Ministry
of Justice

Judicial Review – proposals for further reform: the Government response

February 2014

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Ministerial Foreword

I believe in protecting judicial review as a check on unlawful executive action, but I am equally clear that it should not be abused, to act as a brake on growth. In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system.

The recent consultation 'Judicial Review: proposals for further reform' set out the Government's concerns about the growth in the number of judicial reviews, the motives of some who bring them, and their impact. The consultation attracted 325 responses. Having considered them with care I am satisfied both that there is a compelling case for reform and that it should proceed at pace.

Some of the changes I intend to take forward were detailed in the Autumn Statement and the National Infrastructure Plan, namely the creation of a Planning Court to reduce delays to key projects, allowing nationally significant cases to reach the Supreme Court more swiftly, and amending how the courts deal with judicial reviews brought on minor technicalities.

In addition, I am taking forward a comprehensive package of reform to the financial measures relating to judicial review. I want to ensure that claimants – and those who support and fund claims but sometimes remain hidden in the background – bear a more proportionate degree of financial risk when they decide to pursue a case. In particular, I am setting up a strict framework governing when Protective Costs Orders (in non-environmental cases) can be made. This reflects my belief that only claims which the courts deem to have merit and which are genuinely in the public interest should gain such protection and that, where a Protective Costs Order is granted, the taxpayer must also be protected from excess costs.

I consulted on a proposal to pay legal aid providers for work carried out on application for permission only if permission is granted, to ensure that weak cases no longer receive taxpayer funding. I intend to implement this reform, with some modifications to the discretionary criteria.

To complement our streamlining of planning cases, I will also introduce a permission filter for appeals under section 288 of the Town and County Planning Act 1990 in order to weed out weak claims earlier. I do not, however, intend to remove those cases (or those under section 289 of the same Act) from the scope of legal aid altogether.

Some of these measures may not be popular with those who benefit from the status quo, but I am confident that they support economic growth for our nation's future, promote fairness for the taxpayer, and protect access to justice for all.

Chris Grayling
Lord Chancellor and Secretary of State for Justice

Summary

Introduction and context

1. The consultation *Judicial Review: Proposals for further reform*, to which this document is the Government's response, opened on 6 September 2013 and closed on 1 November 2013. The consultation examined proposals in six areas aimed at reducing the burden imposed by judicial review. In particular the Government was concerned to speed up planning cases and tackle the abuse of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken. The present economic climate gives a particular urgency to reform, as the issues the Government is seeking to address are holding back growth.

2. The recent consultation sought to build on reforms to judicial review which were implemented following an earlier consultation.[1] Those reforms:

   - reduced the time limits for bringing a judicial review in planning and procurement cases from three months to six weeks and 30 days respectively;
   - removed the right to an oral reconsideration of a refusal of permission to bring judicial review where the case is assessed by a judge as totally without merit; and
   - introduced a new fee for oral renewal of a permission hearing, initially £215.

3. The first and second of these reforms were implemented on 1 July 2013, the third on 7 October. The Ministry of Justice has recently consulted separately on a move to full cost recovery for judicial review fees.

4. Alongside these reforms, from 1 November 2013 the majority of immigration and asylum judicial reviews transferred from the Administrative Court to the Upper Tribunal. This is expected to significantly reduce the judicial review workload of the Administrative Court and improve efficiency. The effect of the transfer on the Upper Tribunal will need to be monitored during 2014.

5. The reforms implemented last year were an important first step but the Government is of the view, having carefully considered the consultation responses, that more needs to be done.

6. The Government is also clear that its reforms do not detract from the crucial role played by judicial review as a check on the Executive.

Why further reform is needed

7. The latest court statistics published on 19 December 2013 show that there has been a significant growth in the volume of judicial reviews lodged, which by 2012 was nearly three times the volume in 2000 (rising from around 4,300 in 2000 to around 12,600 in 2012). For cases lodged in 2012, around 7,500 were considered for

[1] The consultation *Judicial Review: Proposals for reform* ran from December 2012 until January 2013. The Government response was published in April 2013.

permission and around 1,400 secured permission (including after an oral renewal).[2] The volume of judicial reviews lodged continued to increase during 2013. In the first nine months of 2013, around 12,800 judicial reviews were lodged, exceeding the total of around 12,600 for the whole of 2012.[3]

8. Around 16,000 cases were lodged over the 12 months between 1 October 2012 and 30 September 2013. Around 6,700 (42%) of these 16,000 cases reached the permission or oral renewal stages.[4] Around a third of the cases which reached those stages were found to be totally without merit.[5]

9. 325 responses were received to the recent consultation (summarised at Annexes A and B) including from legal practitioners and their professional bodies (e.g. the Law Society and the Bar Council), charities and NGOs, several of whom had difficulty with much of what was proposed. But there was a body of support for reform, particularly among businesses and public authorities who agreed that there are further improvements to be made to the current system. Other than in respect of certain proposals (see paragraphs 14 and 16) below, the Government believes that the case for reform is strong. Its reasons are set out in detail from paragraph 17 onwards, where each of the original proposals is considered in turn in light of the points made by respondents.

10. Respondents highlighted a number of cases where planning judicial reviews had delayed development projects – increasing costs for developers and delaying the economic benefits, including the creation of new jobs. For example, Southend Airport's expansion was delayed by 65 weeks after planning permission was granted despite permission being refused at every stage of the judicial review appeal, including an oral hearing in the Court of Appeal. Respondents suggested that the cost of this delay to the local economy was £100m per year.

11. The Government's view is that those who bring judicial reviews do not always have – but should have – a proportionate interest in the financial risk of litigation. One example provided related to a planning decision where a group of local residents formed a limited company which brought a judicial review. The company was formed by a small number of directors, each of whom paid £1 to the company funds. By doing this, the respondent argued, the directors aimed to avoid any adverse costs consequences if the challenge was unsuccessful. The potential cost to the taxpayer, in terms of defendant legal costs which might otherwise have been recovered from the losing claimant, could be significant. The respondent also said that other local residents were "horrified" that a small group could hold up a democratically agreed development at such small financial risk to themselves.

12. The Government has taken this opportunity to look again at the use of legal aid in cases of judicial review and considers that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most.

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[2] This figure does not include those cases that withdraw before a permission decision is made.

[3] https://www.gov.uk/government/publications/court-statistics-quarterly-july-to-september-2013

[4] At the time the data was extracted in November 2013.

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267508/csq-q3-jul-sep-2013.pdf

The way forward

13. Overall the Government has concluded that reform is necessary to address the problems it had identified and to help ensure that in future judicial review is used appropriately. This document sets out a package of measures, some of which have already been announced, which are the result of careful consideration of the many consultation responses. On 4 and 5 December 2013 respectively the National Infrastructure Plan and the Chancellor's Autumn Statement set out the Government's intention to proceed with the following reforms:

    - a specialist Planning Court within the High Court to deal with judicial reviews and statutory appeals relating to Nationally Significant Infrastructure Projects and other planning matters;
    - a lower threshold test for when a defect in procedure would have made no difference to the original outcome. The Government will also establish a procedure to allow this to be considered earlier in the case at the permission stage; and
    - allowing appeals to 'leapfrog' directly to the Supreme Court in a wider range of circumstances by expanding the criteria for such appeals, removing the requirement for consent of both parties, and allowing leapfrog appeals to be brought from more courts and tribunals.

14. The Government will also be taking forward a set of reforms to certain financial aspects of judicial review, the aim being to deter claimants from bringing or persisting with weak cases. Accordingly this document details action to be taken in respect of legal aid for judicial review cases, oral permission hearings, Protective Costs Orders, Wasted Costs Orders, interveners' costs and third party funding. The Government considers that these changes are a more effective means of reducing the number of unmeritorious judicial reviews that are either brought or persisted with than changing the test for standing.

15. The Criminal Justice and Courts Bill makes provision for the reforms in relation to procedural defects, the various financial elements of the package, and leapfrogging. Other elements in the overall reform package will be taken forward by means of secondary legislation.

16. Having considered the responses to the consultation, the Government does not intend to make any changes to the scope of legal aid for planning challenges under sections 288 and 289 of the Town and Country Planning Act 1990, or to the ability of local authorities to challenge infrastructure projects.

The Proposals – Planning

Planning Court

17. The consultation proposed establishing a new **Planning Chamber** in the Upper Tribunal, building on the recently established Planning Fast Track (PFT) in the Administrative Court. Details of the PFT and revised time limits were set out at paragraphs 40–44 of the consultation document. The PFT was introduced in July 2013 to reduce delays in challenges to major infrastructure and planning decisions. The PFT uses specialist planning judges to hear cases in line with administrative time limits set down by the President of the Queens Bench Division. Early indications are that the PFT appears to be working well (see below).

18. The Government invited views on further developing the fast track model to create a new Planning Chamber in the tribunal system. Just under a third of respondents expressed a view on the PFT versus a new Planning Chamber. Approximately half of those who commented on planning (mainly members of the judiciary and legal representatives) wanted time to assess the impacts of the first phase of reforms to judicial review and the impact of the PFT before supporting further reform. In particular, the senior judiciary supported keeping the PFT but developing it into a **Planning Court** within the High Court, with a longer term aim of streamlining how planning and environmental cases are dealt with overall.

19. Encouragingly, some respondents had noticed that the PFT is already having an impact. This appears to be borne out by the early data we have received from the Administrative Court with cases which reached permission during October 2013 taking around 7 weeks to get there from being lodged, compared to 21 weeks for the same month in 2012.[6] The Government wishes to build on this promising start.

20. Developers and industry welcomed the proposal to establish a Planning Chamber, though it was clear they welcomed any proposals that would speed up the hearing of planning and major infrastructure cases, in particular through the use of specialist judges, and the development of new procedural rules and set timescales.

21. Having considered carefully the arguments on both sides, the Government has decided to build upon the PFT by establishing a Planning Court in the High Court, as suggested by the senior judiciary, with a separate list under the supervision of a specialist judge. We will also invite the Civil Procedure Rule Committee to include time limits for case progression in the Civil Procedure Rules.

22. The Government is satisfied that the Planning Court continuing to hear cases in the High Court will deliver the improvements it had been minded to seek through the creation of a Planning Chamber in the Upper Tribunal. The Planning Court should be up and running more quickly without introducing uncertainty around the development of new rules and case management procedure that a Planning Chamber in the Upper Tribunal would have required.

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[6] The figures should be treated with caution as they relate to a very small number of cases over a short period of time, and differences in waiting times might reflect differences in case characteristics rather than improvements in court processes. In addition, since the PFT has only been in operation since July, the data relates only to the first part of the court process (from the claim being lodged to a permission decision). Nevertheless, the PFT does appear to be delivering improvements in the pre-permission stages.

Permission filter for section 288 Town and Country Planning Act 1990 challenges

23. Section 288 of the Town and Country Planning Act 1990 provides the only mechanism by which an aggrieved person can challenge certain planning orders, decisions and directions. Challenges may be brought in the High Court on the basis that the order or action concerned was beyond the power conferred by the Act, or that the procedural requirements in relation to the order or action were not complied with.

24. Following suggestions by the judiciary, the Government consulted on whether to include a permission filter for these challenges. This would mean that leave of the court would be required for a challenge to be brought, echoing the approach for judicial reviews and restricting how far weak cases could progress.

25. Of those who responded, the majority were in support, arguing that this would help to reduce the burden of weak challenges. Whilst some respondents raised the risk of the extra stage adding delay, the Government is persuaded that this step will assist by allowing weak challenges to be dealt with more quickly. Scarce resources can then be better focused on stronger cases, also allowing those to be considered more quickly than at present. It will also ensure consistency with the equivalent permission stage for planning judicial reviews.

Local authorities challenging infrastructure projects

26. The major infrastructure planning regime is the process through which Nationally Significant Infrastructure Projects (NSIPs) relating to transport, energy, waste, waste water and water get planning permission and other consents. The major infrastructure regime, contained in the Planning Act 2008, has been in operation since March 2010. Judicial review provides the final opportunity for testing that the legal process has been complied with. The 2008 Act provides for a 6 week time limit for an application for judicial review to be brought.

27. The Government sought views on whether local authorities, who are statutory respondents under the major infrastructure regime, should continue to have standing to challenge permission decisions. Following careful consideration of responses, the Government was persuaded by respondents who noted that, as the consultation set out, there had been no challenges by local authorities to NSIPs since the major infrastructure regime has been in force. Many also argued that, if a local authority does bring a challenge, it will be for the people that the authorities represent to arrive at a view on whether that decision was the right one. The senior judiciary noted that local authorities are already constrained in statute over whether and how they can bring a challenge; and that where local authorities do bring a judicial review it is usually well founded.

