



**Judicial Review:
Proposals for further reform (Cm 8703)
JUSTICE Response
November 2013**

For further information contact

Angela Patrick, Director of Human Rights Policy
email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

“There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review”

Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

JUSTICE considers that the proposals *Judicial Review: Proposals for further reform* are ill-considered, poorly evidenced and ill-advised.

Modern judicial review and the underlying administrative law provide an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control the relationship between the citizen and the State, this function takes on a particular constitutional significance.

Clearly, it must be open to the Government – and to Parliament - to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. We are concerned that this consultation fails to take this obligation seriously.

Changes proposed to legal aid for judicial review – together with other proposals to limit access to funding for prisoners and non-residents – appear designed to insulate public decision makers (including central Government) from effective judicial oversight. Minor amendments to the Government’s earlier proposals introduce a possible discretionary payment for some work done on risk, in some cases, according to limited criteria. This, in our view, is far from adequate to meet the damage that the proposed cuts may do to the availability of advice and representation for vulnerable people who want to complain about their treatment by public bodies.

New proposals on standing and costs could significantly impact upon public interest litigation within the United Kingdom, without clear evidence to support the case for change. We seriously regret that nothing in the Consultation appears to consider or evaluate the important public interest function played by organisations who expend resources to bring cases in their own name when they would otherwise not be heard. The picture painted by the Consultation of the conduct of third party interveners neglects that the role of organisations who intervene in the public interest is to assist the court. In light of the enthusiasm expressed by our senior judiciary for the

impartial assistance provided by third party interventions in the public interest – including those by JUSTICE – this is surprising.

It is regrettable that the measures in the Consultaion which address standing, protective costs orders and the costs of interventions appear to neglect the gatekeeper function of the courts in making these public interest orders. In each of our domestic courts, the question of standing, permission to intervene, and the imposition of costs orders remains squarely within the power of our judges. The current rules strike a fine balance between the proper, efficient and fair administration of justice and the public interest in ensuring that significant public interest cases are heard and when they are heard, any information of value to the court is available without undue restraint of costs risk.

We encourage the Government to step back from its proposed short timetable for the consideration of responses to this Consultation Paper, and the implementation of these reforms, to allow fuller time for reflection and analysis. JUSTICE is concerned that without such opportunity for fuller consideration, these proposals will lead to a significant shift in administrative law practice in this country to the detriment of the constitutional relationship between individuals and the State.

Introduction

1. JUSTICE is an independent human rights and law reform organisation and is the United Kingdom section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law. JUSTICE has worked actively on issues of good administration, oversight and accountability since our inception, publishing *The Citizen and the Administration* (1961), *The Citizen and his Council* (1969), and *Administration under the Law* (1971) during the early development of modern administrative law in England and Wales. We briefed on the retention of the constitutional duties of the Lord Chancellor in connection with the rule of law, independence of the judiciary and the public interest in the administration of justice, during the passage of the Constitutional Reform Act 2005.¹ We regularly intervene in constitutionally significant proceedings as a third party, including in cases arising by way of judicial review. Most recently, we argued in *R (Cart) v Upper Tribunal*, for the retention of judicial review for the determinations of the Upper Tribunal and other similar specialist tribunals. In that case, Lord Dyson stressed the fundamental nature of the function of judicial review:

There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review.²

2. In September 2013, the Government published *Judicial Review: proposals for further reform* (“the Consultation”). While we welcome the opportunity to respond to this consultation, we consider that there a significant number of flaws both with the Consultation and the proposals it makes for reform. We address these in turn below. Importantly, we regret that the Government’s proposals for change largely fail to consider the important constitutional function outlined by Lord Dyson.
3. In this response, we limit our comments to our areas of expertise. Where others are better placed to comment, we have not provided a response. Silence on a specific consultation question should not be read as approval for the Government’s proposals.

¹ For example, see ss 1 and 3.

Background

4. This is the third Government Consultation proposing changes to judicial review in the last 15 months. The rush to reform in this area appears unrelenting. Just eight weeks have been provided for consideration of these proposals.
5. Following last December's consultation, *Judicial Review: Proposals for reform* ("the First Consultation"), significant changes to judicial review procedure have already been made. Time limits have been reduced in some cases; fees introduced for renewal hearings and, importantly, judges have been given greater discretion to refuse to consider cases deemed "totally without merit".
6. *Transforming legal aid* consulted on wideranging proposals for reform of civil legal aid for judicial review, already restricted significantly by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The significant response to those proposals, we understand, was overwhelmingly negative.³ Over 16,000 responses to the consultation were received, yet a Government response was hastily produced which proposed that the Government intended to proceed with its proposal to shift a significant costs risk in judicial review to claimant solicitors, subject to the inclusion of a slightly amended scheme in this consultation. We deeply regret that this Consultation appears to have been published without adequate time for analysis of the changes in LASPO or following the First Consultation and presents significant proposals to curtail judicial oversight of public authority decision making without clear evidence or justification in support.
7. In our responses to both the First Consultation⁴ and to *Transforming legal aid*,⁵ we expressed significant concern that many of the proposals would - by design or coincidence - significantly shield administrative decision makers, both within Government and in public agencies, from effective judicial oversight. This would significantly alter the relationship between individuals – particularly those without independent means – and the State. They could significantly undermine the accountability, transparency and effectiveness of public decision making and the public interest in good administration.

² Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

³ Although many individuals have published their own responses, the Ministry of Justice, has decided not to publish all consultation responses received.

⁴ JUSTICE, Response to Judicial Review: proposals for reform, 31 December 2012 (First consultation response) <http://www.justice.org.uk/resources.php/341/judicial-review-consultation>

8. In light of the clear constitutional significance of these measures, we raised concerns about the Government's failure to recognize the important function of judicial review. However, we also expressed serious concerns about the absence of evidence produced to support the Government case for reform, the use of anecdotal evidence, supposition and assertion and political statements in the Government's case for change. We regret that each of these deficiencies are repeated in this Consultation and we reiterate our concerns, below.

