



Ministry  
of Justice

# **Government response to the Second Report of the House of Lords Select Committee on the Constitution Session 2014/15:**

## **Criminal Justice and Courts Bill**

September 2014



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House of Lords Select Committee on the Constitution  
Session 2014/15:**

**Criminal Justice and Courts Bill**

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

September 2014



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## Introduction

1. This is the Government response to the House of Lords Select Committee on the Constitution's ('the Committee') Second Report of the 2014–15 Session, *Criminal Justice and Courts Bill*, which was published on 4 July. The Government is grateful for the Committee's work on this important Bill. The current draft of the Bill can be found at <http://services.parliament.uk/bills/2013-14/criminaljusticeandcourts.html> and the clause numbers used in this response are taken from this version.
2. The Committee has invited the House of Lords to consider aspects of Parts 3 and 4 of the Criminal Justice and Courts Bill ('the Bill'). Areas to which the House's attention is drawn include Appeals in Civil Proceedings ('leapfrog appeals'), judicial reviews grounded on procedural flaws highly unlikely to have provided a substantially different outcome to the applicant, interveners and costs, and Costs Capping Orders. The Government's position on each of these is set out below.
3. For ease of reference the current clause numbers are below and in brackets the clause numbers used by the Committee.
  - Appeals in Civil Proceedings – Clauses 54–57 (clauses 46–49)
  - Likelihood of substantially different outcome for applicant – Clause 70 (Clause 64)
  - Interveners and Costs – Clause 73 (Clause 67)
  - Capping of Costs – Clauses 74–76 (Clauses 68–70).

## ‘Leapfrogging’ to the Supreme Court

4. **The Committee:** “The submission to that consultation [*Judicial Review: Proposals for further reform*] made by the senior judiciary of England and Wales stated, “we do not object in principle to the removal of the requirement for the consent of the parties, but suggest that provision is made for the view of the parties to be taken into account.” The Bill does not provide in terms for the views of the parties to be taken into account. **The House may wish to consider whether the bill should be amended so that it does so or, alternatively, whether the matter should be left to the judiciary.”** (Paragraph 4)
5. Sections 12–15 of the Administration of Justice Act 1969 provide for appeals to ‘leapfrog’ the Court of Appeal, moving directly to the Supreme Court, under the law of England and Wales. Under the present approach, an appeal may only leapfrog where it involves a point of law of general public importance, which either relates to statutory interpretation that has been fully argued at first instance or is one where the court of first instance would be bound by a superior court. Both the court of first instance and a Committee of the Supreme Court must agree to the application before a leapfrog can take place, and the consent of all parties is required. A leapfrog appeal may only begin in the High Court.
6. Clauses 54–57 of the Bill are intended to effect three changes to the present process for leapfrog appeals, namely:
  - a) allowing an appeal to leapfrog if it is of national importance or raises issues of sufficient significance to warrant the leapfrog;
  - b) removing the requirement for all parties to consent; and
  - c) allowing appeals from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission to leapfrog.
7. In the Government’s view, it is important not to over-prescribe matters of procedure on the face of the Bill, and to allow a measure of control and flexibility to the judiciary in the process of considering whether an application for a case to leapfrog should be allowed. The Government agrees with the Committee’s alternative suggestion that it is appropriate to leave such matters to the judiciary. Consequently, clauses 54–57 do not include a requirement for all parties’ views to be sought and considered. The parties’ views on whether the case fulfils the criteria for a leapfrog appeal will of course be relevant in the same way that they will be on the question of whether there are sufficient grounds for appeal, and whether those grounds raise a point of law of general public importance. There has been no suggestion that there should be a requirement on the face of the Bill to consider the parties’ views on those other questions. The Government’s view is that there is no reason to treat the question of whether the case meets the criteria for leapfrogging any differently and in any event the judiciary will be able to take such considerations into account. The Government will invite the Civil Procedure Rule Committee to consider what provision might be appropriate to include in Rules as a result of the changes in the Bill, and it would be wrong to pre-empt that consideration in this response.

## Judicial Review

8. The Committee's Report sets out the background of the reforms to judicial review and includes detail of the challenges to the evidence base. **Paragraphs 5–9.**
9. 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.
10. 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<sup>1</sup> 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.<sup>2</sup>
11. 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.
12. 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:
  - 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.
13. 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.