28. The Government accepts that in the absence of any challenges to NSIPs by local authorities there may still be arguments about future proofing the 2008 Act regime against challenges in years to come. But it is not convinced that to do so would be beneficial. Developers report that the 2008 Act regime is working well, and that much of that is down to developers and other interested parties, including local authorities, engaging in a constructive way early in the process. Making this change could upset that careful balance. Further, where a claim is brought by a local authority it might be instead of several less well-focused claims by affected individuals and groups, which may actually serve to cause delay. The establishment of a separate Planning Court

will also assist by streamlining the progression of planning judicial reviews through the courts. For these reasons the Government is not minded to make this change.

Funding for challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

29. At present, legal aid is not generally available in respect of planning cases or statutory challenges under sections 288 and 289 of the Town and Country Planning Act 1990 other than where an individual is at immediate risk of losing their home as a result of the proceedings in question. In the consultation the Government asked whether legal aid should continue to be available (in scope) in those situations, or whether it should only be available where a failure to fund would result in breach, or a risk of breach, of the legal aid applicant's ECHR or EU rights.

30. Legal Aid Agency data suggests that there were only two legally aided challenges under sections 288 and 289 in the last 3 years, both of which were granted legal aid prior to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 coming into force. This is an area in which some respondents had particular concern over equalities.

31. Given the arguments raised, the Government has decided not to seek to remove legal aid for these challenges at the present time but intends to introduce a permission filter in section 288 statutory appeals (in line with the filter which already exists in section 289 appeals). This will provide a stronger mechanism to prevent weak cases proceeding to a full hearing in future.

The Proposals – Standing

32. The consultation tested whether there was a case to reform standing to bring a judicial review. The present test for standing, set out in section 31 of the Senior Courts Act 1981, requires a claimant to demonstrate a "sufficient interest in the matter to which the application relates". The consultation noted that the test had been applied less restrictively by the courts over time, so that groups and individuals without a direct interest were now more often able to bring judicial reviews in the public interest. The Government had become concerned that this wide approach is vulnerable to misuse by those who wish to use judicial review to seek publicity or otherwise to hinder the process of proper decision-making. The consultation therefore sought views on whether the existing test should be changed.

33. This suggestion was largely opposed, particularly by lawyers and their representative groups and NGOs, who argued that claims brought by groups or organisations without a direct interest in the outcome should continue to be possible. The case for change was challenged, given that there were few such claims brought (as a percentage of total applications) and that Government figures indicate those cases tend to be more successful than on average. Many respondents argued that a change would impact upon meritorious claims which hold the executive to account where it has acted unlawfully and therefore shield the executive from challenge. Additionally, some respondents argued that a direct interest test would alter the purpose of judicial review, moving the focus from challenging public wrong to protecting private rights. The risk of a period of uncertainty and cost while a direct interest test is litigated through the courts was also highlighted and respondents questioned the potential effectiveness of any new test.

34. It was also argued that requiring a direct interest might be counter-productive – causing multiple individuals to bring challenges whereas, under the current test, a single challenge by an expert group would have been brought, with a focus on the key issues.

35. The Government is clear that the current approach to judicial review allows for misuse, but is not of the view that amending standing is the best way to limit the potential for mischief. Rather, the Government's view is that the better way to deliver its policy aim is through a strong package of financial reforms to limit the pursuit of weak claims and by reforming the way the court deals with judicial reviews based on procedural defects.

The Proposals – Procedural Defects

36. At present, the court may refuse to grant permission or award a final remedy on the basis that it is inevitable that a complained of failure would not have made a difference to the original outcome. 'Inevitable' is a high threshold to meet, and the court rarely examines no difference arguments at the permission stage. The consultation sought views on changing the existing approach so the court should refuse permission or a remedy in a case where the alleged failure was 'highly unlikely' to have made a difference – in other words, lowering the threshold.

37. Some respondents, particularly legal practitioners and their representative groups, had concerns about these proposals. The risk of dress rehearsals at permission was noted. (By this, respondents meant that the change would require a fuller examination of the facts and might turn permission hearings into full considerations of the entire case, adding delay.) Few however made suggestions on how to mitigate that risk. A number of respondents thought that amending the test would see valid claims and substantive illegality not ventilated or remedied and would encourage public authorities to behave unlawfully, with potential implications for claimants' confidence in the effectiveness of judicial review. There were also concerns that the court would stray beyond the present focus of judicial review, which concerns the lawfulness of the procedure, to consider the merits of the original decision.

38. The Government's view is that, in a case where the defect complained of is highly unlikely to have made a difference, any remedy the court awards will also be unlikely to make any substantive difference to the outcome. Therefore, the Government's position is that judicial reviews based on failures highly unlikely to have made a difference are not a good use of court time and money. The Government is satisfied that the risk of dress rehearsals is manageable, and that the new test is a reasonable one, given that where there is anything more than minor doubt as to whether there would have been a difference the courts would still be able to grant permission or a remedy.

The Proposals – Public Sector Equality Duty and Judicial Review

39. The Public Sector Equality Duty (PSED) requires public authorities to pay due regard to its three limbs when performing their public functions.[7] 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.[8]

40. The Government Equalities Office, which is responsible for equality strategy and legislation across Government, is considering the results of the consultation (see summary at Annex A) as part of its work to implement the recommendations of the Independent Steering Group.

The Proposals – Financial Incentives

41. The Government intends to bring forward a tough package of reform to financial provisions in respect of judicial review to deter weak claims from being brought or pursued. It is right that those who bring weak claims face a more appropriate measure of financial risk as their action places pressure on the taxpayer-funded courts and potentially delays important projects and policies.

Legal Aid – paying for permission work in judicial review cases

42. The purpose of the proposal is to ensure that limited legal aid resources are properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. The Government proposed that providers should only be paid for work carried out on application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission to the Court of Appeal) where permission is granted. Following responses to the Transforming Legal Aid consultation, the Government also proposed permitting the Legal Aid Agency to pay providers in certain cases which conclude prior to a permission decision. The purpose of this revision to the original proposal was to enable payment in meritorious cases which settle prior to a permission and in which it is not possible to obtain costs from the defendant.

43. Some respondents recognised that the Government had modified the original proposal by proposing to allow the LAA to pay providers in certain cases which conclude prior to a permission decision, thereby seeking to address some of the concerns expressed about the original proposal. However, in general respondents remained opposed to this proposal, in particular arguing that the uncertainty and financial risk for providers would impact on the number of providers willing to carry out public law work and the kinds of cases they would be willing to take on in future.

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[7] Equality Act 2010; the three limbs are: eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act; advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and foster good relations between different groups. The protected characteristics are race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

[8] https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response

44. A number of respondents were also concerned about the proposed discretionary payment mechanism, arguing that it would not address the risk they would face at the point of issue and would involve an additional burden for providers in making their application to the LAA. It was suggested that the proposed exhaustive list of criteria was too narrow, and did not take account of factors which might weaken the case after issue, placed too much weight on the claimant's conduct in the proceedings (rather than the defendant's) and would allow defendant public bodies to influence a provider's payment by arguing that the reasons for settlement were unrelated to the claim.

45. The Government remains of the view that the taxpayer should not be paying for a significant number of weak judicial review cases which issue but are not granted permission by the court. The Government considers that it is appropriate for the financial risk of the permission application to rest with the provider and to use the permission test as the threshold for payment. Under the proposals, cases which proceed beyond the permission stage will continue to be paid, regardless of the eventual outcome, and providers will continue to be paid for pre-permission work, whether or not the case is granted permission. The Government therefore intends to implement this proposal.

46. That said, having taken account of the responses to both consultations, the Government will enable the Legal Aid Agency to pay in meritorious cases which conclude prior to a permission decision and, in light of the comments made, will adjust the criteria – or factors – which will be in legislation and which the Legal Aid Agency will apply. The proposed adjustments, set out in full in Annex B, will reduce to a degree the risk that providers will be expected to take and will enable them to continue to be paid in cases which were meritorious at issue but which conclude prior to the permission decision.

Costs at oral permission hearings

47. 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 consultation sought views on introducing 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. The Government intends to revise these rules so that such awards are routine, but this will still be subject to the court's general discretion on costs.

48. Some respondents raised concerns with the proposal, including that there is a risk of renewals becoming dress rehearsals to any substantive hearing. The Government recognises that it is not desirable to turn permission hearings into dress rehearsals but considers that this can be managed, as now, by the court through its case management powers. It was also argued that the proposal would price claimants out of bringing a claim by increasing the potential costs if unsuccessful. The Government recognises that it is important that meritorious cases are not discontinued solely due to the cost of litigation, but considers that claimants should consider more carefully the potential costs involved when deciding to renew an application already refused by a court.

49. Some respondents argued that the purpose of the oral permission hearing is for the claimant to prove his or her case and the defendant is not required to attend, so if the defendant chooses to do so they should bear their own costs. Having carefully considered the responses the Government believes the measure is justified; whilst it is indeed the defendant's choice (unless ordered to attend by the court) to be represented at an oral permission hearing, equally it is the claimant's choice to pursue the oral permission hearing having been refused on the papers.

50. 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. The courts will still have a general discretion in this area, to ensure justice is done. The Government will invite the Civil Procedure Rule Committee to introduce a principle in the Civil Procedure Rules that the costs of an oral permission hearing should usually be recoverable.

Wasted Costs Orders (WCOs)

51. Where a court makes a WCO it has the effect of making a legal representative personally liable for some of the costs of litigation which they have caused unnecessarily by their improper, unreasonable or negligent behaviour, and which it is unreasonable to expect the litigant to meet. But WCOs are only issued rarely – between March 2011 and June 2013 only around 50 such orders were made – and the Government wished to test in the consultation whether they could be used more effectively.

52. Many respondents felt that the current test for WCOs is appropriate and that there was an insufficient case for change. Some were concerned that the suggestion of a broader test failed to recognise that it is ultimately the client's decision whether or not to bring a case. There were also concerns about the practicalities of deciding whether to award a WCO, in particular advice covered by legal professional privilege which the court would be unable to consider without the client's consent.

53. At present, the Government is content that the best way to improve WCOs' effectiveness is not to amend the existing test, but instead to strengthen the implications for the legal representative where one is made. In many situations where a WCO is awarded, professional negligence will be at issue and, as many respondents pointed out, independent regulatory bodies should have a role in these situations. This should help encourage legal representatives to consider more carefully the decisions they make in handling a case.

54. Whilst a WCO is a serious matter, there are currently no formal regulatory or contractual consequences for the legal representative who has acted improperly, unreasonably or negligently. The Government intends to place a duty on the courts in legislation to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made. This duty will apply in respect of all civil cases, not only judicial reviews.

Protective Costs Orders (PCOs) (non-environmental cases[9])

55. PCOs protect the unsuccessful claimant – and sometimes a defendant – against some or all of the other side's costs. Developed by the courts, PCOs were originally intended to be exceptional (although this is no longer an explicit requirement) and have the effect of shielding the claimant from some or all of the financial consequences of their decisions. The consultation sought views on removing the availability of PCOs where there is an individual or private interest, on modifying the principles for determining when PCOs may be made and on whether there should be a presumption of a cross cap (limiting, generally at a higher level than the claimant's cap) an unsuccessful defendant's liability for the claimant's costs.

56. Some respondents raised concerns with these proposals, including removing the ability to award a PCO where there was a private interest, since (they argued) judicial review is about public wrongs and the proposed reform would leave NGOs and similar groups unable to challenge public interest cases as the potential costs were prohibitive. The point was made that the courts are experienced in balancing private and public rights. Respondents also focused on the small numbers of PCOs made in non-environmental cases. In relation to a cross cap for the defendant's liability there were mixed views, with some respondents arguing that fixed amounts of caps would be unduly restrictive.

57. The Government recognises that some PCOs will undoubtedly be made in cases where there is a strong public interest in resolving an issue, therefore it does not intend to remove the availability of PCOs entirely in non-environmental cases. The Government does, however, wish to make sure that in future PCOs are reserved for cases where there are serious issues of the highest public interest in cases granted permission and which otherwise would not be able to be taken forward without a PCO. It is only in those cases that the Government, regardless of whether it wins or loses, should have to meet its own costs and the costs of the claimants, thus carrying virtually all of the costs of the litigation. The Government is also persuaded that it is right to ensure that where a PCO is granted to a claimant, the court also caps the defendant's costs, ensuring that the taxpayer has cost protection to ensure that costs overall remain within reasonable limits.

58. Therefore the Government will introduce primary legislation to set out the framework for PCOs, and in particular intends to ensure that a strict approach is taken to deciding whether it is in the 'public interest' that the issues in the claim are resolved; that only cases with merit should benefit so that PCOs should only be available once permission to proceed to judicial review has been granted by the court; and that, where a PCO is granted, there should be a presumption that the court will also include in the order a cross-cap on the defendant's liability for the claimant's costs. In addition, the Government will firmly re-establish the principle that a PCO should only be granted where the claimant would otherwise discontinue the claim, and would be acting reasonably in doing so.

