chancellor and the Secretary of State is not as stark as the JCHR implies. Both roles entail responsibility for efficient and effective justice services, and both are therefore subject to common imperatives such as the need to determine goals, to modernise systems, balance efficiency and effectiveness, and provide accountability. Both roles require the evaluation and adjustment of diverse and potentially conflicting stakeholder interests and viewpoints. These conflicts are innate; they do not arise out of the combination of responsibilities.

12. The post-legislative assessment of the Constitutional Reform Act 2005 submitted to the Justice Select Committee in March 2010 emphasised that the wide-ranging constitutional reform to the relationship between the legislature, the judiciary and the executive had been implemented in line with the stated objectives of the Act and that the office of Lord Chancellor itself had been successfully modified and remains operational.

13. In the Government's view the combined portfolios of the Lord Chancellor and the Secretary of State are not therefore in conflict and there is no evidence to support the need for a review of the effect of combining in one person these two roles. Lord Chancellors have previously engaged in reform of judicial review, both before they held the role of Secretary of State for Justice as well as after.

The Evidence Base

14. **JCHR: We recognise that there has been a substantial increase in the number of judicial reviews in recent years, but this has been largely because of the predictable and foreseen increase in the number of immigration cases being pursued by way of judicial review. Such cases, however, have been transferred from the High Court to the Upper Tribunal since November 2013. We note that the number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We also note that there has not been sufficient time since the transfer of immigration cases to the Upper Tribunal for any assessment to be made of whether the numbers of judicial review cases is still growing. We therefore do not consider the Government to have demonstrated by clear evidence that judicial review has "expanded massively" in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate. (Paragraph 30)**

15. Whilst much of the growth in judicial review has been in immigration and asylum cases, between 2000 and 2013 there was a 27% increase in other civil judicial reviews. The Government agrees that the transfer of Immigration and Asylum cases to the Upper Tribunal and the other reforms implemented in 2013 are an important first step but it is of the view that there are still issues that need to be addressed across all types of judicial review.

16. In 2012 only around 1,500 (20%) of the 7,700 applications considered for permission on the papers or at oral renewal were granted permission to proceed to judicial review. Between October 2012 and March 2014[1] around 30% of judicial reviews considered for permission on the papers or at oral renewal were found to be totally without merit. And in 2012 the average time to permission was around 100 days, around 220 days to oral renewal and around 330 days to a final hearing.[2] .

17. While the Government is not commenting on specific cases, examples brought to our attention during the consultation process include a challenge to planning permission which was refused permission at three stages causing significant delays, and a challenge to the "spare room subsidy" which the court considered a policy objection under the guise of a process challenge.

18. There have been a number of judicial reviews which have resulted in considerable delay to development projects, including infrastructure, housing, retail and residential developments. For example:

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[1] Latest published data in Court Statistics Quarterly since totally without merit marker introduced.

[2] Data from 2012 is used as 96% of cases have closed compared to 89% for 2013.

- the expansion of Bristol airport which was delayed by around 36 weeks;
- a £38m retail development in East London, due to create 500 jobs, which was delayed by 15 months at considerable cost to the developer and local economy;
- a development of 360 dwellings in Carmarthenshire which was delayed by around 18 months by an unsuccessful judicial review;
- a supermarket development in Skelton which was challenged by a rival store, delaying the development by around 6 months. The judicial review was found to be totally without merit;

19. The recent unsuccessful judicial review against the decision of the Secretary of State for Justice to grant a licence to exhume human remains that turned out to be those of Richard III was brought by a limited company - the Plantagenet Alliance Limited – which was formed for the purpose of bringing the litigation. The claimant company sought, and was granted, an absolute protective costs order on the basis that it did not have any assets, transferring the risk from the director of the company to the taxpayer. This meant that the director – the 'real' claimant - was protected from cost liability. Despite winning the judicial review on all grounds, the absolute protective costs order granted in the claimant's favour means that the Government is unable to recover any costs from the Plantagenet Alliance Limited. This applies also to the other defendants in the case, the University of Leicester and Leicester City Council.