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<sup>1</sup> Latest published data in Court Statistics Quarterly since totally without merit marker introduced.

<sup>2</sup> Data from 2012 is used as 96% of cases have closed compared to 89% for 2013.



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.

14. 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.

### **Clause 70 – Likelihood of substantially different outcome for the applicant**

15. 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 70 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.
16. **The Committee said:** "In short, lowering the threshold risks unlawful administrative action going unremedied. As such, **the House may wish to consider whether clause 70 risks undermining the rule of law**" ..... **"The House may wish to reflect on the wisdom of reform to judicial process despite such warnings from the judiciary."** (Paragraph 11)
17. The Government's view is that 'highly likely' still presents a high threshold to meet and takes into account the development of the case law in this area which established that "mere probability" was not sufficient: *R (Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 para 10 per May LJ).
18. 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. 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.
19. 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 can grant permission or a remedy. Consequently, the Government believes this is a proportionate approach to making sure that 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.
20. The Government does not agree that clause 70 results in a significant risk that substantially unlawful action will go unremedied. The courts have previously established a "no difference" principle and consider such matters already, sometimes at the permission stage.

### **Clauses 73–76 – ‘Interveners and costs’ and ‘Capping of costs’**

21. Clause 73 relates to interveners and costs. It provides two rebuttable presumptions concerning when interveners who voluntarily intervene (i.e. it would not apply where the intervener was invited to become involved by the court) should pay their own or other parties’ costs. The first presumption is 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. The second presumption is 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.
22. Clauses 74–76 establish, in judicial review cases, a codified regime on Costs Capping Orders (‘CCOs’), commonly known as Protective Costs Orders. CCOs provide an unsuccessful party to a judicial review with protection against paying some or all of the other parties’ costs. The Government’s reforms replace the regime currently contained in caselaw with the codified regime. Under the reforms taken forward in the Bill, a CCO 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 CCO should be made; the Lord Chancellor has the power to change through secondary legislation the matters the court must consider in making these decisions (this is often referred to as a Henry VIII power). The Bill also requires that where a court awards a CCO to a claimant, it must also make an order limiting or removing the liability of the defendant, known as a ‘cross cap’.
23. **The Committee said: “The House may wish to consider whether the restrictions in clauses 73–76 impose too great a limit on effective access to justice. Paragraph 14. The House may nonetheless wish to consider whether it is constitutionally appropriate for the Lord Chancellor to have such a Henry VIII power. Paragraph 15.”**
24. In relation to clause 73 and interveners, 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.
25. The Government considers that there are sufficient safeguards within the clause to make sure that such orders are made fairly – for example, a court will only consider awarding costs against an intervener on an application of a party rather than in every case and, where an application is made, 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. The Government does not therefore consider that this clause limits access to justice.
26. The Government recognises however that this clause has caused some disquiet. As indicated during the passage of the Bill through Parliament, it is looking seriously at how to help make sure that interveners consider carefully the cost implications of intervening without deterring those that intervene in appropriate cases.

27. In relation to clauses 74–76 and CCOs, the Government recognises the value of CCOs in exceptional cases where there is a strong public interest that the issues in the claim are resolved. 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.
28. The Government considers that restricting the availability of CCOs until after permission is granted will place a proportionate burden on applicants to bear the pre-permission costs where permission is not granted. However, where permission for judicial review is granted the order will cover the costs incurred during the permission stage. This means that, as now, in appropriate cases where permission is granted the applicant will still benefit from the full protection of a CCO. The Government does not therefore consider that these clauses limit access to justice.
29. In relation to the power of the Lord Chancellor to amend the matters the court must take into account in deciding what is in the public interest, 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. As is clear from the development of Protective Costs Orders, the approach to when such orders 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. If the Lord Chancellor does in the future propose changes, they will first be debated in Parliament under the affirmative resolution procedure before they can be brought into force. The Government notes that when considering the Bill, the Delegated Powers and Regulatory Reform Committee in its 3<sup>rd</sup> Report of Session 2014–15 did not consider the delegation of this power to the Lord Chancellor within clauses 74 and 75 to be something necessary to draw to the attention of the House of Lords.

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