59. Although the consultation did not suggest any change to PCOs in environmental cases which fall under the Aarhus Convention and the Public Participation Directive,

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[9] A different cost protection regime applies in judicial reviews concerning environmental matters within the scope of the Aarhus Convention and the Public Participation Directive and is set out in the Civil Procedure Rules. In these cases a claimant's costs are capped at £5,000 where the claimant is an individual and at £10,000 in other cases, and at £35,000 for the defendant.

some respondents supported a more restrictive approach to costs protection in environmental cases. The Government is awaiting the outcome of proceedings before the European Court of Justice but, once the outcome is known, intends to examine whether the approach to PCOs in environmental cases should be further reviewed.

Interveners

60. The consultation looked at whether the provision for the award of costs against parties who choose to intervene in proceedings could be strengthened so that they would bear both their own costs and those of the parties which result from their intervention.

61. Some respondents indicated that interveners do already generally bear their own costs and there was limited support for making them bear other parties' costs. Concerns were raised over whether this would prevent interveners from being involved in cases, the point being made that this could be to the detriment of the final outcome of the case as interveners bring expertise from which the court and parties will benefit.

62. The Government agrees that interveners can add value, supporting the court to establish context and facts. Indeed, the Government will on occasion intervene itself. However, the Government still considers that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and this should extend to interveners. The Government does not intend to apply these reforms to a party who is requested to intervene by the court, rather these reforms are intended to apply to those who choose to make an application to the court to intervene. The Government will therefore take forward reform, through primary legislation, to introduce a presumption that interveners will bear their own costs and those costs arising to the parties from their intervention. The courts will retain their discretion not to award costs where it is not in the interests of justice to do so.

Non-Parties

63. The Government wants to ensure that claims cannot be brought in a way that limits a person's proper cost exposure and circumvents the court's powers to make them liable for the defendant's costs where they lose. This might include a person who is not a formal party to a claim, but provides financial backing and advice to the 'named' claimant, or where potential claimants create companies, in both cases to evade the full financial risk from a claim. This behaviour by 'non-parties' might cost the taxpayer significant sums. The Government's view is that non-parties who are, in practice, driving litigation should have to face a more proportionate amount of the cost risk.

64. The consultation looked at whether the courts should be given greater powers to identify non-parties and ensure that they cannot avoid liability for the costs they should meet.

65. Having considered the responses, the Government is satisfied that the courts should have greater powers to identify non-parties in order to have the necessary information to make effective costs orders under their existing powers. The senior judiciary argued to this effect in their response to the consultation.

66. The Government will introduce primary legislation so that an applicant must provide information on funding at the outset of the judicial review, and requiring the courts to

have regard to this information in order to consider making costs orders against those who are not a party to the judicial review. This will allow the courts to make better use of the powers that they have. The Government recognises that it is not desirable for the changes to result in courts doing a forensic investigation into the information on funding and will make clear in legislation and court rules the extent of the information that is required to make sure an appropriate balance is struck.

The Proposals – Leapfrogging

67. Leapfrog appeals are cases which move direct from the court of first instance to the Supreme Court, missing the Court of Appeal. The current approach requires that a case involves a point of law that is of general public importance, and which either relates to statutory interpretation that has been fully argued 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 have to agree before a leapfrog can take place, and both parties must also give their consent.

68. The Government's view is that some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court should get there more quickly. Moving step by step through the court hierarchy can lead to lengthy delays, adding to costs and damaging public confidence in the effectiveness of the justice system. Therefore the consultation proposed three changes to the present arrangements to extend the potential for leapfrog appeals:

    i. allowing a case to leapfrog if it is of national importance or raises significant issues;

    ii. removing the requirement for all parties to consent; and

    iii. allowing leapfrog appeals to lie from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission.

69. These proposals would apply to leapfrog appeals in civil and administrative proceedings generally, not only to appeals in judicial reviews.

70. In general those who responded agreed with the principle that appropriate cases should be expedited to the Supreme Court, though some highlighted the risk that the Supreme Court could become overloaded and would lose the benefit of the Court of Appeal's consideration. In terms of the specific proposals, a majority was supportive of these changes, though some refinements were suggested. Specific concerns raised included that the extended criteria were too vague, that removing the need for consent would undermine appeal rights, and that leapfrogging should not be extended to SIAC.

71. Under the proposals the current role of the court of first instance and Supreme Court in agreeing to a leapfrog taking place would be retained, which would mitigate the potential risk of overloading the Supreme Court. This would also ensure that leapfrogging is only used in appropriate cases, addressing concerns that appeal rights could be undermined and that SIAC cases may not be suitable for leapfrogging. The Government considers that it is important to widen the criteria to allow certain high-profile cases to leapfrog and that sufficient clarity will be achieved through legislation and subsequent interpretation by the judiciary.

72. Therefore the Government is persuaded to make the three changes proposed in order to ensure that appropriate cases can be resolved more quickly, with fewer intermediate steps and at lower cost. Legislation is being brought forward to extend the criteria which must be met for a leapfrog to take place to include cases of national importance or which raise significant issues, remove the requirement for consent of both parties and allow a leapfrog to be initiated in the Upper Tribunal, EAT and SIAC.

Equality Impacts

73. As explained earlier, the Government intends to speed up planning cases and tackle the abuse of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken, irrespective of by whom the judicial reviews are brought.

74. The consultation set out the Government's obligations under the Equality Act 2010, and specifically the requirement to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics.[10] The Government sought, through the consultation, to gather further views and evidence on the potential equality impacts and has taken these into account in discharging its obligations under the 2010 Act.

75. It was argued by several respondents that, as the majority of judicial reviews relate to immigration and asylum cases, it was reasonable to assume that the proposals (with the exception of planning) had the potential to have a differential impact on the characteristics of race and religion/belief. The Government recognises that this may be the case but as the effects of the proposals will be felt only on weak cases it does not accept that the impact will be adverse or that the policy is wrong.

76. Some of the responses received, including ones from charities and NGOs, argued that certain reforms (such as on procedural defects) could have a disproportionately negative impact on groups with protected characteristics on the basis that those groups tend have more interaction with state services, and consequently have greater resort to judicial review. There is little centrally collected data on court users generally, and specifically about those who bring non-immigration and asylum judicial reviews, except that young people aged 18–25 bring disproportionately large numbers of claims. It is not possible to establish whether greater interaction with the state translates into more judicial reviews, and other factors may also affect this. Again, the Government would point to its aim being to tackle only weak cases and therefore it does not expect an adverse impact to be likely.

77. Specific concerns were raised by respondents over the proposals:

- for a Planning Chamber and a permission filter in appeals under section 288 of the Town and Country Planning Act 1990, which it was argued might affect Gypsy and Traveller communities disproportionately;
- on PCOs and interveners, which it was argued might cause fewer claims to be brought or arguments raised by or on behalf of individuals with protected characteristics;

[10] The protected characteristics are race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

- reform to other financial measures, which it was argued might disproportionately affect those in lower income groups who tend to have protected characteristics more often than other groups.

78. Equalities points were also made in relation to a possible change to the test for standing, which for the reasons set out in paragraphs 32 to 35 the Government has decided not to pursue.

79. Having had due regard to equalities issues, the Government's view is that it is justified in moving forward with the reform package set out in this document. The proposals will limit abuse and affect weak cases whether or not they are brought by those with protected characteristics, not strong cases (including those properly to be considered as in the public interest). The measures should speed up the consideration of these stronger cases by focusing scarce taxpayer funded court resources on them. In addition, reform such as the permission filter for section 288 challenges may save claimants, including those with protected characteristics, from the cost of preparing for a full hearing at which they may be unsuccessful. On balance, for the reasons given above and in relation to the specific proposals, the Government has concluded that the benefits of reform are sufficient to justify the potential impacts and, for these reasons, believes that its duties under the Equality Act 2010 have been fulfilled.

Next Steps

80. The Government is of the view that, where reform is to be taken forward, it is imperative that this is done quickly. Consequently, clauses to give effect to the following proposals are contained in the Criminal Justice and Courts Bill:

- changes to how the courts deal with procedural defects by amending the current test of 'inevitable' to ensure judicial reviews cannot proceed on the basis of minor 'technicalities';
- reducing the potential for delay to key projects and policies by extending the scope of leapfrogging appeals (which move direct from the court of first instance to the Supreme Court);
- strengthening the implications of receiving a Wasted Costs Order by placing a duty on the courts to consider notifying the relevant regulator and/or the Legal Aid Agency when one is made;
- setting out the circumstances in which a court can make a Protective Costs Order in non-environmental judicial reviews to ensure they are only used in exceptional cases;
- establishing a presumption that interveners in a judicial review will have to pay their own costs and any costs that they have caused to either party because of their intervention;
- introducing new requirements for all applicants for judicial review to provide information about how the judicial review is funded in the courts and Upper Tribunal.
- introducing a permission filter in challenges under section 288 of the Town and Country Planning Act 1990 (policy ownership of this provision lies with the Department of Communities and Local Government rather than the Ministry of Justice)

81. The Bill, and the accompanying documents which can be found on the Parliamentary website – http://www.parliament.uk/business/bills-and-legislation/ – set out the detailed form of the reforms.

82. The Government also intends to work with the Civil Procedure Rule Committee, the Tribunals Procedure Committee and the senior judiciary to urgently take forward:

    - the establishment of a new Planning Court; and
    - costs to be awarded more often at oral permission hearings.

83. We intend to introduce the proposal in relation to payment for legally aided judicial reviews in secondary legislation in spring 2014.

84. Consideration of the results of the consultation questions on the Public Sector Equality Duty as part of work to implement the recommendations of the Independent Steering Group will be taken forward by the Government Equalities Office.

85. The consultation also set out that the Government intends to review the rules on PCOs in environmental cases, to ensure that there is no gold-plating in how the Public Participation Directive has been implemented. This work will be done once we have the judgment of the European Court of Justice.

Statistical correction

86. The consultation paper drew from data published on 20 June 2013 as part of 'Court Statistics Quarterly January to March 2013'. This split judicial review data into the three categories of 'civil (immigration and asylum)', 'civil (other)', and 'criminal'. On 29 November 2013 the Ministry of Justice published a revision to these figures.[11] This re-allocated a small number of cases from the 'civil (immigration and asylum)' to the 'civil (other)' category. The 29 November 2013 statistical revision notice revised the figures in paragraph 10 of the consultation document and revised the chart on page 8 of the consultation document.

87. Following publication of this revision notice, updated statistics were published on 19 December 2013 as part of 'Court Statistics Quarterly July to September 2013'. These latest statistics show how the volume of judicial reviews has changed since 2000, broken down by the above three categories.[12]

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262036/revision-judicial-review-figures-stats.pdf

[12] https://www.gov.uk/government/publications/court-statistics-quarterly-july-to-september-2013

Annex A: Summary of consultation responses

88. This Annex and Annex B provide a summary of the responses received to the questions posed in the consultation. All the responses were considered carefully in deciding how to proceed. Each section sets out the main arguments and views expressed by respondents. Inevitably these include opinions with which the Government does not necessarily agree or accept as fact.

Chapter 3 – Planning

89. The Government consulted on a number of proposals to speed up the time taken to consider judicial reviews and statutory appeals relating to planning and major infrastructure projects. These included establishing a new Planning Chamber in the Upper Tribunal, introducing a permission filter for statutory appeals and amending the procedural rules to include time limits for completing these cases.

90. There were a total of 325 responses to the consultation overall, but of these 235 refrained from commenting on the planning proposals, citing a lack of expertise in this area or referring to responses from specialist planning experts.

Specialised Planning Chamber

Questions

Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?

Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?

Summary

91. Of the 90 respondents who responded to the planning questions, 43 were in favour of creating a specialist Chamber in the Upper Tier of the unified tribunal system while 47 were against the proposal. The remaining four respondents felt there were advantages and disadvantages to both options.

92. Those against creating a Planning Chamber (mainly judicial and legal representatives) felt the Government should first assess the impacts of the recent changes to judicial review (namely reduction of timescales to lodge a planning judicial review; introduction of fees and the totally without merit test; the transfer of immigration and asylum judicial reviews to the Upper Tribunal) and the impacts of the Planning Fast Track (PFT) before introducing more changes. The senior judiciary supported building on the PFT by establishing a separate Planning Court within the Administrative Court and formalising the administrative timescales, with a longer term aim of streamlining how planning and environmental cases are dealt with overall.

93. However developers, business and infrastructure organisations were more likely to express support for the Planning Chamber and welcomed steps to speed up hearing of planning and major infrastructure cases through use of specialist judges, new procedural rules and statutory timescales.