The Constitutional significance of judicial review

9. In one of the first JUSTICE reports on the relationship between the individual and the State, *The Citizen and the Administration*, in 1961, we considered a legal landscape where there was little to no provision for the public oversight of administrative decision making. Yet, administrative discretion in the provision of public services and the treatment of the individual had begun to grow exponentially. The recommendation of the Faulks Committee (1955-57) led to the establishment of the Council on Tribunals. Our report led, eventually, to the creation of the Parliamentary and Health Service Ombudsman. Judicial review was a little developed remedy, which as Bondy and Sunkin explained did not exist in its modern form until decades later.⁶ As the Lord Hartley Shawcross – then Chair of JUSTICE - outlined in his preface:

The standards of administration in this country are high... But, with the existence of a great bureaucracy there are inevitably occasions, not insignificant in number, when through error or indifference, injustice is done – or appears to be done ... But too often the little man, the ordinary humble citizen is incapable of asserting himself...The little man has become too used to being pushed around: it rarely occurs to him that there is any appeal from what “they” have decided. And as this Report shows, too often in fact there is not.⁷

10. In the intervening period, the State has continued to grow, and with it, modern public law. Trite as it would be to set out the theoretical foundations of the constitutional importance of judicial review, there are clear judicial statements about the important democratic function of judicial oversight in the tripartite dialogue of Government between the

⁵ JUSTICE, Response to *Transforming Legal Aid*, June 2013 <http://www.justice.org.uk/resources.php/349/transforming-legal-aid>

⁶ The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing, Varda Bondy and Maurice Sunkin, 2009. See also *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Const L Blog, 10 January 2013.

⁷ JUSTICE, *The Citizen and the Administration* (1961), xiii

Executive, the legislature and the judiciary. For each purpose served by judicial review, there is a corresponding quotation, rendered significant by the context of an individual case, an individual public wrong and the need for a remedy exhibited by a little man (or woman) or a group of individuals affected by poor administrative decision making. Judicial review finds its grounding in the rule of law; the principle that all public bodies are themselves subject to the law and that individuals are entitled to relief from arbitrary or abusive actions by the State. Its functions to control arbitrary or abusive administrative action, to ensure that public decisions are lawful ones and thus to perform an important function of our constitutional settlement.⁸ Thus, as explained by Lord Reed:

Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits.⁹

11. The role of judicial review has at its heart the public interest in the prevention of public wrongs:

Public law is not at its base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.¹⁰

12. Decades on from our 1961 Report – the successor of the Council on Tribunals, the AJTC now abolished – the degree of discretion afforded to executive and administrative decision makers continues to expand, touching on most, if not all, aspects of our daily lives. In his 2013 JUSTICE Annual Lecture – an annual memorial dedicated to Tom Sargent, one of the key authors of *The Citizen and the Administration* – Lord Neuberger explained that the continuing importance of judicial review:

The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or

⁸ See for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408E; *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42, 62B. See Fordham, *Judicial Review Handbook*, Hart, 2012, Chapter 1; Auburn, Moffett, Sharland, *Judicial Review: Principles and Procedure*, OUP, 2013, Chapter 1.

⁹ *Axa General Insurance v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868, [148]

¹⁰ *R v Somerset County Council ex p Dixon* [1998] Env LR 111, [121]. See also *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 [2008] QB 365, [61]: “What modern public law focuses on are wrongs – that is to say, unlawful acts of public administration.”

other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly.

13. He added an express note of caution about this Consultation:

While the Government is entitled to look at the way that JR is operating and to propose improvements, we must look at any proposed changes with particular care, because of the importance of maintaining JR, and also bearing in mind that the proposed changes come from the very body which is at the receiving end of JR.¹¹

14. It is against this background that we return to our concerns about the substance of this Consultation. Although the foreword explains that judicial review is a “crucial check to ensure lawful public administration”¹² throughout the Consultation paper the language used by the Government suggests – without foundation – that judicial review is unnecessary and overly bureaucratic red tape to be diminished without cause for concern. Nowhere in this Consultation does the Government consider the public good served by judicial review, or any possible costs associated with restricting access to it, particularly for those without means. Rather, with respect, the use of unsupported assumptions and impressions – in both the First Consultation and this - to support the Government's case for change shows significant disregard for the important constitutional role played by judicial review.¹³

15. Modern judicial review and associated administrative law provides an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control the relationship between the citizen and the State, this function

¹¹ Lord Neuberger, *Justice in an age of Austerity*, JUSTICE Annual Tom Sargant Lecture 2013, delivered on 15 October 2013. <http://www.justice.org.uk/events.php/52/justice-tom-sargant-memorial-annual-lecture-2013>

¹² The Consultation, Foreword. See also paragraph 1 (“critical check on the power of the State providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful”.)

takes on a particular constitutional significance. Clearly, it must be open to the Government – and to Parliament - to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. We are concerned that this consultation fails to take this obligation seriously.

Evidence-based policy making: the case for change

16. The First Consultation was published shortly after a series of high-level, blunt Ministerial criticisms of judicial review in the press.¹⁴ Unfortunately, the politicisation of this process has continued apace.¹⁵ However, no further steps have been taken to remedy the gaps in the Government’s case for reform. The same criticisms we made about the First Consultation, stand:¹⁶

- a. **The case for reform is broadly based on assertions and implications, unsupported by evidence.** Few examples of the motivation for reform are given and little evidence is cited to support the Government’s case. Notably, in the foreword, the Lord Chancellor asserts concern about “the time and money wasted in dealing with unmeritorious cases”. There is no evidence produced to support the implication that the court is inundated with unmeritorious claims that cannot be controlled using existing powers – or the new extended discretion to reject claims “totally without merit”. Equally, a new foundation of the Government’s case is that many claims are brought without substance and for political, or “campaigning” purposes, claiming cases “may be brought simply to generate publicity”, by groups “who seek nothing more than cheap headlines”. JUSTICE does not bring claims in its own name. However, we find these allegations crude and unsupported by the experience of our courts or the jurisprudence on public interest litigation. We return to this issue in some detail, below.