20. The Government maintains that reform is needed to judicial review and is particularly keen to reduce the extent to which legal challenge unduly hinders economic development and regeneration.

21. The JCHR noted the concerns raised by the senior judiciary in responding to last autumn's consultation. The Government welcomes the engagement of the senior judiciary with that and with its earlier consultation paper and the constructive comments they made. In relation to both sets of reform, the Government considered their views carefully before proceeding. Whilst the senior judiciary raised concerns about several of the proposals, they responded positively, for example, on streamlining how planning and environmental cases are dealt with – which the Government adopted in deciding to take forward a Planning Court rather than a Planning Chamber - and having greater information on how litigation is funded. They were content with the principle of widening the scope for leapfrog appeals and made some very helpful suggestions on the detail of the measures which we have taken into account in developing the policy. And having listened carefully to the senior judiciary and other respondents, we decided not to take forward changes to standing or limiting local authorities' ability to challenge key planning projects ('Dutch Standing').

The Way Forward

22. On 5 February 2014 the Government published its response to the second of its judicial review consultations and set out a package of measures to make sure that the judicial review process is not open to abuse, arguable cases can proceed quickly to final resolution, and financial risk is proportionately balanced between those involved. The majority of changes will be given effect through the Criminal Justice and Courts Bill currently before Parliament, while others such as the costs of the oral permission hearing and legal aid payments for permission applications are being taken forward through secondary legislation.

23. The proposal concerning payment of remuneration to legal aid providers for civil legal services consisting of making an application for judicial review has been implemented by the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 ("the 2014 Regulations"). The 2014 Regulations amended the Civil Legal Aid (Remuneration) Regulations 2013 to insert a new regulation 5A. The 2014 Regulations were laid before Parliament on 14 March and came into force on 22 April.

24. The Government is grateful to the JCHR for its deliberation on the proposals set out in the consultation paper *Judicial Review: Proposals for further reform,* and for the opportunity to provide both written and oral evidence.

25. The Government will continue to engage constructively with interested Members in the course of the progress of the Criminal Justice and Courts Bill through Parliament.

Procedural defects and substantive outcomes

26. A court or tribunal may already refuse an application for permission or to provide a remedy where it is satisfied that a complained of flaw would 'inevitably' have not made a difference to the outcome of the process in question. The Government's reform, in Clause 64 of the Criminal Justice and Courts Bill, would require the court or tribunal to refuse permission or a remedy where it was satisfied that a complained of flaw would have been 'highly likely' to have made no difference to the outcome of the process in question for the applicant.

27. **JCHR: We accept that it is a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law. However, for the reasons we have explained above, in our view lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied. It therefore risks giving rise, in particular cases, to incompatibility with the right of practical and effective access to court, which the European Court of Human Rights recognises as an inherent part of the rule of law requiring States to ensure that legal remedies are available in respect of unlawful administrative action determining civil rights or obligations. (Paragraph 45)**

28. The Government's view is that its reform will allow cases built on minor technical flaws to be determined more swiftly, and with fewer scarce and taxpayer-funded court resources expended.

29. 'Highly likely' still presents a high threshold to meet (taking into account the development of the case law in this area which establishes that mere probability is not sufficient: *R (Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 para 10 per May LJ)).

30. As such, where there is any significant doubt as to whether the flaw complained of would have made a difference the clause would not cause permission or relief to be refused by the court. As where the inevitability threshold is met, where it is highly likely that the flaw complained of would have made no difference to the outcome the Government's view is that any remedy which would have been provided would have been of no substantive benefit to the claimant.

31. The Government is of the view that its reform is compatible with Article 6(1). Full reasoning is set out in the *'Memorandum prepared by the Ministry of Justice on the compatibility of the Bill with the European Convention on Human Rights'*, which can be found at https://www.gov.uk/government/publications/criminal-justice-and-courts-bill-overarching-documents

32. In brief, in *Golder v. United Kingdom (1975)* the European Court of Human Rights stated that the right of access to a court is protected by Article 6. However, that right is not absolute, and may be made subject to limitations which "may vary in time and place according to the needs and resources of the community and individuals". To

remain compliant, any such restrictions do need to be in pursuance of a legitimate aim and be proportionate to that aim.