Planning Chamber

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

- Scepticism that the Lands Chamber would deliver any appreciable advantage over the PFT, given it will deploy the same judges to hear cases previously heard in the High Court and there are already backlogs in the Lands Chamber
- Planning law under the Town and Country Planning Act is a devolved matter and the Welsh Assembly Government is about to introduce new planning legislation; it is important that the Welsh judiciary and legal representatives are involved in planning cases in Wales. There were concerns that a Planning Chamber would be more likely to hear cases in London as opposed to the District Registries of the Administrative Court.
- In the absence of legal aid provision for parties in tribunals, concerns that the proposal would disadvantage Gypsy and Traveller groups in statutory planning appeals.
- A key element in reducing delay is ensuring initial permission hearings are made by authoritative specialist judges to prevent further appeals.
- Planning judicial reviews include important public law issues which should remain in the High Court rather then be dealt with exclusively on planning grounds in the Upper Tribunal.
- It was questioned whether the Lands Chamber, as an expert forum looking at merits-based arguments, is best placed to consider judicial reviews which examine deficiencies of process.

Additional Procedural Requirements

- Pre-action protocols should be updated to reflect shorter time limits for lodging planning judicial reviews.
- Both the claim form and the acknowledgment of service should allow parties to indicate if the matter should be referred to the specialist chamber.
- Given the specialist nature of the judiciary it may be proportionate to amend the right to an oral renewal or have the case reconsidered on the papers by another specialist.
- Given the specialist nature of planning judicial reviews and statutory appeals it is appropriate to make more use of written evidence and time limits for oral evidence presentation.
- There should be a high threshold of ‘arguability’ to remove weak cases earlier.
- The Government should reduce the period required by the Civil Procedure Rules for production of detailed grounds of resistance from 35 days to 21 or 28 days and codify timescales to provide skeleton arguments (21 days for claimants/14 days for defendants).
- Guidance is required for staff asked to allocate cases which also have significant other non-planning issues.
- The period for issuing a pre-action letter challenging a planning decision should be six weeks from when the Local Planning Authority makes their decision and not when they publish the decision notice.

- Targets in either the PFT or a new Chamber should be published alongside regular performance statistics.
- If taken forward it would be proportionate to remove an automatic right to oral renewal in planning judicial reviews or to only reconsider an application for renewal on the papers by another specialist judge.
- Appropriate to make more use of written evidence and set time limits for oral evidence presentation.
- Some support for maintaining the current CPR rules.

Scope of Chamber

Respondents made a number of suggestions as to what should be in scope for a new Planning Chamber to consider. These included:

- Planning decisions including Nationally Significant Infrastructure Projects;
- Statutory appeals (288) under the Town and Country Planning Act 1990;
- All environmental consents and permits;
- All related development consents for Nationally Significant Infrastructure Projects;
- Transport and Works Act;
- Environmental and Habitat Regulations;
- Village Greens and rights of way;
- Local Plans and other LA planning documents; and
- Environmental matters which do not involve planning.

Section 288 permission filter

Question

Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and Country Planning Act?

Summary

95. 41 respondents supported the introduction of a permission filter for appeals made under section 288 of the Town and Country Planning Act 1990, while 30 were against the proposal.

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

- This additional stage may potentially add delay.
- Some proposed further changes to the statutory appeal process under the Act, including a requirement to file an acknowledgment of service with summary grounds of defence. This would give the claimants and courts an earlier view of the strength of the case, encourage early settlement and deter late withdrawals.

Evidence of impact of judicial review

Question

Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?

97. 23 respondents provided examples or evidence in response to this question, a number of which showed delays to infrastructure projects, including:

- ASDA – delay from competitors launching judicial reviews;
- Airport Operators Association – 9 months delay to Bristol Airport Expansion and Stansted Generation 1 development; 15 months delay to Southend Airport Runway Extension;
- Tendring District Council – already a two year delay caused by an ongoing judicial review of the construction of a new Container Terminal Port;
- British Property Federation – Shopping Centre London – 15 months delay and additional costs.

Additional suggestions for improving the speed of judicial reviews

Question

Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?

98. 33 respondents provided suggestions in response to this question, including:

- Increase resources, in particular the number of specialist judges.
- Introduce a permission stage for section 288 claims.
- Greater enforcement of existing rules and time limits for filing evidence to prevent delays.
- Consider restricting Protective Costs Orders so parties are not protected when challenging competitors' developments.
- Greater enforcement of the requirement for pre-action protocol to stop a judicial review been filed on last possible day without any cost penalty due to Protective Costs Order protection.
- More use of regional courts.

Local Authorities Challenging Infrastructure Projects

Questions

Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?

Summary

99. This proposal concerned restricting the ability of local authorities to judicially review Nationally Significant Infrastructure Projects ('NSIPs') which are given permission to bring a judicial review under a streamlined process in the Planning Act 2008. Of the 325 total responses to the consultation 84 respondents answered this question. Of those respondents 6 supported the proposal, 77 did not and 1 had mixed views.

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

- There has not been a challenge to an NSIP by a local authority and so these proposals do not target a real problem.
- This is an arbitrary restriction of local authorities' powers and would negatively impact upon the rule of law.
- This change would be ineffective; for example a local authority could fund a community group to bring a challenge. Alternatively, it was argued that unless a local authority was able to bring a challenge then an unlawful project might not be challenged.
- It would be undemocratic and run counter to the wider localism agenda.
- It is important for local authorities to represent the interests of local inhabitants.
- It is for the taxpayers and voters of an area to form a judgement on any decision to litigate.
- This change would be a denial of access to justice if a local authority would otherwise meet the standing test, particularly as they may bring a claim they consider in the interests of the local community.
- Local authorities tend to behave responsibly and not risk taxpayers' funds on unmeritorious judicial reviews.
- The Local Government Act 1972 empowers local authorities to prosecute or defend legal proceedings only where it is expedient for the well-being of the inhabitants of their area and local authorities in general only bring well-considered claims.
- The nature of NSIP projects is that there will almost invariably be a possible claimant who could bring the challenge instead and so the reduction in risk of challenge would be limited.
- This change might increase the risk of delay as challenges are brought by individuals in a piecemeal fashion rather than a single challenge by a local authority.

Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

Question

Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to

fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?

Summary

101. The consultation said the Government was considering whether it is appropriate for these cases to continue to attract legal aid. We asked for views on whether legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Act where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application. This would not affect the availability of legal aid where the failure to fund the challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights.

102. Many respondents did not provide a view. Of the 325 total responses to the consultation 88 respondents answered this question. Of those respondents, 65 supported retaining legal aid for these cases, 11 supported removing legal aid, and 12 provided no clear view.

103. The main arguments and views expressed by respondents were:
- Concerns that removing legal aid would reduce the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which has already restricted legal aid in these types of appeals to cases where the individual is at immediate risk of loss of home) and would be unjust given the importance of that issue to the legally aided individual.
- Any further restriction of legal aid availability in this area, would be contrary to the rationale expressed during the passage of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and on which the current scope of legal aid, as a whole, is therefore based.
- This issue was not connected to the growth-related aims of the other planning proposals in the consultation, and was in fact intended to target gypsies and travellers. Respondents highlighted the lack of data provided to evidence the case for exploring any further restrictions of legal aid in this area.
- Introduction of a permission filter for section 288 cases should be considered as an alternative. A filter already exists in section 289 cases.

Chapter 4 – Standing

Questions

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

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

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

Summary

104. In this chapter the Government sought views on whether the test for standing – which governs who may bring a judicial review – should be amended to require a 'direct' interest and if so what a new test might look like. Of the 325 responses to the consultation, 241 respondents answered this question. Of those 241, 16 were in favour of a revised test, 213 did not agree with changing the test and 12 gave a mixed response.

105. The majority of respondents did not support a tighter approach to standing. The senior judiciary identified this as an area which caused them "particular" concern in respect of preventing meritorious challenges, and this was a view echoed widely. The Bar Council, individual chambers and barristers, the Law Society, and a range of solicitors' firms (including large commercial ones) also registered their concern as did NGOs.

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

- Requiring a direct interest would deny meritorious claims standing, and would be an example of the Government using a procedural technique to stop important issues being considered.
- A direct interest test would be a significant denial of access to justice and weakening of the rule of law.
- Stopping public interest challenges would switch the role of judicial review – which is to challenge public wrongs and unlawfulness – rather than allow persons to protect their own rights.
- There is little evidence of a problem with the current approach, with few claims brought in the public interest. Claims brought by NGOs tend to be more successful, as the Ministry of Justice's own figures show. In addition, there is little evidence of use as a campaigning tool – the permission filter already works well.
- Expert NGOs assist the court and can assist the court to understand the public policy context, in addition to assisting claimants this, it was argued, is beneficial to the Government.
- Any new test is likely to be ineffective as NGOs should easily be able to find directly affected persons to bring the challenge instead.
- It might have adverse implications for the cost of living if consumer groups are not able to challenge regulatory decisions.
- This change would leave some acts by Government without a possible challenger, and so effectively immunises Government from scrutiny by the courts.
- There is likely to be satellite litigation over the application of any test which would take time and there would be uncertainty in the meantime.
- A claim might be bought by a person without a direct interest simply so that they could generate publicity for their cause from the courts having not granted permission (because of their lack of standing).
- In relation to an alternative test, most respondents argued that none of the potential alternatives offered in the consultation paper were satisfactory and that the current approach worked well. Most respondents supported the Government's view that the general test for standing to challenge EU measures in the European

Court of Justice, which requires a "direct and individual concern", is too narrow to be considered.

- Many respondents argued that interveners in general assist the court, and the ability to intervene is already subject to a good measure of judicial control.

There was some support for a change to the test for standing, for example:

- People do need to have a direct interest in decisions in order to be able to challenge them otherwise the system will get clogged. There were arguments that the current test, by allowing for those with only a very limited connection to bring a challenge, causes public authorities (particularly local authorities) to have to waste scarce funds on defending judicial reviews. Several supporting respondents warned, however, that the Government should be careful not to restrict direct interest to a point where nobody will get standing.
- Allowing any person whatsoever to challenge a decision which the court feels it wants to examine is to undermine the democratic process as it allows unelected, unrepresentative and unaccountable judiciary to appropriate decision-making powers on the application of equally unelected, equally unrepresentative and equally unaccountable pressure groups.

Chapter 5: Procedural Defects

Questions

Question 12: Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

Summary

107. In this chapter the Government proposed two changes to the existing approach to challenges brought on the basis of procedural defects which could not have made a difference to the original outcome. The proposals looked at a) allowing such arguments to be tested more thoroughly earlier in the judicial review process – at permission stage – and b) applying a lower test of 'highly likely' to replace the current one of 'inevitable'. Of the 325 responses to the consultation, 170 respondents answered this question. Of those 170, 17 were in favour of a revised test, however, 132 did not agree. A further 21 had mixed views on the merits of the proposal.

108. There was some support from respondents but generally little detail as to why the proposal was supported. Most respondents were opposed to any reform, and many questioned whether there was any basis for reform.

109. Where examples of claims brought solely on 'procedural defects' ground were raised the respondents tended to argue that these claims concerned substantive illegality and that the claims had raised issues of significant importance.

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

Option 1 – Bring forward the Consideration

- Rejecting a claim on the basis of procedural defects can already be done at permission stage. The judiciary are already making such decisions appropriately.
- The proposal could result in 'dress rehearsals' of the substantive claim at the permission stage, slowing the judicial review process and adding to costs. This risk could not be mitigated effectively.
- The permission stage is not appropriate for considering whether there could have been a difference, not least as the defendant will not have fully disclosed their papers to the claimant.
- A link to the paying for permission work in judicial review cases was also identified by some respondents. By 'front-loading' the process, legally aided solicitors would have to do more work at risk, and so may be less likely to take on claims.
- Where respondents supported this change, they agreed that it could help reduce the number of weak claims brought and ensure those with merit would be resolved more quickly. It could serve as a disincentive to claimants who bring judicial reviews in order to delay decisions.
- Some respondents noted that planning judicial reviews are relatively often brought on technical points which a court might conclude would not have made a difference to the outcome of the overall decision making process. There was some support for the view that, in those cases, the court should be able to form a view on whether there would have been a difference at permission.

Option 2 – A different threshold

- The senior judiciary pointed out that a lower threshold would mean that some unlawful processes which may have had an impact will not be considered fully by a court or remedied.
- Many respondents also argued that the lower threshold downgraded the importance public authorities need to place on following lawful processes.
- The judiciary are experienced in making such decisions and there is no need to change the test.
- There is a risk that any changes will cause judicial review to focus on substance rather than (as now) process. This might mean that the judge would begin to look at the substance and merits of the decision, being forced to usurp the proper position of the decision-maker.
- Again, some respondents commented that it could result in 'dress rehearsals' of the substantive claim at the permission stage, slowing the judicial review process and adding to costs.