¹³ See First Consultation, paras 35, 49, 64 and 78, for examples. See this Consultation paper, paras 7(ii), 7(ii), 7(iii). We return to a number of other examples of assertions unsupported by evidence during the course of this response, below.

¹⁴ JUSTICE, First Consultation Response, para 2.

¹⁵ In the week that that this Consultation was published, the Lord Chancellor published an article in the Daily Mail which stated “Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state.” Mail Online, *The Judicial Review is not a promotional tool for countless left-wing campaigners*, Chris Grayling, 6 September 2013. <http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>

b. **Where evidence is provided, it is weak and undermined by simple analysis.**

For example, as we explain below, figures provided show that, outside immigration and asylum cases, the rate of judicial review has remained largely static for many years. Yet, the Lord Chancellor continues to assert that “use of judicial review has “expanded massively in recent years”. In connection with specific proposals on standing, assertions are made, for example, about the burden of public interest cases brought by organizations and groups acting in the public interest, but the statistical evidence produced in the Consultation does not support those criticisms.

c. **The impact assessments produced do not fulfil their purpose.** Again, the principal justification provided for reform is that judicial review is an economic burden which cannot be justified in the current climate. Yet, the impact assessment prepared provides no concrete examples of cases where judicial review has stood in the way of economically viable and valuable projects. The figures provided are limited as the Government accepts that little data is available on the impact of judicial review. Little or no consideration is given to the positive benefits of the existing procedure (such as encouraging early settlement and pre-action mediation). We regret that the impact assessment of the potential changes to legal aid is particularly scant.

17. The case for change identifies a series of arguments for reform, none of which stand up to scrutiny. However, we deeply regret that the claims made are in many cases couched in inflammatory language and may be misleading without a wider understanding of administrative practice and public law. We deal with new claims here in some detail; claims which echo the First Consultation are unsupported by any significant new evidence:¹⁷

a. **Judicial review has grown exponentially:** We deal with the Government’s simplistic analysis of the figures and statistics provided on the expansion of judicial review in our response to the First Consultation. There is nothing in either that paper or this which engages with the rationale behind the figures, including the growth of the State and the development of judicial review. Simply, a significant proportion of the number of cases given are immigration claims, shortly to move from the administrative courts to the Upper Tribunal. The Government reiterates a significant expansion in the number of judicial reviews lodged during

¹⁶ We do not repeat our earlier criticisms, but point to the same flaws arising herein.

the last decade. The Consultation focuses on the figures for 2007 – 2012. Although it accepts that the greatest increase is in immigration cases, it points out that other claims are also increasing albeit at a slower rate. This is true, but misleading in its presentation. The increase shown is at a significantly lower rate with other civil justice claims rising from around 2,000 per year to around 2,500 per year. Focusing on figures for 2011, the Consultation notes that around only 4% of claims lodged reached a final hearing. The Government concludes that “there is a large and growing number of judicial reviews. Many such challenges are unsuccessful.” This simplistic analysis shows a limited understanding and engagement with the nature of administrative law and its practice. Firstly, there is no rationale given for the reason for the expansion of judicial review and no analysis of whether this could present public benefits. Secondly, there are many reasons why a judicial review might be withdrawn before reaching either permission stage or a final hearing. In the figures given, there is no analysis of why cases which do not proceed withdraw. Judicial review is by its nature front loaded and designed to reach a practical solution. In some cases issuing proceedings may be enough to persuade a public authority to reconsider its position. In others, cases may develop during their progress through the courts, beyond the control of the claimant, in a way which makes a claim academic. Concessions may be made; new information may come to light during the process of disclosure and in some cases, authorities may settle late in the day, removing the need for further action. Yet in all of these cases – as accepted by the Government in *Transforming legal aid: next steps* – there may be benefit to the individual claimant and the public interest. No attempt has been made, despite concerns raised in previous consultations, to better determine how many claims are brought and abandoned or rejected with no public or individual benefit resulting. In our view, it is unlikely that these are significant in number. We regret that statistics are being used once again as a foundation for reforms with a significant constitutional impact, which do not stand up to basic examination. We concur with the assessment of Bondy and Sunkin – who are conducting the leading academic research into the operation of judicial review – that:

One of the puzzles of the reform saga is that the Government appears to know that the figures do not justify its concerns in relation to growth...[yet] It is

¹⁷ See JUSTICE Response to First Consultation, para 10.

as if growth in the use of judicial review is a mantra which cannot be dispensed with.¹⁸

- b. **Judicial Review poses an economic burden:** The Consultation Paper asserts that major projects of national significance are delayed by the conduct of unmeritorious judicial review, impacting adversely on economic recovery and growth. However, no evidence is given at all to support this claim, bar a single anecdotal case study.¹⁹ The study itself undermines the Government's claims. That case involved a major private building project. We are given no further information about the location of the project or the grounds for review. There are many possible grounds that might have led to challenge, not least significant environmental reasons why building in a particular area might be subject to challenge. The regulatory framework for building and other infrastructure projects is complex. That regulation exists to ensure that building complies with national and international standards which protect us all. If an expensive project proceeds, but is ultimately unlawful, the expense incurred could be wideranging in monetary and non-monetary impacts. Yet, in this case, permission was granted. Permission to appeal to the Court of Appeal was granted. Not only did the applicants have an arguable case in public law terms, the issue was considered of sufficient public importance for an appeal to be considered appropriate by either the High Court or the Court of Appeal. The only major national infrastructure project currently subject to judicial review – HS2 – was subject to similar degrees of scrutiny. Public investment of this scale is likely to raise significant issues of public importance and will inevitably be subject to specific legal requirements and the ordinary rules of administrative law. However, there is no evidence to show that the Court's power to reject unmeritorious cases is inadequate, not least with the addition of the recent widened discretion to reject any case "totally without merit". In HS2, the Supreme Court, which has additional powers to limit its docket to only those most significant cases of public importance, has determined the case worth consideration. Without further evidence, it appears that the Government's case here can be summarised thus: where significant sums of public or private money is in play, a lower standard of oversight should apply, lest scrutiny deter investment.