33. As has been stated, in the Government's view the clause pursues the legitimate aims of allowing claims based on minor procedural defects to be determined more quickly, and with fewer resources expended; those resources can be used to determine challenges in which it is more likely that there had been some substantial effect on the outcome.

34. The threshold to be applied is relevant to proportionality – whilst the clause sets out a move away from 'inevitably' the threshold is still a high one, so that even where it is likely that a procedural defect would not have made a difference the court <u>can</u> grant permission or a remedy. Consequently, the Government believes this is a proportionate approach to making sure that the access to justice is provided for those cases which are more than academic or hypothetical and that resources can be properly directed to those meritorious cases likely to make a difference.

35. **JCHR: The Government ought not so lightly to go against the views of the senior judiciary on a matter concerning the practical impact of its proposal on court proceedings, at least without any indication as to how the concerns of the senior judiciary can be mitigated in practice. In the absence of such concrete proposals, we set greater store by the senior judges' concerns that lowering the threshold will unavoidably lead to "dress rehearsal permission hearings", with all the associated cost and delay. We are also concerned about the combined effect of this proposal and the legal aid proposal that we consider below, because together the two proposals significantly increase the amount of pre-permission work which will have to be done by claimants' lawyers at their own risk. (Paragraph 48)**

36. The Government's view is that cases which would have made no difference should be determined earlier, and with fewer resources. It is important to make sure that judicial reviews focus on issues which could have had an impact, not mere technicalities.

37. The Government accepts that where 'no difference' arguments are raised the court will require a relatively deep understanding of the matter, but it does not accept that this means judicial reviews will become overlong.

38. At present a defendant may make 'no difference' arguments, and in those cases the challenges should not be more drawn out under the new threshold than under the existing one. Defendants should only argue that it is highly unlikely that the flaw complained of would have made no difference to the outcome for the applicant where sure of their position. If the arguments are made without a sound basis the courts would be able to look to costs. In the Government's view, this will act as a sufficient deterrent to defendants taking up court time by making such arguments in inappropriate cases.

39. The Government will in due course invite the Civil Procedure Rule Committee to create a process in rules of court which allows for oral arguments on this question at permission where necessary. It would be wrong to pre-empt that Committee's consideration.

40. Turning to the combined effect of legal aid and clause 64, there may be small additional costs to legal aid providers if fewer cases are granted permission as a result

of the change to the procedural defects test. Fewer legal aid providers may be willing to take on the risk of legal aid judicial reviews lodged solely on grounds of a procedural defect. However, we believe that this will be mitigated by the fact that legal aid providers may consider more carefully the merits of lodging JR, with providers incentivised to take a more considered approach and therefore no longer take forward weaker cases.

41. **JCHR: We are not persuaded that there needs to be any change to the way in which courts currently exercise their discretion to consider, at both the permission and the remedy stage, whether a procedural flaw in decision-making would have made any substantive difference to the outcome. We therefore recommend that clause 52 (*now clause 64)* be deleted from the Criminal Justice and Courts Bill. (Paragraph 54)**

42. **However, if Parliament prefers to retain clause 52, we recommend that clause 52 be amended so as to reflect the current approach of the courts. In our view, there is a case to be made for such an amendment in order to clarify the approach which the courts currently take to the issue of whether the correction of a procedural defect would make any difference to the outcome. The fact that the Government's own consultation initially proceeded on the mistaken assumption that there is currently no role for the "no difference" argument at the permission stage demonstrates the need for such a statutory clarification. (Paragraph 55)**

43. **We therefore recommend amendments which would make clear that the High Court and the Upper Tribunal have the discretion to withhold both permission and a remedy if they are satisfied that the outcome for the applicant would inevitably have been no different even if the procedural defect complained of had not occurred. The following amendments to clause 52 would give effect to this recommendation:**