- Many respondents argued that this proposal reflected a Government misunderstanding of the importance of following a lawful process (particularly those set out in statute), which was as important as any type of substantive illegality.

Chapter 6 – Public Sector Equality Duty

Questions

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide it?

Summary

111. The consultation included a question on whether disputes relating to the Public Sector Equality Duty (PSED) could be better resolved by an alternative mechanism to judicial review. This followed a recommendation by the Independent Steering Group, whose report was published on the same day as the consultation was launched.

112. Of the 325 total responses to the consultation, 136 respondents answered some or all of the questions on the PSED. A majority of those 136 responses (107) responded negatively to the question, arguing that judicial review should remain the principle mechanism for resolving disputes related to the PSED. 18 (of the 136) respondents saw some scope for using alternative mechanisms, and made suggestions in this regard. 11 respondents gave a mixed view, being sceptical of alternatives to judicial review but accepting that some may exist.

113. Those opposed to making changes in this area argued that the PSED relies on judicial review to be effective and enforceable and that cases have led to improvements in equalities protection. Many suggested that while the duty remains in its current form, judicial review should be available to enforce it. However, many of the negative responses had interpreted the consultation as proposing to remove judicial review in relation to the PSED, rather than seeking views on alternative mechanisms.

114. Some respondents saw merit in using alternative mechanisms to judicial review. Suggestions included a specialist tribunal, Alternative Dispute Resolution, an independent regulator and stronger enforcement powers for the Equality and Human Rights Commission. Some also suggested that the emphasis should be placed on public bodies fully complying with the PSED (through a statutory code of practice or better guidance). Furthermore, respondents highlighted that any alternative would need to have the same powers as the High Court, or judicial review would still need to be available as a last resort.

115. Respondents were asked whether they had any evidence regarding the volume and nature of PSED-related challenges. A small proportion of respondents were able to provide information in this regard. Many of those that did highlighted cases which they saw as leading to a positive change in terms of equalities protection in the behaviour of the public body or wider policy.

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

- Adjudicating breaches of the PSED is an important exercise – even if the same decision will ultimately be taken.
- Successful judicial reviews do not just result in the same decision being re-taken – they can lead to substantive benefits for claimants and others.
- The PSED should not be treated any differently to other public law duties – it should be enforceable in courts.
- If Parliament wants to change or abolish the duty then it should do so.
- There is no evidence of any problem with PSED challenges.
- PSED is usually brought as an additional ground as part of a wider challenge. An alternative mechanism would lead to dual litigation – one for PSED and another for other grounds.
- Various cases were highlighted by respondents where a PSED challenge resulted in substantive benefit to the claimant as well as a wider change in policy.
- Removing the potential to go to judicial review would lead to satellite litigation at the outset.
- PSED has just started to 'bed down' and courts have established boundaries effectively – should not be tampered with.
- Alternatives to judicial review should already be explored under the Pre-Action Protocol – judicial review is a measure of last resort.
- Judicial review is resource intensive for both sides – alternative mechanisms could be cheaper and quicker.
- Judicial reviews related to the PSED place an undue burden on public bodies and so alternatives should be found.
- Specialist or expert bodies could be more effective in resolving disputes at an early stage.
- Any alternative would need to have the same powers as the High Court, or judicial review would still need to be available as a last resort.
- Better guidance is needed for public bodies on complying with PSED.
- Equality and Human Rights Commission enforcement powers should be strengthened.
- Public bodies should respond properly to the pre-action procedure.
- Alternative mechanisms include Alternative Dispute Resolution, an independent regulator, or a new specialist tribunal or extension of jurisdiction of an existing tribunal e.g. Employment Tribunals.
- Claimants could be required to identify on claim form whether they intend to raise a PSED argument.

Chapter 7 – Rebalancing Financial Incentives

117. In this chapter the Government sought views on how the approach to costs for judicial review could be adjusted to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings. Reform was considered in five areas: restricting payment to legal aid providers unless permission is granted, the costs of oral permission hearings, Wasted Costs Orders, Protective Costs Orders and costs relating to interveners and non parties. The proposal on paying for permission work in judicial reviews is dealt with in Annex B.

Costs of Oral Permission Hearings

Question

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

Summary

118. This proposed introducing a principle that the costs of an oral permission hearing should usually be recoverable as a matter of course, rather than exceptionally. Of the 325 total responses to the consultation, 148 respondents answered this question. Of those responses 23 were in favour of the proposal, however, 121 did not agree. 4 respondents provided a comment but had mixed views on support or opposition for the proposals.

119. The majority of respondents were generally not in favour of the proposal, citing access to justice issues arising from more financial barriers to bringing a judicial review which, it was argued, would price claimants out. A common theme amongst respondents was that the hearing is intended to be for the claimant to prove his case and a defendant is not required to attend but if he (the defendant) chooses to do so then he should bear his costs. Respondents stated that it would be premature to take this forward without looking at the impact of previous reforms (namely removal of the right to an oral hearing in cases deemed totally without merit and the new fee for an oral hearing).

120. There was some support for the introduction of such a principle in commercial cases, recognising that such hearings do take longer and involve more costs.

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

- Different costs rules should apply to judicial review; the permission filter is a special case and serves to protect defendants from unmeritorious cases which would suggest a defendant should cover his own costs of it.
- The oral hearing is not for the defendant to defend but for the claimant to prove his case and court to decide if it is arguable. A defendant's attendance is therefore voluntary (unless required by the court) and if he chooses to attend he should bear costs. Arguably the defendant does not add anything to the hearing that could not be dealt with by paper representations.
- This could turn permission hearings into dress rehearsals of the full hearing. It could also result in satellite litigation over costs.

- The court already has powers to award costs in exceptional circumstances and this is the correct balance. To change it would unbalance the process to the claimant's detriment. In any case it is already open for a defendant to apply for costs of oral permission against an unsuccessful claimant.
- These reforms are designed to price claimants out, particularly alongside previous reforms and legal aid proposals. There are access to justice and rule of law issues.
- It is premature to do this without waiting to see the impact of earlier reforms such as the removal of the right to an oral permission hearing for cases determined by a Judge on the papers as Totally Without Merit, and the introduction of a fee for an oral permission hearing.
- There would need to be a strong case for departing from the current principles but there is no evidence to justify change or whether the presence of a defendant is generally of assistance to the court.
- The number of cases that succeed at oral renewal hearing is low but applications are high, which suggests claimants apply even where there is a low chance of success. Although a defendant is not obliged to attend they do need to protect interests and may incur costs through doing so.
- This will deter weak claims that are unlikely to get permission and will help reduce court time and the burden on defendants.
- Currently it seems permission is renewed orally regardless of merits without any fear of costs so this may go some way to help that situation.
- In practice courts refuse to make cost orders at oral permission hearings which ignores the fact that public bodies have to spend public money in defending what can be an unmeritorious claim.

Wasted Costs Orders

Questions

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

Question 23: How might it be possible for the wasted costs order process to be streamlined?

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

Summary

122. The Government sought views on whether the current approach to Wasted Costs Orders (WCOs) should be modified to capture a wider range of behaviours, and/or whether the WCO process could be streamlined. The consultation also tested whether a fee should be charged to cover the costs of any oral hearing of a WCO.

123. 145 of the 325 total responses to the consultation answered questions on WCOs. 7 responded positively, and 6 respondents offered mixed comments both in support and opposition. However, 132 respondents opposed the proposals.

124. Many respondents felt that the current test was appropriate and that the Government had failed to present a compelling case for change. Some respondents were concerned that the suggestion of a broader test for WCOs failed to recognise that it is ultimately the client's decision whether or not to proceed to bring the claim. Whilst there was some support for the proposal, several respondents noted that the effect of fee changes introduced earlier this year should be assessed before any further fee reforms are pursued.

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

- There is an insufficient case for change to the existing approach for issuing WCOs.
- Broadening the test risked deterring legal representatives from taking on difficult but important cases.
- It is the lawyer's role to advise the client of the merits of the case, but the client's decision whether or not to proceed to bring the claim.
- The court would often have to consider advice given to the client covered by legal professional privilege. This could only be disclosed if the client waived that privilege, and it would rarely be in their interest to do so.
- Legal representatives should not be financially penalised to defend themselves against a WCO at an oral hearing.
- The effect of earlier fees reform should be assessed before further action is considered.

Protective Costs Orders (PCOs)

Questions

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

Summary

126. The proposals looked at abolishing PCOs in any case where there is an individual or private interest regardless of whether there is a wider public interest or modification of the principles governing the awarding of a PCO; greater clarity on funding and the presumption of a cross cap for a defendant's liability, with fixed cap amounts.

127. Of the 325 total responses to the consultation 186 respondents answered this question. Of those responses 14 were generally in favour of the proposals, however, 162 generally opposed the proposals. 10 respondents provided comments but had mixed views on support or opposition for the proposals.

128. Generally, respondents were not in favour of abolishing PCOs where there was a private interest; respondents commented that judicial review was about public wrongs not private rights and to remove in cases where there was a public interest was an attack on access to justice. With the standing proposals this was a double barrelled attack and would leave NGOs/charities unable to challenge public interest cases. There was more support for greater transparency in funding but respondents urged caution that it didn't make for lengthier applications. There was some support for a cross cap.

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

On abolishing or modifying PCOs

- The central consideration for awarding a PCO is whether there is a public interest, other factors such as private interest should then be considered. A private interest is not determinative and courts are experienced in making such judgements.
- This is another barrier to deter meritorious claims and designed to price out a claimant, particularly given earlier reforms (such as court fees) and legal aid proposals. Opposition on access to justice grounds. PCOs will become more important with legal aid changes.
- When read alongside the standing proposals this is a double barrelled attack on NGOs and charities and will leave them in a Catch 22 situation, It places a claimant – particularly NGO and charities – in a position where if they have a sufficient (direct) interest for standing then they could not get a PCO, and vice versa.
- Removal or modification would mean executive can act unlawfully with impunity. Wrong in principle for executive to intervene with costs/abolish completely, this is a matter for judicial discretion.
- It is in the interests of the taxpayer that public bodies are held to account. No conflict between access to courts and interests of taxpayers.
- The consultation talks of 'rebalancing' but things are moving too far in favour of the defendant. There is an imbalance between parties and this inequality of arms led to PCOs being developed in the first place.
- When PCOs are awarded they don't always mean that a claimant doesn't have to pay costs – there will usually be some costs liability and that can be financially difficult.
- Abolition of PCOs may mean more costs in long run if cases aren't brought. For example, (even if the claimant loses) the case could be used to the benefit of the wider public interest – to clarify the law, prevent future unlawful decisions. There

is also a risk of multiple challenges as individual claimants would all bring their own challenge.

- May be appropriate to modify the private interest test to rule out a PCO where there is a financial or commercial interest.

On financial transparency

- Responses were mixed, with respondents considering that transparency is important but that the courts consider such matters already and have sufficient powers.
- It is important to make sure that looking into the finances does not overly prolong applications.
- Finances should go to the amount of the cap rather than whether a cap should be made in the first place.

On Cross Caps (limiting the defendant's liability for the claimant's costs)

- Some respondents thought the courts do already consider such things and do not need new powers.
- Cross caps have a different purpose: to protect the defendant from the claimant raising unreasonable costs. A cross cap would significantly change the function of the PCO.
- Some respondents queried whether it is right for a public body defendant who has been found to have acted unlawfully to have costs protection.
- A cross cap could affect the claimant's ability to find a legal representative. Defendants have greater funds so can use lawyers of their choice as they are able to cover costs above the PCO limit but claimants can't. Cross caps shouldn't be at a level that makes Conditional Fee Agreements unviable.
- A presumption of a cross cap for local authorities would be helpful. Courts forget there is more pressure on local authority finances with reduced budgets. Not only does this mean less to use for litigation, but it is likely to cause more judicial reviews as services will need to be withdrawn to fund the costs, and that will be challenged.
- There was little support for fixed limits as the claimant's circumstances and the amount of the cap will vary from case to case. If fixed limits were introduced the claimant should have a lower amount for his liability. Setting individual amounts may be too restrictive and will alter over time in any event.

Interveners

Questions

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

Summary

130. The Government proposed that third parties who choose to intervene in judicial review should be responsible for their own costs and any costs they cause the existing parties. Of the 325 total responses to the consultation 169 respondents answered this question. Of those respondents 23 were in favour of the proposal and 122 were not. 24 respondents provided comments but had mixed views on support or opposition for the proposals.

131. The majority of the respondents said that interveners already pay their own costs. There was little support for interveners paying additional costs, with respondents arguing that it was a matter for judicial discretion – courts already manage the process well and can benefit from the expertise brought by interveners.