¹⁸ Varda Bondy and Maurice Sunkin, How many JRs are too many? An evidence based response to 'Judicial ReviewL Proposals for further reform', UK Const. L. Blog (26th October 2013) (available at <http://ukconstitutionalaw.org>)

¹⁹ The Consultation, paragraph 7.

- c. **Judicial review is abused by “time-wasters” or political campaigners:** A core pillar of the Government case for reform in the First Consultation was delay or “time-wasting”, again with the implication that many claims brought were without merit. A variation on this theme, in this Consultation, criticises public interest litigation brought by organisations or groups. This is linked to proposed reforms to standing and costs considered below. The Consultation explains the Government view that “judicial reviews are being used as a means of generating publicity and prolonging campaigns after all proper decisions have been made”. We return to this below, but no specific evidence is produced to support this assertion. Again, no recognition is given to the role played by the Court as gatekeeper of its jurisdiction. Without evidence that the decision taken may be unlawful – and thus improper – no grounds for judicial review will lie.
- d. **When claims are won, the victory doesn’t matter:** The allegation that some claims even when successful were “pyrrhic victories” was made in the First Consultation. The Government expands on this in this Consultation, making proposals to expand the power of the court to refuse to give permission in some cases involving procedural illegality (see below). We are concerned that this appears to show a fundamental lack of understanding of the purpose and effects of judicial review. We reiterate our view that this assessment of the purpose and value of a judicial review claim by a Government department is deeply disappointing. The remedies available to the Court are varied, but it is never the purpose of review for the Court to become an administrator. As we explain below, the proposals in the Consultation would inappropriately require the Court to second-guess the substantive decision making of an individual authority. Where a decision is judged unlawful it is determined that a decision-maker has failed to act within his or her powers, has misunderstood the law or acted so unreasonably that no other decision maker could rationally have reached the same conclusion. In practice, a victory will necessitate a new decision and greater reticence and awareness by the decision-maker. This is a serious outcome for any aggrieved claimant and important for good governance and the rule of law.
- e. **Judicial review frustrates public decision making and hinders “actions the executive wishes to take”:** As explained above, that judicial review places boundaries on the scope of executive and administrative power is entirely proper. In fact, it is not judicial review which creates these boundaries, but the proper function of substantive administrative law. Judicial review is designed to provide a remedy for individuals aggrieved by public bodies acting unlawfully; albeit in

pursuit of an action which they “wish to take”. While it may prevent the executive from pursuing its policies without fetter, it is constitutionally proper that the Government is required to act within the bounds of the law and that an independent check on its assessment of its own actions is available, even to those without means. Restricting the “judge on your shoulder”; would remove an important lever designed to prevent arbitrary or discriminatory decision making or public agencies acting entirely outwith the bounds of their statutory powers.²⁰

²⁰ The long-standing guidance issued by the Treasury Solicitors, *Judge over your shoulder*, intended for public decision makers, which explains that compliance with administrative law is commensurate with good administration. The 4th edition, published in 2006 explains: “We have always kept in mind the purpose and target audience of this book. It’s purpose is not “How to survive Judicial Review”, but rather to inform and improve the quality of administrative decision-making – though, if we are successful, that should have the incidental effect of making decisions less vulnerable to Judicial Review”. http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf A more recent parallel guide for public authorities published by the Scottish Government, to assist administrators applying public law principles in Scotland explains: “Good decision-making is an essential part of good government. It is fundamental to the Rule of Law ideal that official decisions are fair, efficient, accessible and not arbitrary, and that they comply with the law. *Right First Time* is designed to assist any public decision-maker comply with these high standards.” (*Right First Time* (2010)). <http://www.scotland.gov.uk/Publications/2010/02/23134246/1>

Standing

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?

18. JUSTICE does not agree that there is a problem with the current test for standing under section 31(1) of the Senior Courts Act 1981 and as interpreted by the courts. The application of the “sufficient interest” test, subject to the exercise of judicial discretion, allows individuals or groups, in limited circumstances, to vindicate the rule of law and stop unlawful conduct, which may otherwise go uncorrected.²¹ In these cases the public interest is served by allowing the court to consider whether the public body in question has acted within the bounds of the law:

[T]he courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.²²

The current law

19. Domestic law has long recognised the value of public interest litigation:

[there would be] be a grave lacuna in our system of public law if a pressure group ... or even a single public-spirited taxpayer ... were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

20. However, this does not necessitate a ‘free-for-all’ approach toward standing. In practice, the courts have carefully circumscribed the rules on standing, a critical consideration that the Consultation does not consider in any detail. Significant legal and practical implications operate to vitiate against frivolous or vexatious claims, not least the power of the administrative court to refuse to hear unmeritorious cases.

²¹ Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617:

²² *R v Somerset County Council, ex p Dixon* [1998] Env LR 111, QBD, 121.

21. Importantly, an organisation purporting to represent the public interest may, in fact, also be found to be representing its members, who have a direct interest in the outcome of the claim. In such cases, the organisation will be regarded as having associational standing through its membership.²³ These kind of representational cases allow claims to be brought by one party rather than in multiple claims by individuals, joined, repeat or otherwise. In the cases of, for example, federations of professionals or small businesses, this may allow a public interest argument to be raised and considered effectively without the significant cost in monetary and other resources falling on a single individual or institution.²⁴
22. The courts routinely take into account an important range of factors before granting permission to bring a claim, including, among other things: the merits of the claim;²⁵ the legislative framework;²⁶ the importance of vindicating the rule of law;²⁷ the importance of the issue raised;²⁸ and the existence of a better placed challenger.²⁹ These factors reflect the focus of public law, and judicial review in particular, on addressing public wrongs or misuse of public power.
23. Even where other factors may be satisfied, the courts retain full discretion to dismiss cases that demonstrate an ulterior or improper motive. For example, Lord Justice Dyson expressed the view that “it is difficult to conceive of circumstances in which the court will accord [an individual] standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose.”³⁰ Context is key, as Lord Reed has explained:

What is to be regarded as sufficient interest to justify a particular applicant bringing a particular application before the court, and thus as conferring standing, depends

²³ *R v HM Inspector of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329, QB, 350 per Otton J.