    Page 52, line 35, leave out 'must' and insert 'may'

    Page 52, line 37, leave out 'not' and insert 'decide not to'

    Page 53, line 1, leave out 'highly likely' and insert 'inevitable'

    Page 53, line 12, leave out 'highly likely' and insert 'inevitable'

    Page 53, line 13, leave out 'must' and insert 'may'

    Page 53, line 16, leave out 'conduct (or alleged conduct) of the defendant' and insert 'procedural defect'

    Page 53, line 34, leave out 'conduct (or alleged conduct) of the defendant' and insert 'procedural defect'

    Page 53, line 38, leave out 'highly likely' and insert 'inevitable'

    Page 53, line 40, leave out 'must' and insert 'may'.

    (Paragraph 56)

44. As explained above, the Government's view is that mere technicalities which are highly unlikely to have made a difference to the outcome for the applicant should not be an adequate basis for a judicial review to proceed. As developed in case law, the existing approach sees judicial reviews dismissed by the court or a remedy refused only where it would be inevitable that a complained of flaw would not have made a difference. This is a high threshold to meet, which is why the Government has introduced clause 64 and resisted the Committee's amendments in the Commons at Report on 17 June (Official Report, cols. 963 - 1004).

45. The amendments which would have replaced 'conduct (or alleged conduct) of the defendant' with 'procedural defect' were also resisted.

46. In the Government's view, in practice the clause will only bite on minor procedural defects. This reflects the current approach whereby the courts are more willing to refuse a remedy where the complaint is in relation to procedural fairness. The retention of the high threshold of 'highly likely' means that any major or substantive defects would be dealt with as they are now given that it would be difficult to demonstrate that they resulted in no substantial difference for the applicant.

47. The Government has concerns about introducing the term "procedural defects" into statute. The grounds for judicial review are not defined in legislation and the Government takes the view that to confine the operation of the clause to 'procedural defects' would represent a partial attempt to put the grounds for judicial review on a statutory footing. The term has no accepted definition, and it appears to the Government that it would be impossible to arrive at a definition which would maintain its meaning as judicial review continued to evolve.

Legal aid for judicial review cases

48. The Government considers that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most if the legal aid system is to command public confidence and credibility. We therefore amended the Civil Legal Aid (Remuneration) Regulations 2013 ("the Regulations") to implement the proposal that legal aid providers should only be paid for work carried out on an application for permission in a judicial review case if permission is granted by the court, but subject to a discretion to pay providers for work carried out on an application for permission in cases that conclude prior to a decision on permission.

Chilling Effect on Legal Service Providers

49. **JCHR: In our view, the reform pushes too much risk onto providers, and creates too much uncertainty about the degree of such risk, causing a chilling effect on providers which will have a significant impact on access to justice because meritorious judicial review cases will not be brought. (Paragraph 76)**

50. The Government does not accept that there will be a denial of access to justice for claimants who may have meritorious cases. Rather, the policy will ensure that limited funds are properly targeted on those judicial review cases which really require it. Providers will need to scrutinise claims carefully before applying to the Legal Aid Agency (LAA) for funding. Where the case is meritorious the claimant will still be represented and the provider will be paid, either through a costs order from the defendant, or by legal aid because the case is granted permission or because the case concludes prior to permission and the LAA exercises its discretion in the provider's favour.

51. For these reasons the Government does not accept that the policy gives rise to a chilling effect on access to justice or is unlawful.

52. It is also important to remember that remuneration will continue to be paid in the usual way for the earlier stages of the case, to investigate the prospects and strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings. In addition, remuneration will continue to be paid for work relating to interim relief.