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

- Interveners already pay their own costs. Intervention happens rarely but happens in the public interest so cost orders should not be used to deter interventions.
- The court and parties will benefit from intervention by expert interveners, improving decision making. This can mean less cost in the long run.
- Courts have to consent to an intervention so can manage the process already and may also make use of their current case management powers. Courts are experienced in judging where an intervention is unnecessary and inappropriate and make costs orders as necessary.
- The government often intervenes.

Non-parties

Question

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

Summary

133. The Government proposed requiring claimants to provide information on how litigation is funded. Of the 325 total responses to the consultation 118 respondents answered this question. Of those respondents 30 were in favour of the proposals and 73 were not. 15 respondents provided comments but had mixed views on support or opposition for the proposals.

134. Responses were mixed – some respondents believed the change was unnecessary as courts had sufficient powers and that parties shouldn't have to provide additional information. There was support, including from the senior judiciary, for having greater information on how litigation is funded.

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

- The courts already have powers to award costs against non parties and have experience of investigating finances. Further powers are unnecessary.

- The senior judiciary support strengthening transparency over claimants' funding as it will help the court in deciding whether to make a costs order against a non-party. However, courts should retain full discretion in making costs orders.
- There would be practical difficulties in deciding when and how much information should be disclosed to the courts and how this information should be provided.
- The proposal could result in courts having to do a forensic investigation of the truthfulness of the information given. There could be difficulties in collecting costs if an order extends to a large group of ill defined people who contributed to the charity/interest group.

Evidence and Examples of Costs Orders

Question

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

Summary

136. Few respondents answered this question; of the 325 responses only 26 provided an answer, although some respondents referred to examples of costs orders in their responses to other questions in this chapter. Where an answer was provided, respondents had referred to examples of costs orders or interveners in cases they had been involved in, or referred to leading case law that set out the principles in awarding a particular cost order.

137. In answer to this specific question, and to other questions in the Rebalancing Financial Incentives chapter, some respondents questioned the evidence base for reform, arguing that the Government had put forward no evidence that there was a problem in this area and that change was necessary or desirable.

138. Several respondents referred to research conducted by the Public Law Project and the University of Essex, funded by the Nuffield Foundation. This research found that during the 20 month period between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted, in which only 3 were in non environmental cases. The PCOs included awards to NGOs such as Medical Justice and the Child Poverty Action Group.[13]

Chapter 8 – Leapfrogging

Questions

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

[13] This research is based on self reported questionnaires from solicitors and may not represent a complete picture.

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

Option 2 – Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

Question 38: Are there any risks to this approach and how might they be mitigated?

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

Question 41: If the Government implements any of the options for reforming leapfrog appeals. should those changes be applicable to all civil cases?

Summary

139. The Government sought views on extending the scope of 'leapfrog' appeals (cases which move direct from the court of first instance to the Supreme Court) in order to allow cases which will end up in the Supreme Court to get there more quickly. The consultation suggested three changes to the present approach to leapfrogging: allowing for a case to leapfrog because of its nationally significant implications; removing the need for all parties to consent; and extending leapfrogging to the Upper Tribunal, Employment Appeals Tribunal (EAT) and Special Immigration and Appeals Commission (SIAC).

140. Of the 325 responses to the consultation, 116 respondents answered some or all of the questions on leapfrogging. 51 respondents were in favour of all three leapfrogging proposals, while 20 did not agree with any of them. 45 respondents were either supportive of some, but not all, of the proposals or had no clear opinion.

141. Many respondents agreed with the principle that appropriate cases should be expedited to the Supreme Court. Some highlighted the risk that the Supreme Court could become overloaded with extra cases and would lose the benefit of the Court of Appeal's consideration.

142. In terms of the specific proposals, many respondents were supportive of the changes proposed in order to ensure appropriate cases reach the Supreme Court quickly. Some saw benefits in the scope for leapfrogging to be extended even more widely than proposed. A minority of respondents were opposed to these changes. Specific concerns raised included that the extended criteria were too vague, that removing the need for consent would undermine appeal rights, and that leapfrogging should not be extended to SIAC.

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

General points

- It was right that appropriate cases should be expedited to the Supreme Court as this would save costs and time and would be in the interests of justice, though some respondents cautioned that this should not become routine.
- Changes should be applicable to all civil appeals.
- There was a danger of overloading the Supreme Court with cases – it's important that it retains discretion to refuse a leapfrog.
- The Supreme Court benefits from consideration by the Court of Appeal and its role in refining arguments and establishing facts.
- If the Supreme Court refuses permission for a leapfrog appeal the appellant should retain the right to seek permission to appeal to the Court of Appeal.
- Some respondents questioned whether there is evidence of a problem, arguing that considerable efforts are already taken by the courts to expedite cases; cases of national importance are likely to fulfil current criteria anyway.
- It can be difficult to see whether a case will end up in the Supreme Court at first-instance.
- It is not a good use of the Supreme Court's time to wade though evidence from the court of first-instance.
- There should be protection from increased costs for claimants.
- Some respondents offered suggestions for additional procedural changes, including that the Supreme Court should decide an application within seven days and that there should be flexibility to change a leapfrog decision if circumstances change.

Option 1 – Extending the relevant circumstances

- The criteria should be extended as proposed so that a case which is inevitably going to reach the Supreme Court can leapfrog.
- They should also be extended to cases where there would be no significant benefit in seeking the views of the Court of Appeal, which affect a large number of people, are of general public importance, raise novel issues of law, where there is evidence of varying practice, where there would be a benefit to the public purse, or where the delay would cause a severe detriment to the parties such as prolonged detention.
- Judges should be given a wide discretion without the legislation being too prescriptive.
- The extended criteria seem to reflect the cases that are important to Government, but not necessarily the public.
- The extended criteria are poorly defined and ambiguous – they could lead to satellite litigation and there will always be cases that fall outside of a given definition.
- The extended criteria may be matters of contention in the relevant proceedings, and as such are not suitable as criteria for leapfrogging.

Option 2 – Consent

- It is right that the decision on a leapfrog should be left to the court and not the parties.
- The proposal would not affect appeal rights as cases would end up in Supreme Court anyway.
- Consent should not be removed as it is an important safeguard to ensure appeal rights are not curtailed.
- If the requirement for consent is removed, provision should be made for views of all parties to be taken or there should be a right of appeal against a decision to allow a leapfrog at an oral hearing.

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

- Leapfrogging should be extended to the Upper Tribunal, EAT and SIAC – they should not be treated differently to the High Court.
- They should be subject to the same criteria as for appeals from the High Court.
- Leapfrogging should also be available from the County Court.
- Some respondents had concerns about extending leapfrogging to SIAC as it is a first-instance tribunal and finder of fact – the Supreme Court would benefit from the Court of Appeal's consideration.

Equality Impacts

Question

Question 43: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

Summary

144. The consultation asked respondents whether they considered that groups with protected characteristics would be particularly affected, either positively or negatively, from the proposals.

145. Of the 325 responses to the consultation, 211 respondents answered this question specifically although some respondents did include comments on equality impacts within their response to particular proposals. Of those that did provide a response, almost all were of the view that the proposal(s) would have a disproportionately negative impact on groups with protected characteristics and other vulnerable groups. Some respondents were of the view that Government has not produced sufficient evidence that the proposals will not disproportionately affect groups with protected characteristics, and before it took any of these proposals forward it would need to do so. Some argued that the proposals were in themselves discriminatory.

146. A small number of respondents thought that the consultation paper highlighted the potential impacts accurately or considered that while there was a risk of differential impact, this would be mitigated by the court ensuring that arguable cases are heard.

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

General points

- Respondents were of the view that taken together the proposals would have a disproportionate impact on those with protected characteristics as these groups tend have more interaction with state services and consequently have greater reliance on judicial review. The proposals would threaten their access to justice and ability to challenge unlawful decisions which affect them.
- In particular, respondents highlighted the following groups with protected characteristics as likely to be disproportionately affected by the proposals:
  - Children, including children with learning difficulties and migrant and asylum seeking children. (It was highlighted that MoJ data shows that 23% of JRs are brought by young people aged between 18 and 25 while they make up only 11% of the population of England and Wales).
  - Older people.
  - Vulnerable women.
  - People with a disability, including mental health problems.
  - Lesbian, gay, bisexual and trans (LGB&T) people.
  - People with religious beliefs.
  - Black and minority ethnic communities.
  - Gypsy and Traveller communities.
- Regarding the lack of data on court users with protected characteristics, it was highlighted that some evidence of differential experiences of the civil justice system is available showing that in England and Wales, people aged 18 to 24 and those aged 65 or over; people who are Asian, Black, mixed race or Chinese; and those who are Muslim, Buddhist or Hindu are more likely than those in other groups to give up or do nothing when faced by a civil justice problem or less likely than other groups to obtain advice when faced with a civil justice problem (However note that this research did not include judicial review.)[14]

Points on specific proposals

Planning and section 228 and 229 Town and Country Planning Act 1990 permission filter

- The planning proposals are likely to affect Gypsies and Travellers disproportionately as they are more often claimants in challenges under sections 228 and 229 of the Town and Country Planning Act 1990.
- Respondents noted the relevance to planning matters of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and highlighted that of two complaints decided in favour of applicants by the UN Disability Committee, one was a planning decision.

Standing

- Respondents stressed the negative impact of the standing proposals on groups with protected characteristics by preventing NGOs from bringing claims for groups

[14] http://www.equalityhumanrights.com/key-projects/our-measurement-framework/

they represent e.g. children, people with disabilities, people holding religious beliefs etc.

Financial incentives

- Some respondents highlighted that as people with protected characteristics (e.g. disability, gender, ethnicity) are overrepresented in low-income groups, the proposals will act as a barrier to justice for these groups.
- It was argued that the proposals on interveners will impact negatively on vulnerable groups who rely on the intervention of NGOs and charities in proceedings.

Public Sector Equality Duty (PSED)

- Respondents were of the view that as PSED disputes invariably concern the impact of a public authority's decision on people who share protected characteristics, the proposals in this area are likely to have a greater effect on these groups.

Annex B: Paying for permission work in judicial review cases

148. The consultation paper proposed that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the court. We also proposed that Legal Aid Agency (LAA) would have a discretion to pay providers in certain cases which conclude prior to a permission decision.

149. The paper stated that the proposal would only apply to issued proceedings. Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre-Action Protocol for Judicial Review. In addition, payment for work carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim.

150. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing the permission application, would continue to be paid, even if permission were not granted by the court.

Key issues raised[15]

Market sustainability and access to justice

151. Many respondents (including the senior judiciary, legal aid providers and representative bodies) argued that providers will not be able to carry the uncertainty and financial risk of work on a permission application, even with the introduction of a discretionary payment mechanism. As a result, they argued that the number of providers willing to carry out public law work will reduce considerably and access to justice will be compromised. They argued that this will mean clients will be unable to find representation, which they say would breach Article 6 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Respondents suggested this will impact particularly upon vulnerable groups and those with protected characteristics, as such persons are more in need of legal aid for judicial review and their cases involve greater uncertainty at the point of issue.

152. Some providers who responded argued that they have modelled the likely financial impact on their firms of the increased uncertainty they would face under the proposal and concluded that it would not remain viable for them to continue to take judicial review work. Others argued that they would in practice be likely to apply a higher

[15] A number of respondents referred to their response to the consultation *Transforming legal aid: delivering a more credible and efficient system* and made reference to those points. Those arguments and the Government response to that consultation were set out in the response paper *Transforming Legal Aid: Next Steps*.

merits test than exists in the Civil Legal Aid (Merits) Regulations 2013, and take on only the very strongest cases.

Merits test

153. Some respondents argued that the merits test is in place at which point the provider and the LAA already give consideration to the prospects of success so it is unnecessary to provide any greater incentive to the provider to give careful consideration to the strength of the case before issue. There was also concern at the LAA applying both the merits criteria and discretionary criteria. If the former have already been applied by the LAA at the outset, some respondents queried whether the LAA would be able to exercise a finely balanced judgement looking behind all the circumstances of the case at the end of the process.

Other general issues on principle of proposal

154. Some respondents argued that the proposal misunderstood the nature of judicial review and was disproportionate, in particular in cases which are refused permission but where there is substantive benefit to the client, and in cases which are meritorious but settle for a good reason such as the claim becoming academic through an external event.

155. Many respondents raised concerns that the proposal would impact heavily on the provider as a lot of preparation and work for the judicial review is frontloaded because of the need to pass the permission stage. They were also concerned that not only would the preparation of the permission application be at risk, but also that the proposal would extend to work on an oral renewal hearing and appeal; that on pursuing the other side for costs; and the work on a rolled up hearing.

LAA discretion and criteria

156. Although respondents recognised that the proposed system of discretionary payment sought to address concerns raised with the original proposal, they argued that it is only a partial response and creates fresh uncertainty for providers. Many responses pointed to the Exceptional Funding scheme and low levels of grants seen following the introduction of LASPO, asserting that this suggests they could have little confidence in a system of discretionary payments for JR work determined by the LAA.