²⁴ See for example, *R (Hackney Drivers Association) v Parking Adjudicator* [2012] EWHC 3394.

²⁵ *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, DC, 395 per Rose LJ: “the merits of the claim were an important, if not dominant, factor when considering standing.”

²⁶ *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617, 630 per Lord Wilberforce, 646 per Lord Fraser, 662 per Lord Roskill.

²⁷ *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617, 644 per Lord Diplock; *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, 395 per Rose LJ.

²⁸ *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, 395 per Rose LJ.

²⁹ *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, 395 per Rose LJ; *R (Hasan) v Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin), para 8 per Collins J.

³⁰ *R (On the application of Feakins) v. Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546, [24]. Sedley J expressed a similar view in *R v Somerset County Council, ex p Dixon* [1998] Env LR 111, QB, 121: “If an arguable case of such misuse [of public power] can be made out on an application for leave, the court’s only concern is to ensure that it is not being done for an ill motive.”

therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.³¹

24. This careful consideration is at odds with the concern expressed by the Government in the Consultation that claims are being brought only “for reasons of publicity or to cause delay” and that the courts have taken an “increasingly expansive” approach to standing. We consider that the picture painted in the Lord Chancellor’s foreword of judicial reviews being sought by “groups who seek nothing more than cheap headlines” is entirely inaccurate. Issues of public interest likely to attract the interest of an organisation – and permission from the court – will be, by their nature, high-profile matters of public controversy. As explained above, judicial review is a remedy of last resort designed to prevent or remedy unlawful public activities; delay is an inevitable and likely desirable consequence of proceedings being issued. That these are side-effects of a public interest challenge – and frustrating for the public body concerned – is not a compelling case for reform. The Consultation provides no further evidence that the current approach to standing is inadequate.

The case for change

25. A considered appraisal of the law and practice on standing illustrates the weaknesses in the Government’s case for reform. The Consultation relies on principally on assertions of claims brought for campaigning purposes and anecdotal evidence. It cites the *Evans* and *World Development Movement* cases, with no consideration of the important issues of public importance raised in those claims. *Evans* challenged the transfer to the Afghan authorities of suspected insurgents detained by UK armed forces in the course of operations in Afghanistan.³² The case hinged on an allegation that the transferees were at a real risk of torture, which “the English common law has regarded...with abhorrence for over 500 years”.³³ *WDM* involved a claim that a significant sum of public money was being spent unlawfully on a development in Malaysia. The failure to engage with the “sufficient interest” test as applied, or the public interest elements of the claims actually brought reinforces the impression that the present proposals are motivated by purposes other than effective administration.

³¹ *AXA General Insurance v Lord Advocate* [2011] UKSC 46 at [170].

³² *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

³³ *A and Others v Secretary of State for Home Department* [2005] UKHL 71, Lord Bingham at [51].

26. On the government's own figures, between 2007 and 2011, only around 50 judicial review claims have been lodged each year by NGOs, charities, pressure groups and faith organisations. The Consultation concedes that these figures have been manually compiled and are unreliable. This figure represents a very small fraction of the total number of claims filed each year. In 2010, for instance, the Administrative Court received a total of 10,548 applications for permission to apply for judicial review.³⁴ Thus, on the worst case presented by the Government, in 2010, the number of claims brought by organisations potentially lacking direct interest amounted to less than 0.5% of the total number for that year.
27. This percentage is likely to be even smaller once one takes into account (1) groups that may in fact have had associational standing through their membership; and (2) that 30% of the approximately 50 per year applications relate to environmental matters, which are governed by the separate rules under the Aarhus Convention. This minor increase in the number of cases each year seriously undermines the government's assertion that "the wide approach to standing has...hinder[ed] the process of proper decision-making". Given the near negligible increase in case load, the statistics undermine rather than make the case for reform. We note that recent academic research by Bondy and Sunkin suggests that the figures may yet be even smaller, citing only three identifiable cases over a 20 month period.
28. It is important that the Government acknowledges that cases brought by NGOs and other such organisations have a higher than average success rate. This is illustrative of the significant legal and practical constraints placed on the public interest litigation. Organisations who act in the public interest will refrain from frivolous litigation, and will generally only make considered applications when there is an important point of public interest at stake. Not least, most organisations who take cases in the public interest will be charitable bodies or not-for-profit organisations have limited resources and must account to their trustees and boards for their operations. They will tend to act only in those cases where they have the necessary expertise and capacity to make focused legal arguments. The quality of such applications has been expressly welcomed by the courts.³⁵

³⁴ Ministry of Justice, Judicial and Court Statistics 2010, p.157, available online at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217516/judicial-court-stats.pdf.

³⁵ See for e.g. *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, DC, 350 per Otton J: "an entirely responsible and respected body with a genuine concern for the environment...who, with its particular

29. Importantly, the proposals overlook the supervisory nature of the court’s jurisdiction in judicial review cases. Unlike ordinary appeals, the supervisory jurisdiction “does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case”.³⁶ Contrary to what is stated in the proposals, Parliament and Government are still the final authority on what is in the public interest. The courts are only concerned with the legal validity of the decision. Moreover, as highlighted by Lord Reed, albeit in the context of Scottish law, lessons from private law concepts of standing are not appropriate in the context of applications to the court’s supervisory jurisdiction.³⁷

30. The Consultation fails to consider the public good in any public interest litigation. JUSTICE is concerned, again, at the lack of balance in this approach. The constitutional significance of cases initiated by those lacking direct interest, albeit limited in number, cannot be overstated. Even when decided in the favour of the government or the public body, there is much value in clarifying the scope of public power with regards to important issues, given the lack of a defined relationship between the citizen and the state. By way of example, the following issues would never have been contemplated, but for the current approach taken by the judiciary towards standing:

- Whether the Overseas Development and Co-operation Act 1980 authorised aid for a development project that was not economically sound.³⁸
- Whether the government’s child poverty strategy complied with Parliament’s intention as set out in the Child Poverty Act 2010.³⁹
- Whether the principle of open justice prevented Justices from withholding their names from the parties to a case, their legal representatives, the press in court reporting the proceedings or a bona fide inquirer.⁴⁰
- Whether a fast-track pilot scheme for the adjudication of asylum applications made by single male applications arriving from countries where the Home Secretary believed there to be no serious risk of persecution was fair and lawful.⁴¹

31. Moreover, in most public interest cases, the issues raised will ultimately impact a wide range of persons, or might adversely affect a marginalised community. In the latter case,

experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge”.