Evidence of number of weak claims

53. **JCHR: We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. In our view, for the reasons we have explained above, it constitutes a potentially serious interference with access to justice and, as such, it requires weighty evidence in order to demonstrate the necessity for it—evidence which is currently lacking. (Paragraph 79)**

54. Our data suggests that there are a significant number of unmeritorious cases which receive public funding but where permission is refused. In 2012/2013, there were 751 legally aided cases in which proceedings were issued but not allowed to proceed past the permission stage when considered by a judge. The Government considers that public funding should be directed at cases where it is needed most and taxpayers should not be expected to pay for unmeritorious cases.

55. It is of course impossible to state with certainty how many cases would in future benefit from a discretionary payment. In reaching its decisions, the LAA will consider the circumstances of each individual case, and in particular the three factors outlined in regulation 5A of the 2013 Regulations, and its decisions cannot be prejudged. However, the impact assessment published by the Government alongside the consultation response provides an indication of the number of cases in 2012/13 which may have been eligible to apply for a discretionary payment under the Regulations.

56. As explained in the impact assessment, the data used is based on end-point codes for cases, as recorded by legal aid providers with the LAA[3]. Due to uncertainty in recording practices, it is not possible to say with certainty how many cases may be affected[4]. However we estimate that, in addition to the 751 cases refused permission, up to another 1,732 cases would be eligible to apply for a discretionary payment. However, the effect of new regulation 5A(1)(b) will be that meritorious cases which conclude pre-permission will continue to receive payment whereas weaker cases will not.

57. It is worth making the point again that the 751 legal aid cases referred to above are the number of cases in which permission was refused; therefore the assertion that this number could include settled cases is not correct. The Government does not accept that there will be a denial of access to justice for claimants who may hold meritorious cases. Rather, the policy will make sure that limited legal aid funds are properly targeted at those judicial review cases that really require it.

Secondary or primary legislation?

58. **JCHR: We also regret the fact that the Government has chosen to bring forward by a negative resolution statutory instrument a measure with such potentially significant implications for effective access to justice. (Paragraph 80)**

59. **In our view, the significance of the measure's implications for the right of effective access to court is such that it should have been brought forward in primary legislation, to give both Houses an opportunity to scrutinise and debate the measure in full and to amend it if necessary. The Government could have given both Houses of Parliament the opportunity to do so by including a provision expressly authorising the change in the Criminal Justice and Courts**

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[3] Legal aid providers are asked to record with the LAA the reasons how and why a judicial review case ended from a range of specified outcomes.

[4] See paragraphs 2.85-2.87 of the consultation response impact assessment, available via https://consult.justice.gov.uk/digital-communications/judicial-review/results/jr-impact-assessment-1.pdf. The number of cases is set out as a range due to the way outcomes are recorded by the LAA.

Bill which is currently before Parliament, Part 4 of which contains some other significant proposals for reforming judicial review. (Paragraph 81)

60. **In view of the unusual level of concern about the substance of the proposal, and the critical report of the Secondary Legislation Scrutiny Committee, we recommend that the Government withdraw the regulations it has laid to give effect to its proposal, and introduce instead an amendment to the Criminal Justice and Courts Bill to provide Parliament a proper opportunity to consider and debate in detail this controversial measure with such serious implications for effective access to the courts to hold the Government to account. (Paragraph 82)**

61. The Government does not consider that primary legislation was the appropriate vehicle through which these reforms should be considered by Parliament.

62. The 2014 Regulations were made under section 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which gives the Lord Chancellor the power to make regulations in relation to payment of remuneration to legal aid providers. The form of legislation and level of parliamentary scrutiny to which provisions in relation to the remuneration of providers should be subject was considered by Parliament during the passage of LASPO.

63. Making provision about payment of remuneration for judicial review work in primary legislation would not be consistent with the wider position on remuneration under LASPO. The Government does not agree that it is necessary to apply a higher level of scrutiny regarding remuneration for these types of cases but not for other types of case funded by legal aid.

64. It follows that secondary legislation subject to the negative resolution procedure was appropriate for these provisions, as provided for under section 41(5) of LASPO, because they relate to the remuneration of providers not the scope of legal aid for individuals.