157. A number of responses suggested that the criteria should not be exhaustive because, first, an exhaustive list cannot cater for all the circumstances in which it might be appropriate to make payment, leading to potential injustice, and second, an exhaustive list would amount to unlawful fettering of discretion. Some respondents argued that it would not be constitutionally appropriate for the LAA to exercise discretion on behalf of the Lord Chancellor in cases in which the Lord Chancellor might also be the defendant.

158. Several respondents argued that the discretion would be an additional burden for both the LAA and the provider.

159. Many responses also argued that there should be a right of appeal against an LAA decision, arguing that review by an independent panel should form part of the proposal.

160. Many responses did not comment in detail on the proposed criteria, although it was suggested by many that they did not in practice differ significantly from the considerations that a court would apply when considering costs, so would offer little extra protection to providers in ensuring that meritorious cases continued to receive payment. In addition, respondents argued, in particular, that:

    a. The criteria do not take into account that it is the defendant who is in fact in the best position to know the strength of a case, and that the behaviour and conduct of both the claimant and defendant in the proceedings should be taken into account.

    b. New evidence which materially affects the merits of the case may only come to light following issue (either from the defendant, from the client or from a third party). Respondents argue that the criteria should ensure that providers are not prevented from receiving payment on the basis of information emerging which they could not have known or could not reasonably be expected to know at the time of issue.

    c. Similarly, the prospects of a case which was assessed as having merit at the outset can diminish in the light of a change of circumstances, a change of law (for example a new Supreme Court decision) or the actions of a third party. A case can become academic for the same reasons. In such cases, where the claim was properly issued (and concluded) by the provider, they ought to be paid.

    d. It will not be possible in practice for the LAA to determine "the likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered", and that to do so would be costly and unproductive. They argued that the criteria would involve an element of "crystal ball gazing" for the LAA.

    e. Where the defendant settles "without admission of liability", it was difficult for providers to demonstrate the true motivation of public bodies and it would be difficult for the LAA to look behind the stated reasons to make proper assessments of why a case settled.

    f. Defendants routinely argue that their reason for reaching a particular decision is unrelated to the claimant's grounds of claim. Giving weight to the defendant's reasons or alleged motivation for settling will further encourage them to say they settled on a pragmatic basis rather than admit the claim had genuine merit. It was unjust that this should have an impact on whether the provider is then paid.

    g. A defendant resisting a costs order might want to say that they have compromised the claim for pragmatic reasons and that they ought not to pay costs. However, such claims are treated with great scepticism by the courts and the question generally applied is whether the client has achieved success (*R (Bahta) v SSHD* [2011] EWCA Civ 895).

Wider impacts

161. In terms of wider impacts some respondents were concerned that the proposal would lead to costs beyond those set out in the impact assessment, in particular for public bodies and the courts resulting in satellite costs litigation where costs are not agreed, an increase in litigants in person, and additional oral renewal hearings. They argued that the projected savings to the legal aid fund compared to potential costs and administrative burdens (both to the LAA and wider system costs) did not justify the proposal.

162. Some respondents argued that the proposal would impact in particular on BAME providers and vulnerable clients (young people, the disabled) whose cases entail the greatest risk for providers. They argued that often judicial review is the only means available to vulnerable people to challenge decisions or failures of public bodies and they were concerned about the particular impact on disabled people and their ability to access justice.

163. Some respondents raised that implementation of the procedural defects proposal in the consultation paper would increase the amount of work undertaken at risk and therefore add to the uncertainty in taking on a case.

Alternative proposals

164. Some respondents argued that payment should be made available in certain cases refused permission by the Judge and in all cases which issue but conclude prior to a court decision (for whatever reason).

165. Some respondents, and in particular the Judicial Executive Board (JEB), argued that payment should only be withheld in cases certified by the court as "totally without merit". The JEB also proposed that the judiciary should have a discretion to allow legal aid rates to be paid for cases where permission is refused but it was reasonable for permission to have been sought.

Government response

Market sustainability and access to justice

166. It is difficult to assess the extent to which providers would, in practice, refuse to take on judicial review cases in future. A number of respondents argued that they would not be able to continue acting in JR cases if the proposal were taken forward. The potential impact turns on the level of risk and uncertainty that providers would face (or perceive they would face) of not receiving payment for meritorious cases. similar arguments have been made in respect of other reforms to civil legal aid scope and remuneration. Despite this significant numbers of providers have to date remained in the civil area.

167. In order to carry out legally-aided judicial review work, a provider must hold a public law contract or a contract in the underlying area of law. The number of providers holding a public law contract pre 2010 was 43 and following contract tender in 2010 there were 103 providers offered contracts and 82 held contracts by February 2011.[16] This would suggest that in recent history there has been a strong willingness amongst providers to undertake public law contract work. Since February 2011 there has been little change in the number of providers (80 providers at January 2014) with public law contracts since despite recent fee changes. While it is still early to assess the impact of this fee cut, it does suggest that there remains a willingness amongst providers to undertake public law work at current levels of remuneration (despite previous predictions that providers would leave the market).

168. In relation to arguments that providers would in practice be inclined to operate a threshold of more than 50% prospects of success in order to minimise their risk, providers will still receive payment for their pre-proceedings work which will assist

[16] The figures relate to firms rather than schedule offices.

them in robustly considering the merits of the case prior to issue. Having carried out that consideration, we would expect providers generally to proceed to issue a claim which they and the LAA had properly assessed as having prospects of success of 50% or more, in accordance with the merits test. The Government's decision to modify the criteria following consultation (see below) also lessens the risk the provider is expected to take at the point of issue.

169. We do not therefore accept that providers will leave the market or there will insufficient numbers of providers as a result of our proposal, leading in turn to a denial of access to justice. We consider that it is likely that there will remain sufficient providers who will undertake judicial review work, taking on cases which they consider to be of merit. It is proper that they scrutinise claims carefully before applying to the LAA for funding, and in a case where the LAA and the provider agree that the case is meritorious the client will still be represented (albeit that the provider will act at risk up to the point of a permission decision). In a meritorious case the provider will still be paid, either through costs from the defendant at *inter partes* rates, or at legal aid rates because either the case is granted permission or concludes prior to permission and LAA exercises its discretion in the provider's favour. Taking into account respondent's points we have modified the discretionary criteria in a number of respects (see below), which will also serve to mitigate some of the concerns raised by providers and lessen the degree to which they are expected to act at risk. For these reasons we do not accept that the proposal gives rise to a chilling effect on access to justice or is unlawful.

Merits test

170. We consider that legal aid should be directed at cases where it is needed most and taxpayers should not be expected to fund unmeritorious cases. We continue to believe that it is appropriate to introduce a degree of risk based on whether or not a claim passes the permission threshold. We note that payment will not depend on the ultimate success of a claim but on whether the issues raised reach the permission threshold, which is a lower test.

171. The LAA merits assessment requires a case to have at least 50% prospects of success. A significant number of cases pass the merits test but fail the permission threshold. Therefore we consider it is appropriate to introduce further controls in these cases. Although the LAA will assess the case at the outset, the agency is necessarily guided by the provider's assessment on the information provided. Consultees stated that the LAA can and do challenge that assessment, but ultimately the LAA will be dependent in large part on the information provided at the point of issue by the provider. So it is important that the provider is incentivised to do all they can to consider the prospects of success thoroughly.

Other general issues on the principle of the proposal

172. We do not agree that the proposal should not place rolled up hearings at risk. We consider that this could incentivise their use where they are not warranted and, were more hearings ordered, could undermine the permission filter. We also consider that it would have the effect of putting a provider who failed at a rolled-up hearing (which takes more time for all parties and the court) in a better position than a provider who had lost at the permission stage in the ordinary way.

173. Although we have listened to the points made, we continue to consider that providers should generally only be paid for work carried out on an application for permission if

permission is granted by the court. However, we also consider that a discretion should be introduced permitting the Legal Aid Agency (LAA) to pay providers in certain cases which conclude prior to a permission decision. In light of the views of respondents we have adjusted the factors that the LAA will take into account in those cases in order to strike an appropriate balance between disincentivising weak cases and paying providers in cases which were properly issued but concluded prior to permission for reasons beyond the provider's control.

LAA discretion and factors

174. We do not accept the criticisms made of the exceptional funding scheme or that it would be inappropriate for the LAA to operate this discretion on behalf of the Lord Chancellor, including where the MoJ or one its agencies is the defendant in the case. Remuneration decisions are made at present by the LAA in such cases, including elements of discretionary decision-making. The decision would be made on ordinary public law grounds, under which it would not be relevant to take into account that the defendant to the case was the Lord Chancellor. Were an unlawful decision to be made on such a basis, it would ultimately be subject to judicial review.

175. We have carefully considered and taken into account arguments raised by respondents regarding the proposed criteria against which applications for discretionary payment would be assessed.

176. We agree that the list of criteria should be non-exhaustive in order to take into account the range of circumstances in which a judicial review may conclude prior to permission. In operating the discretionary payment system, the LAA will therefore be required to consider whether it is reasonable to pay the provider, taking into account in particular the factors[17] outlined below. When considering cases, the LAA will look at the facts of each individual case. We also recognise a number of specific points made by respondents regarding the proposed factors. Taking these into account, we intend that the final factors[18] will be as follows:

i) The reason for the provider not obtaining a costs order or agreement (whether in full or in part) in favour of the legally aided party.

177. In accordance with the terms of their contract with the Lord Chancellor, providers are required to endeavour where possible to obtain and pursue a client's costs order or costs agreement, as they would do if acting for a privately paying client.[19] The LAA will therefore closely scrutinise the reasons why costs were not obtained. In the consultation this criterion also referred specifically to the conduct of the claimant both at the pre-action stage and in the proceedings. A number of respondents argued that the conduct of the defendant should also be considered by the LAA in exercising the discretion. We agree that the conduct of both parties should be taken into account. Given that the parties' conduct would be relevant to whether costs were awarded or

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[17] Some respondents pointed out that the discretion will be based on factors to be taken into account rather than criteria. We have adjusted the language accordingly.

[18] In light of responses we have developed the language of some of the criteria (e.g. criterion (i) on costs no longer refers to seeking a costs order as we consider that is included in the reasons for not obtaining such an order). Consultation criteria (ii) and (iii) have been combined and reference to "redress or benefit" removed as otiose. These changes are not intended to change the meaning. Precise language will depend on the final drafting of the regulations.

[19] 2013 Standard Civil Contract, paragraph 6.58.

agreed, we intend that in applying this factor the LAA should take that conduct into account, but that it need not be stated expressly.

ii) the extent to which, and reason why, the legally aided party obtained the remedy they had been seeking in the proceedings (or failed to do so).

178. When considering cases against this factor, the LAA will take into account whether and to what degree the remedy which was in fact sought by the claimant was obtained. Where a case concludes prior to permission and the claimant receives the remedy sought in full, this will be a significant indicator that the claim was a good one (even if ultimately it was not possible to obtain costs).

179. The LAA will also consider the reasons why any remedy was obtained, or not. This was a separate criterion in the consultation, about which many respondents raised concerns. It was suggested in particular that this would mean that where defendants claimed for tactical reasons that the outcome had nothing to do with the claim this would adversely affect the provider's prospect of payment. This was not the intention. Rather, the reason why the remedy was or was not obtained may be relevant is because for example, the claimant may have obtained the remedy but it was demonstrably unrelated to the claim and therefore the provider should not receive payment.

180. Conversely, where in certain pre-permission cases there was a third party intervention rendering the claim academic but this factor could operate in the provider's favour (because the reason the remedy was not obtained was related to the intervention) when looked at in the round with the rest of the factors.

iii) the strength of the application when it was made (based on the facts which the provider knew or reasonably ought to have known, and on the state of the law at that time).

181. When considering cases against this factor, the LAA will take into account whether the application was genuinely meritorious at the time the application was made, based on the law and the facts as the provider knew or ought reasonably to have known them. The relevance of facts which come to light after issue will depend on whether the provider could reasonably have ascertained them at that time. We recognise concerns raised by respondents that information may only come to light following issue of an application, and that (where a case is withdrawn prior to permission) providers should not be denied payment if such information materially alters the prospects of success in a way that they could not have foreseen at the time of application. The LAA will therefore consider whether the provider knew (or ought reasonably to have known) information which affects the prospects of success. Where it transpires that there were facts that the provider could reasonably have ascertained at the point of issue, but did not do so, and those facts materially weaken the case, then this would tend against payment. This factor would allow the LAA to take into account the circumstances of that application, for example where it was genuinely urgent.