³⁶ *Reid v Secretary of State for Scotland* [1999] 2 AC 512, Lord Clyde at 541F.

³⁷ *AXA General Insurance v Lord Advocate* [2011] UKSC 46 at [171].

³⁸ *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386.

³⁹ *R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin).

⁴⁰ *R v Felixstowe Justices, ex p Leigh and another* [1987] QB 582.

vulnerable individuals may not have the resources, expertise or the necessary familiarity with the legal process to effectively challenge a misuse of public power. And in both instances, an organisation with specialist knowledge will be best placed to bring a forward-looking challenge that seeks to ensure that the future exercise of public power is in accordance with the law.

32. Finally, it should be noted that domestic practice on standing is not out of line with other jurisdictions, including common law jurisdictions. For example, Canada,⁴² Ireland,⁴³ South Africa,⁴⁴ and India⁴⁵ all appear to have similarly flexible, if not more liberal, rules on standing with regard to constitutional or rights-based challenges. Thus, the domestic test for standing, as applied by the courts, strikes the right balance between ensuring the principle of legality and access to courts, while preserving judicial resources.

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?

33. The government need not consider alternative standing regimes, which are specifically streamlined to serve the particular context in which they operate, and are not suitable for general judicial review challenges. For the reasons set out above, the current test for standing, as applied in a context-sensitive manner by the courts, adequately balances the

⁴¹ *R(Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219.

⁴² *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. The Canadian Supreme Court held that in determining whether to grant public interest standing, a court should weigh the following factors: (1) Whether there is a serious justiciable issue raised; (2) Whether the plaintiff has a real stake or a genuine interest in it; and (3) Whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. Further, the Supreme Court ruled that the factors were not to be viewed as a rigid checklist, but should be “considered in a purposive, flexible and generous manner”. Finally, “courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action.”

⁴³ Order 84 Rule 20(4) of Ireland’s Rules of the Superior Courts requires “sufficient interest in the matter to which the application relates” before applicants may be granted leave for judicial review. The courts have approached the question of standing for organisations on a discretionary basis. Thus, a bona fide organisation with a genuine interest can bring a challenge if the individual affected is not in a position to effectively assert the claim (*Irish Penal Reform Trust Limited & Ors v the Governor of Mountjoy Prison & Ors* [2005] IEHC 305), or if the issue is one that affects almost all of the population and it is unlikely that any individual would litigate the matter (*Digital Rights Ireland v The Minister of Communication, Marine and Natural Resource & Ors*. [2010] IEHC 221).

⁴⁴ Section 38 of the Constitution of the Republic of South Africa, 1996 grants the following categories of individuals or groups the right to bring a challenge in cases where a Bill of Rights guarantee has been allegedly infringed or threatened: “(c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.”

⁴⁵ *S.P. Gupta v President of India & Ors* AIR 1982 SC 149 (Supreme Court of India), Justice Bhagwati: “If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it....[W]henver there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury.”

competing interests at stake; is in line with comparative jurisprudence; and most importantly, constitutes a principal part of the constitutional setup in the UK given the lack of a defined constitutional relationship between the governing and the governed.

34. Although we do not think that an alternative is necessary, we reiterate our view that the tests referenced by the Government – drawn from the tests for standing in EU law and the “victim” test used in the ECHR and incorporated in the Human Rights Act 1998 – are not appropriate. These are tests designed to control when legal or natural persons may vindicate individual rights guaranteed in EU law⁴⁶ or for the purposes of determining access to remedies for the violation of fundamental human rights protected by the Convention in domestic or international law. As explained above, the public interest served by judicial review is not so confined, but is instead focused on the identification and prevention of public wrongs. To adopt a narrower interpretation would be inconsistent with the longstanding approach of our domestic courts, creating a new “technical” hurdle to standing which would not, in our view, serve the public interest.

Procedural Defects

Question 12: Should consideration of the “no difference” argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgement 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?

⁴⁶ The “direct and individual concern” test which operates in EU law is subject to criticism in its own right, for example, C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

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

35. JUSTICE does not agree that there is any benefit to be gained by amendment the current approach to the “no-difference” test. We are concerned that the proposals explored in the Consultation may, at best, create further delay, duplication and cost and at worst, could significantly change the supervisory function of our judges on judicial review applications, with serious and inappropriate constitutional implications as a result.
36. The Consultation explains the Government’s view that procedural claims may involve an argument that there was “simply a failure to follow a certain procedural process” and “[i]n some circumstances, a case founded on a procedural flaw, whilst technically successful, results in no substantive benefit to the claimant in that the same decision or action is taken again”.
37. We are concerned that the proposals in this part of the Consultation illustrate a significant lack of understanding about the purpose of administrative law and the function of judicial review. Question 16 asks for examples of cases “brought solely on the grounds of procedural defects” and each of the other Consultation questions in this part seems grounded in the implication that it should be easier for the Court to dismiss, or refuse a full hearing in cases which raise issues of procedure. Judicial Review is a supervisory remedy. As explained above, one of its core purposes is to ensure that administrative decision makers act within the bounds of the law, including by following fair processes which follow the principles of natural justice. Similarly, where statute or policy requires that a particular process be followed, in order to ensure that a decision takes into account all of the relevant factors deemed necessary by Parliament or the Minister, administrative law requires that those procedures be followed for a reason. The members of JUSTICE have a wealth of legal experience. However, every lawyer has encountered a “cut and dried” case which turns out, after consideration, not to be so straightforward. Just as due process exists in criminal procedure to deal with the risk of wrongful conviction in cases where individuals might be deemed “clearly guilty”; administrative procedures exist to encourage good administrative practice and to ensure that the varied interests of those affected are taken into account and it is extremely difficult to second guess how a

disputed decision might have been different if a lawful procedure had been followed. The case law is clear. Caution must be exercised in applying this test.⁴⁷