65. The Government provided a substantive response to the Secondary Legislation Scrutiny Committee on 30 April. In its report, the Committee suggested that the reforms will result in a serious 'chilling effect' on providers of legal services. As detailed above, the Government does not accept that there will be a denial of access to justice for claimants who may have meritorious cases. Rather, the policy will make sure that limited legal aid funds are properly targeted at those judicial review cases that really require it.

Interveners and costs

66. The reform being taken forward in the Criminal Justice and Courts Bill at clause 67 provides for two presumptions regarding cost liability of those who apply for permission to intervene in a judicial review. First, that a party to the judicial review must not be made to meet the costs incurred by an intervener unless there are exceptional circumstances that make it appropriate to do so. Secondly, that, on application by a party to proceedings, the court must order an intervener to pay any additional costs incurred by that party as a result of the intervention unless there are exceptional circumstances which would make this inappropriate. In both cases the court must have regard to criteria set out in court rules in determining whether there are exceptional circumstances.

67. **JCHR: Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case. Such interventions already require judicial permission, which may be given on terms which restrict the scope of the intervention. We are concerned that, as the Bill stands, it will introduce a significant deterrent to interventions in judicial review cases, because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention. (Paragraph 92)**

68. **We therefore recommend that the Bill be amended in order to restore the judicial discretion which currently exists, by leaving out the relevant sub-clauses. The following amendment would give effect to this recommendation:**

    Page 55, line 30, leave out sub-clause (4) and (5)
    Page 55, line 37, leave out 'or (5)'

    (Paragraphs 93 & 94)

69. The JCHR noted that third party interveners are of great value and was of the view that the Bill is a deterrent to helpful interventions. The Government recognises that interveners can add value but considers that interventions should be made in appropriate cases and in a way which minimises the additional costs to the parties.

70. The JCHR commented that the clause is drawn too broadly: the prohibition on interveners being awarded costs is extremely wide and may mean the intervener cannot recover the costs it incurs when a defendant contests the application to intervene and loses; and the requirement that the court must order the intervener to pay costs incurred by other parties would apply even where the outcome of the case is the one the intervener is urging on the court. The Government considers that there are sufficient safeguards within the clause to ensure that such orders are made fairly - for example, it remains at the discretion of the court not to award costs against an intervener where exceptional circumstances exist. However, where, for example, the court considers the intervention was unnecessary or raised complex points that are not germane to the case, the Government considers that the intervener should bear those costs.

71. The JCHR's report says that it is not clear why there is a distinction in the proposals between interveners who are invited by the court to intervene and those who apply and are granted permission to intervene. While the Government recognises that the court must grant permission before the intervention can take place, it is the intervener's choice to intervene and to incur costs, whereas the defendant and ultimately the taxpayer do not have that choice. The Government wants to ensure that those who choose to become involved in judicial review proceedings face a proportionate exposure to financial liability.

72. In response to the JCHR's comment that the Bill should be amended to reflect the status quo where costs are a matter for the discretion of the court, the Government considers that the clause does not remove judicial discretion. It remains a matter for the court in an individual case to decide whether to make or not an order if it is in the interests of justice to do so.

73. The Government recognises however that this clause has caused some disquiet and as indicated during the Commons Committee and Report stages of the Criminal Justice and Courts Bill, it is looking seriously at how to help make sure that interveners consider carefully the cost implications of intervening while not deterring those that intervene in appropriate cases.

Capping of costs ("Protective Costs Orders")

74. The Government is pleased that the JCHR welcomes certain aspects of the provisions on costs capping contained in the Criminal Justice and Courts Bill at clauses 68 -70. Costs capping orders, usually known as Protective Costs Orders (PCOs), provide an unsuccessful party to a judicial review protection against having to pay the other parties' costs. The Government's reforms to the PCO regime seek to make sure that it is only in exceptional meritorious cases, where there is a strong public interest in an issue being resolved, that a party will have the benefit of a PCO.