182. In relation to other points made about the review process we intend to introduce an internal review process in line with that proposed in the consultation. Providers will need to request that the LAA makes payment under the factors, providing evidence in support of their claim. The initial consideration of the claim will be taken by the LAA. If the provider is not satisfied with the LAA's decision they will have the opportunity for an internal review by the LAA. Ultimately challenge by way of judicial review will also

be available to the provider. The discretionary payment process will be prior and separate to existing costs assessments.

Wider impacts

183. We have taken into account the points raised by respondents in the Impact Assessment and the Equalities Statement.[20] We do not accept that the arguments made in respect of the combined effect of this change and the procedural defects proposal. Although that proposal may involve more work in preparing for permission, it is likely to apply to only small number of legally aided cases in which an alleged procedural defect is the only ground. The test for refusal of permission in such a case will remain a high one, and therefore we do not consider it is necessary to make an exception for such cases.

Alternative proposals

184. We have considered but do not intend to pursue the alternative proposals suggested. We recognise that there will be certain cases which conclude before a permission decision is made and as a result the LAA will have a discretion to permit payment in cases which are meritorious. We do not propose to apply the discretion to all cases in which permission is refused because those cases will have been subject to a court decision that they should not proceed any further and we consider that it is legitimate not to pay for cases which fail that threshold. We consider that restricting the principle of proceeding at risk to cases certified as "totally without merit" would certainly capture some cases which ought not to have been brought, but will not extend to all weak cases and therefore will not necessarily incentivise providers sufficiently to consider the strength of the claim before issuing.

185. In relation to the alternative suggested by the Judicial Executive Board and others, we consider that the judiciary has an important role to play in weeding out cases which are not meritorious which has been evidenced by the number of legally aided cases not granted permission (751 in 2012–13). However a similar system of judicial discretion previously existed in immigration and asylum upper tribunal appeals where legal aid for the application for reconsideration of a ruling of the Asylum and Immigration Tribunal (AIT) and the reconsideration hearing was awarded at the end of the process. The aim of the scheme was that it would reduce the number of weak challenges to AIT decisions reaching the Administrative Court. However, costs orders were made almost as a matter of routine and the scheme therefore failed to transfer any financial risk to the provider. We therefore do not propose to introduce a similar scheme in this context as we are not persuaded that it would achieve the intended aim.

Conclusion

186. The Government continues to believe 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. Under our proposal the provider would still receive payment for meritorious cases through one of three routes: i) the case is granted permission (and therefore will be guaranteed payment at either legal aid or *inter-partes* rates); ii) if a case does not proceed to a permission decision, costs are agreed as part of a settlement or through a costs order; iii) if in

[20] Available at https://consult.justice.gov.uk/digital-communications/judicial-review

such a case costs cannot be recovered, for example where a settlement which is clearly in the best interests of the client is only offered on the basis of no costs, but the case was meritorious, then the provider will be able to recover payment at legal aid rates under the LAA's discretion.

187. We consider this and the adjustment to the factors under the LAA discretion will ensure that pre-permission meritorious cases will continue to be paid.

Annex C: List of respondents

1. Adam Tear
2. Tim Earl
3. Nicholas Dove
4. William Hicks
5. Anonymous 1
6. Anonymous 2
7. Simon Read
8. Ariel Sharon
9. Elizabeth Harris
10. Peter John Hirst
11. David Radlett
12. Anonymous 3
13. David Graham
14. Paul Stockton
15. Sue Otty
16. Ms Rebecca Scott
17. Michael Robinson
18. Parliament Square Peace Campaign
19. Planning Officers Society London
20. Eric White
21. Joseph Markus
22. Community Law Partnership
23. Mr and Mrs A. Andrew
24. Forest of Dean District Council
25. Residential Landlords Association
26. Women's Aid
27. Linkage Community Trust
28. City of London Law Society – Litigation Committee
29. Julia Buckingham
30. Leigh Day
31. Gravesham Borough Council
32. Gender Identity Research and Education Society (GIRES)
33. Tim Padmore
34. Heine Planning Consultancy
35. Coalition for Access to Justice in the Environment
36. Dr John McGarry
37. Accessible Retail
38. Sutton Citizens Advice Bureau
39. Young Legal Aid Lawyers
40. Refugee Action
41. Lesbian and Gay Foundation
42. Housing Law Practitioners Association
43. John Lewis Partnership
44. Prof Richard Macrory
45. Rights Watch UK
46. Bedford Borough Council
47. London Borough of Hammersmith and Fulham
48. Mission and Public Affairs Council of the Archbishops' Council, Church of England

49. Ruston Planning Limited
50. Maggie Smith Bendell
51. Richard Harwood QC
52. Planning and Environmental Bar Association
53. Jeremy Baker
54. Compassion in World Farming
55. Constitutional and Administrative Bar Association
56. Sandra San Vicente
57. Bannister & Co
58. Nicola Daniel
59. Welsh Government
60. Resolution
61. Association of Charitable Foundations
62. National Association for Voluntary and Community Action
63. UKWIN
64. London Borough of Hillingdon
65. Alex Offer
66. Amnesty International
67. Rob Goldspink
68. Inclusion London
69. Ramblers Association
70. Amicus Law
71. British Union for the Abolition of Vivisection
72. Gordon Wignall
73. Unicef UK
74. Taylor Wimpey UK Limited
75. Human Rights Consortium, School of Advanced Study, University of London
76. TV Edwards LLP – Social Welfare/Public Law Department
77. National Aids Trust
78. Asda
79. Office of the Official Solicitor
80. British Heart Foundation
81. Reprieve
82. Equality and Human Rights Commission
83. Medical Justice
84. Airport Operators Association
85. Bates Wells Braithwaite
86. Amanda Ford
87. Prof. Colin T Reid
88. Dan Rosenberg
89. Irwin Mitchell
90. Chartered Institute of Legal Executive
91. John Whittle Robinson Solicitors
92. Coram Voice
93. Intervene
94. Wildlife and Countryside Link
95. Hodge, Jones and Allen LLP
96. Civil Justice Council
97. Rights of Women
98. UK Association of Gypsy Women
99. Office of the City Rembrancer
100. Law Centres Network
101. Legal Wales Foundation

102. Shelter
103. Shelter Cymru
104. Garden Court Chambers – Family Team
105. Association of lawyers for Animal Welfare
106. George Bartlett QC
107. Sense
108. Citizens Advice
109. Panel on the Independence of the Voluntary Sector
110. Daniel Sternberg
111. Wales Council for Voluntary Action
112. London Borough of Richmond
113. Bhatia Best
114. Swain & Co LLP
115. René Cassin
116. Equality and Diversity Forum
117. St John's Chambers
118. Jenny Mansell
119. Immigration Law Practitioners Association
120. Buglife
121. Asylum Support Appeals Project
122. South Eastern Circuit
123. The Constitution Society
124. Jerry Perlman
125. Save Babies Through Screening
126. Action against Medical Accidents
127. Police Action Lawyers Group
128. John Gorringe
129. Kimberley Asbury
130. Transport for London
131. Prachi Kanse
132. National Union of Journalists
133. Michael Sherlock
134. Maxwell Gillot
135. Osbornes Solicitors LLP
136. National Association for Youth Justice
137. Prof. Maurice Sunkin and Varda Bondy
138. Unison
139. Bingham Centre for the Rule of Law
140. Association of Judges of Wales
141. Shazina Hussain
142. Compact Voice
143. Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the Senior President of Tribunals, and Lord Justice Richards (Deputy Head of Civil Justice)
144. Law Society
145. Oliver Studdert
146. Islington Law Centre/The Migrants' Law Project
147. Which?
148. The Aire Centre
149. Fisher Meredith LLP
150. Southall Black Sisters
151. The Christian Institute
152. Low Incomes Tax Reform Group

153. Association of Personal Injury Lawyers
154. Liberty
155. Chartered Institution of Taxation
156. Jonathan Reeve
157. Miles and Partners LLP
158. Association of Taxation Technicians
159. The Young Barristers' Committee
160. Doughty Street Chambers – Public Law team
161. Tesco
162. EDF Energy
163. Karen May
164. PCS Union
165. Thompsons Solicitors
166. Keeley Creedy
167. Legal Aid Practitioners Group
168. Muscular Dystrophy Campaign
169. Women's Resource Centre
170. Leeds Gate
171. British Property Federation
172. RenewableUK
173. The Open Spaces Society
174. The Public Law Project
175. TUC
176. Herbert Smith Freehills LLP
177. Murdoch Planning
178. Flintshire Citizens Advice Bureau
179. Garden Court North Chambers
180. ACEVO
181. Bar Council
182. Sheila McKechnie Foundation
183. RWE Npower plc
184. South Yorkshire Migration and Asylum Group
185. Kate Stone
186. SouthWest Law
187. Guildhall Chambers
188. Campaign for Better Transport
189. Howard League for Penal Reform
190. Matrix Chambers
191. Southwark Law Centre
192. The National Trust
193. London Solicitors Litigation Association
194. Garden Court Chambers – Civil Team
195. Mackintosh Law
196. JustRights
197. Camille Warren
198. West Malling Parish Council
199. Justice
200. The Children's Society
201. City of London Law Society – Planning and Environment Law Committee
202. London First
203. British Institute of Human Rights
204. Royal Town Planning Institute
205. Mayor of London

206. Association of Prison Lawyers
207. Deighton Pierce Glynn
208. Construction Products Association
209. Clifford Chance, DLA Piper, Freshfields Bruckhaus Deringer, Simmons & Simmons, Weil, Gotshal & Manges
210. All Party Parliamentary Group for Gypsies, Travellers and Roma
211. Client Earth
212. Brian Thompson
213. Mind
214. Peter Blair QC
215. Baker & McKenzie
216. NCVO
217. Affinity
218. Prisoners' Advice Service
219. Garden Court Chambers – Housing Team
220. Victoria Pogge von Strandmann
221. Child Poverty Action Group
222. Hausfield & Co
223. Energy UK
224. Haldane Society of Socialist Lawyers
225. Coram Children's Legal Centre
226. Discrimination Law Association
227. UK Environmental Law Association
228. The Corner House
229. Joint Council for the Welfare of Immigrants
230. Bindmans LLP
231. Birnberg Pierce
232. Terence Ewing
233. Turpin & Miller LLP
234. Bangor University Public Law Research Group
235. Vijay Jagadesham
236. Public Law Solicitors
237. Emma Montlake
238. Barrow Cadbury Trust
239. James Stark
240. 11 King's Bench Walk
241. London Criminal Courts Solicitors Association
242. Christian Khan
243. Education Law Practitioners
244. Nick Bano
245. Education Law Association
246. Bailey Nicholson Grayson
247. Steve Symonds
248. Allen & Overy LLP
249. Harriet Samuels
250. Association of Lawyers for Children
251. Jeffery Matthews
252. Catherine Meredith
253. Geldards LLP
254. Race on the Agenda
255. Kent Critical Law Society
256. Wragge & Co LLP
257. British Red Cross

258. David Cotterell
259. The Rt Hon. Sir Henry Brooke
260. Nick Hubbard
261. Constitutional and Administrative Law Bar Association (ALBA)
262. Denise McDowell
263. Julian Coningham
264. Robert King
265. Paul Bowen QC
266. Anonymous 4
267. Nicholas Sagovsky
268. Jerome Phelps
269. Dr Keith Lomax
270. Dr Gitanjali N Gill
271. Anonymous 5
272. Anonymous 6
273. Rhiannon Jones
274. Jonathan Cousins
275. Ian Wise QC
276. Adam Straw
277. Louise Streeter
278. Azeem Suterwalla
279. David Duckitt
280. David Wolfe QC
281. Helen Gill
282. Sam Jacobs
283. Katie Brown
284. Shauneen Lambe
285. Deena Blacking
286. Alex Durance
287. Meyric Lewis
288. Rachel Jones
289. Dr Adeline Trude
290. Richard Blyth
291. Diane Astin
292. Alexander dos Santos
293. Richard James Wood
294. Christopher Whitmey
295. John Ford
296. Mark Mathews
297. Stephen Clear
298. Jane Young
299. P. Carder
300. Lord Neuberger, President of the Supreme Court
301. Edward Kirton-Darling
302. Liz Hinks
303. Criminal Law Solicitors Association
304. Dentons
305. Tendring District Council
306. Richard Buxton
307. British Council of Shopping Centres
308. Hull City Council
309. Bhatt Murphy
310. Scottish Power

311. Kerry Barker
312. Graham Phillips
313. Churches' Refugee Network
314. Tom Pollard
315. The Criminal Bar Association
316. Stephensons LLP
317. Royal National Institute of Blind People
318. Nicola Gibson & Giulio Oliviero
319. Jennifer Hilliyard
320. Anti Trafficking and Labour Exploitation Unit
321. Amnesty International UK
322. Vera Baird QC, Police & Crime Commissioner for Northumbria
323. Favell Smith and Lawson
324. Steve Webb MP

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