38. Thus, the current “no-difference” test – which allows a judge to refuse the remedy sought by a claimant as the outcome would have made “no difference” had the decision been taken properly.- sets a high threshold of “inevitability” before it can be applied in any individual case.
39. The Consultation accepts that a “no-difference” argument can be made in a claim at any stage by the Defendant local authority. Yet, the Government is consulting on the proposal to formally provide for consideration of this discussion at the permission stage. We note that there is no consideration of the existing power of the courts to consider whether a claim is unarguable or “totally without merit” in any event. Formalising the provision for argument on no-difference at permission would create a real risk of duplication with added cost. In order to properly consider whether a decision would make “no-difference” to a claim would require a full consideration of the facts of a case and a substantive hearing. This could lead to more rolled-up consideration, but it will definitely lead to an unnecessary rehearsal at permission of arguments more properly considered as part of the substantive case. The Government asks for views on how to mitigate this likelihood while formalising the consideration of “no-difference” at the earlier stage. We cannot see any way to avoid a substantive consideration of the facts if no-difference is in play.
40. Any change which is based on a format which does not allow for substantive consideration would significantly alter the function of the court and could lead to significant unfairness for the claimant. The analysis of the impact of a failure to follow proper procedure can be complex and nuanced. Thus, the use of the “no-difference” test is properly limited.
41. The proposal that the “inevitability” threshold should be altered to “highly likely” would require judges to step beyond the bounds of their supervisory jurisdiction and second-guess the likely decision making process of the defendant public body. This would be entirely inappropriate and would substantively change the function of the reviewing court. The dangers of an expansive approach to this test have already been recognised by the

⁴⁷ See for example, *R v Broxtowe Borough Council ex p Bradford* [2000] LGR 386at 387f-g; *R v Life Assurance and Unit Trust Regulatory Organisation Ltd ex p Tee* (1995) 7 AdminLR 289, 307F.

judiciary themselves on a number of occasions. For example, the expansion of the test has been called a “slippery slope”;⁴⁸ the bounds beyond inevitability, the “forbidden territory of evaluating the substantive merits”⁴⁹ and the exercise of lowering the threshold as “substituting” for the relevant decision making body. In *R v Tandridge District Council ex p Al Fayed* [2000] 1 PLR 58, 63C-D, the Court explained:

Once it is appraised of a procedural impropriety the court will always be slow to say in effect , ‘no harm has been done’. That usually would involve arrogating to itself a value judgement which Parliament has left to others.

42. In light of the seriousness of the implications for expanding the “no-difference” test, JUSTICE is concerned that the proposals are not accompanied by any evidence that cases where the outcome which has been reached has been of no benefit to the claimant or the decision maker. Instead, the case for change lies on the unsupported assertions set out above.

The Public Sector Equality Duty

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?

43. JUSTICE provided a detailed response to the Government Review of the Public Sector Equality Duty.⁵⁰ We are a member of the Equality and Diversity Forum and endorse their submissions on the volume and nature of PSED related challenges. In particular, we note the significant volume of cases where a different outcome is reached following a decision on judicial review.

⁴⁸ *R v Ealing Magistrates Court ex p Fanneran*, [365]

⁴⁹ *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315

⁵⁰ JUSTICE, Public Sector Equality Duty Review: Response to Call for Evidence, April 2013.

44. JUSTICE considered that the Review was premature, unbalanced and unnecessary. Similarly, we are concerned that, given the limited basis and data on which the Review proceeded, that the Government has chosen to take forward its proposal that alternative mechanisms for the enforcement of the PSED should be explored. We consider that there is no clear evidential basis to support the need to limit judicial reviews based on a failure to comply with Section 149 Equality Act.
45. In addition, the benefits of the PSED are to create a statutory framework which requires individual public decision makers to integrate the objectives of substantive equality into their decision making processes. Without a clear opportunity for effective oversight, the impetus for action is removed. In order for the duty to retain its teeth, any alternative remedy would need to retain the characteristics of independence and the ability to grant a binding determination and a remedy when a violation is identified. JUSTICE is concerned that any alternative remedy which satisfied this criteria would simply duplicate the function currently performed in judicial review. A remedy falling short of this standard would need to leave open the subsequent option of judicial review. PSED arguments are not often raised in isolation but are routinely part of a larger administrative law complaint. In those cases, is part of the claim to be hived off and dealt with in parallel litigation in two distinct fora? Alternatively, is the PSED claim in the alternative venue to be exhausted before any judicial review may be pursued? In either scenario, we consider that this could in practice lead to significant duplication, delay and additional cost, with little understanding of the benefit to be gained.
46. It has taken some time for the general principles underlying the interpretation of the PSED to become now largely settled. Will these principles hold good in the context of an alternative means of enforcement? We share the concerns expressed that a change of venue is not only unnecessary, but could lead in practice to further satellite litigation and costs as the bounds of the competence of the new alternative forum are explored.
47. We are concerned that this Consultation should not be treated as a further opportunity to limit the effectiveness of the PSED. JUSTICE considers that embedding, deepening and mainstreaming equality values within decision-making leads to better and more transparent decisions. It is one of the fundamental principles of good governance that Government wills the means and not just the ends. The PSED ensures that relevant policy-makers and decision-makers take into account the needs of all affected parties. Therefore, whatever the end decision (or policy), one can be confident – if the PSED

operates as it should – that the decision-making process has been well-informed, transparent and undertaken with proper consideration of equality values.