75. Under the reforms taken forward in the Bill, a PCO may only be made after permission to proceed with judicial review has been granted and only in public interest proceedings. The court must consider the matters set out in the Bill when deciding whether the proceedings are 'public interest proceedings' and whether a PCO should be made; the Lord Chancellor has the power to change through secondary legislation the matters the court must consider in making these decisions. The Bill also requires that where a court awards a PCO to a claimant, it must also make an order limiting or removing the liability of the defendant, known as a 'cross cap'.

76. **JCHR: In our view, restricting the availability of costs capping orders to cases in which permission to proceed to judicial review has already been granted by the court is too great a restriction and will undermine effective access to justice. We recommend that the court should have the power to make a costs capping order at any stage of the judicial review proceedings, including at the initial stage of applying for permission. The following amendment to the Criminal Justice and Courts Bill would give effect to this recommendation:**

    Page 56, line 16, leave out "only if leave to apply for judicial review has been granted" and insert "at any stage of the proceedings." (Paragraph 101)

77. The Government recognises the value of PCOs in exceptional cases where there is a strong public interest that the issues in the claim are resolved. For this reason, the Government did not take forward its original consultation proposal to prohibit a court from granting a PCO where the applicant pursues a private interest. However, the Government remains strongly of the view that unmeritorious judicial review claims should not have the benefit of costs protection at the taxpayer's expense.

78. Preventing the availability of PCOs until after permission is granted will place a proportionate burden on applicants to bear the pre-permission costs where permission is not granted. Where permission for judicial review is granted the PCO will still apply to costs incurred during the permission stage. This means that, as now, in appropriate cases the applicant will still benefit from the full protection of a PCO.

79. **JCHR: We do not see the need for the Lord Chancellor also to have the power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings. Such a power has serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power from the Lord Chancellor. The following amendment would give effect to this recommendation:**

Page 57, line 3, leave out sub-clauses (9)–(11). (Paragraph 103)

80. The Government's view is that this provision is sensible and necessary for the practical application of the test of what are public interest proceedings. The approach to when a PCO should be made has developed over time and is likely to continue to do so. The power to amend the list of matters to which the judiciary must have regard will enable the Lord Chancellor to respond quickly and flexibly, without the need for primary legislation, where changes are required. Any changes the Lord Chancellor proposes to make will first be debated under the affirmative resolution procedure in Parliament before they can be brought into force. The Government is clear that this power will not undermine the separation of powers, nor will it affect the judiciary's discretion to apply these criteria in practice and make decisions in an individual case.

81. **JCHR: We recommend that the provision for cross-capping should be a presumption not a duty, which would preserve some judicial discretion in deciding the appropriate costs order to make in the circumstances of a particular case. The following amendment would give effect to this recommendation:**

    Page 58, line 1, leave out "must" and insert "should normally". (Paragraph 105)

82. The cost of defending a judicial review claim is met from public funds. The Government maintains that it is right that, where an applicant for judicial review is protected from the full costs consequences of bringing a claim, the publicly funded defendant is also afforded proportionate protection.

83. A mandatory cross cap for the defendant's costs does not remove the court's discretion over costs. The amount of the cap is not prescribed, and so remains a matter for the judge in the individual case who may choose to set the cross-cap at a much higher level to reflect the status and circumstances of the parties. The Government considers that this gives sufficient flexibility to address an imbalance in the parties' financial positions and preserves judicial discretion.

Alternatives to the Government's judicial review reforms

The Bingham Centre Report

84. The Bingham Centre for the Rule of Law conducted a review, chaired by Michael Fordham QC, "to consider practical ways of streamlining the process of judicial review without impairing its chief function of vindicating the rule of law." Its Report, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*, was published in February and makes a number of recommendations.

85. **JCHR: We welcome the Bingham Centre Report as an important contribution to the debate about possible reform of judicial review, demonstrating that the perennial problem of reducing the cost and delay of judicial review proceedings can be addressed in ways which are compatible with effective access to justice. In our view the Government could go some way towards achieving its aims of reducing unnecessary cost and delay by other reforms which would make the process of judicial review more expeditious and therefore cheaper. (Paragraph 108)**

86. The Government is grateful for the Bingham Centre's work on judicial review. In some areas, the Government has already introduced similar measures to those recommended in the report. For example the publication of target hearing dates has been adopted in the recently created Planning Court and is being monitored.

87. The Government is considering whether any of the report's other recommendations should be taken forward alongside the programme of reforms set out in the Bill.

Costs at the oral permission hearing

88. A person seeking to bring a judicial review requires permission from the court to proceed. If that permission is refused on their paper application they are able to request that the decision is reconsidered at an oral hearing. At present, where the claimant is refused permission at that hearing, a successful defendant's costs of being represented will only be awarded against the unsuccessful claimant in exceptional circumstances. The reform being taken forward is to introduce through the Civil Procedure Rules a principle that the costs of an oral permission hearing should usually be recoverable and that it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application. Where an oral permission hearing is successful costs will not be awarded against a party at that stage but will fall to be determined at the end of the substantive hearing.

89. **JCHR: We recommend that the Government should invite the Civil Procedure Rule Committee to amend the Civil Procedure Rules so that the costs of oral permission hearings in judicial review proceedings should be recoverable from the unsuccessful party at that hearing, whether that is the claimant or the defendant. In our view, this more even-handed approach to costs at oral permission hearings would provide the appropriate financial incentive to**

defendants as well as claimants and so help to reduce unnecessary cost and delay. (Paragraph 113)

90. The Government considers that such an approach would not be practical or necessary. The Government considers that the defendant should not be required to bear the costs of defending an oral permission hearing regardless of whether the claimant ultimately succeeds in his or her claim for judicial review.

91. As part of the court's discretion over costs, it will be able to consider, at the end of any substantive judicial review hearing, who should bear the responsibility for the costs of the oral permission hearing. The court may decide that the unsuccessful party to the full judicial review should not have to bear any of the other side's costs of the oral permission hearing. This, though, is a decision to be made in light of the outcome of the case and in the context of all the costs issues and not in isolation after the oral permission hearing.

92. The Government considers that these factors are sufficient to make sure this is an even-handed approach and remains of the view that the costs of the oral permission hearing should fall to be determined at the end of the proceedings.

93. In addition, this recommendation by the JCHR would place further pressure on scarce court resources as it could mean that cases which succeeded at oral renewal and went on to a substantive hearing might have more than one costs assessment (the first concerning the costs of the oral renewal, the second the substantive hearing).

Judicial review and the Public Sector Equality Duty

94. The Public Sector Equality Duty (PSED) requires public authorities to pay due regard to its three limbs when performing their public functions. If it is felt that a public authority has failed to comply with the legal duty this can form a ground for bringing a judicial review. The consultation sought views on whether there were any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review. This follows a recommendation by the Independent Steering Group tasked with reviewing the operation of the PSED to look at this issue.

95. **JCHR: We welcome the unequivocal confirmation from the Chair of the Independent Review that in his view the PSED should continue to be legally enforceable. From the examples of actual cases that have been cited to us in both written and oral evidence, it is clear to us that the legal enforceability of the PSED is crucial in ensuring the implementation of, and compliance with, equality law by public authorities. We do not rule out the possibility of there being a "quicker" and more "cost-effective" mechanism, but we recommend that any such mechanism must retain the ultimate legal enforceability of the duty by judicial review, rather than be an alternative to it. The Government's overall objectives of reducing cost and delay could be taken forward by the Equality and Human Rights Commission as part of their ongoing work to develop a statutory code of practice and further guidance on the PSED. We look forward to the Government Equalities Office keeping us closely informed about its work to implement the recommendations of the Independent Steering Group on the PSED. (Paragraph 129)**

96. The Government notes the Committee's observations. The Government Equalities Office, which is responsible for equality strategy and legislation across Government, is considering the results of the consultation as part of its work to implement the recommendations of the Independent Steering Group.

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