Costs, legal aid and risk (Rebalancing Financial Incentives)

Legal aid: shifting risk to claimant solicitors

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

48. The Government proposes to further restrict the availability of funding for judicial review by only funding the cost of work done on applications for permission for judicial review if an application succeeds. The Consultation proposes a limited discretion for the LAA to pay in some circumstances, but not when permission is refused. JUSTICE does not consider that these changes are justified or justifiable. Little evidence is provided to support the case for reform by the Consultation, beyond reference to the statistics considered, above. In the introduction to these proposals, the Government references recent changes to judicial review and to the scope of legal aid, and the the changes introduced following the Jackson reforms. We can see no new case to support the need for further restrictions to legal aid and we are concerned that the Government is pressing ahead with plans for these significant changes without taking time to assess how those changes already introduced have changed the scope of administrative practice and the ability of individuals, including vulnerable people, to access advice and representation on public law problems.

49. Access to legal aid for judicial review was significantly restricted in LASPO. JUSTICE is concerned that the proposal to further restrict access to legal aid for judicial review beyond the already significant restrictions in LASPO (and elsewhere) will limit the ability to access advice on public law only to those with the means to pay privately, making publicly funded work unviable. The changes appear designed to insulate public decision-

makers from effective judicial oversight. The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions, in our view, shows a profound misunderstanding of administrative law in practice.

50. Judicial review provides an essential opportunity for people aggrieved by poor public decision-making to challenge those decisions before an independent and impartial tribunal with the power to undo or reverse its effects.⁵¹ In a country with no written constitutional guarantee controlling the relationship between the citizen and the State, this function takes on a particular significance. Even a brief review of recent case law shows that judicial review cuts across public decision-making and can impact significantly on public spending and individual access to public services.
51. As elsewhere, the case for change is unsupported by evidence and found in broad assertions about the practice of judicial review. The implication that cases withdrawn before permission are ‘futile’ was undermined by the acceptance in the First Consultation that, of those cases which proceed to hearing and do not secure permission, many yet result in a concrete benefit to the claimant. For example, in many cases, the possibility of judicial review may influence a public authority to reverse a decision or to change its practice without resorting to proceedings. Similarly, the implication of both the First Consultation and *Next Steps* is that all cases which are refused permission should never have been brought, and this could easily have been determined by the advising solicitors at the point of issue. This neglects that cases develop throughout the course of proceedings, notably with evidence disclosed and concessions made by local authorities during the course of proceedings. Similarly, the law may shift during the course of a case, to the benefit or the detriment of either party.
52. Applications for judicial review are already subject to significant restrictions, including eligibility and merits tests. Changes in LASPO restricted public law work substantially, particularly in connection with immigration decisions. Since the implementation of LASPO, providers can no longer self-certify on judicial review cases, but must obtain permission from the Legal Aid Agency before pursuing a case. In addition, in judicial review claims, the involvement of judicial oversight at a preliminary stage provides for the scrutiny of claims and those deemed “totally without merit” can be dismissed at an early stage. If solicitors are bringing cases and pursuing points which amount to an abuse of

⁵¹ *R (Cart) v Upper Tribunal* [2011] UKSC 2, Lord Dyson at 122.

process, the wasted costs procedure, as discussed elsewhere in the Consultation is open to the court.

53. It is suggested by the First Consultation and *Transforming Legal Aid: Next Steps* that initial advice and preparatory work will continue to be funded, subject to other limitations on scope and eligibility. The distinction between preparatory work and work to support an application for permission is artificial, will create significant uncertainty in practice and is likely to lead to significant argument. However, in any event, JUSTICE considers that this limited provision for funding is yet undermined by the shift of risk on issue. This shift creates a number of clear risks. The most significant of these will be that the nature of public litigation will be significantly affected, creating a significant litigation advantage for public authorities. Awareness that individuals may never be funded – or supported – to pursue proceedings could create a significant disincentive to constructive engagement during the pre-action protocol phase. Will individuals pursue complaints following advice in the knowledge that they may be left to represent themselves if they want to take their claim to court? It is indeed possible that these proposals risk an increase in litigants in person in the administrative courts, with the associated costs already highlighted in shifts in civil courts post-LASPO.
54. JUSTICE is concerned that – from the consideration of settlement between issue and permission hearing to the potential for late concessions – this change will significantly alter the nature of administrative law practice in a way which will significantly favour public defendants. Increasingly, in a move which regularly saves resources, permission and substantive hearings are “rolled-up” and considered together. Thus, the shift of risk to public law solicitors may stretch to the whole costs of any claim, unless this trend is reversed, leading increasingly to two separate hearings, with two distinct sets of court costs.
55. The information provided by Government on projected savings to be achieved as a result of these changes is severely lacking. The Government, on its own best estimate, concedes that the potential savings to be made are minimal, costed at around £1m. The impact assessment makes no acknowledgement of the public good served by judicial review, in particular the preventative and channelling functions which ensure that individuals receive access to services they need at an early stage to avoid further and

costly service provision. Others have provided more detailed assessments of the likely costs associated with the introduction of these measures, which may be significant.⁵²

56. Ultimately, the Government argues that the impact of these proposals will be driven by providers' "decisions" – providers will only "refuse" to take on cases which "would not be considered by the court to be arguable in any event". This misinterprets the statistics, as explained above, and shows an extremely limited understanding of the operation of judicial review. Refusing to fund any work done on the application for permission unless successful is unsustainable and will discourage most providers from taking on all but the most "open and shut" case. Even in these claims, the provider may yet find the claim unfunded as the ground in the case shifts in a way which might be unforeseeable at the time of issue (including, for example, in light of concessions made by the defendant public authority). This approach to funding entirely neglects that research shows an inconsistent approach to permission by the judiciary and the fact that there are difficult cases in administrative law – often test cases where the law is in a state of development - which may fail on their merits (including in rolled up hearings) yet succeed on appeal.

57. We raised these objections in response to the First Consultation, not least that evidence had not been produced to support the Government's case for reform. This Consultation makes no further effort to address concerns about the adverse impact of shifting the burden of risk in the way proposed.

Discretionary payments by the LAA

58. In this Consultation, the Government concedes that cases which are withdrawn or settled between issue and permission may be funded under a discretionary scheme operated by the LAA. It is clear that this funding is intended to be exceptional and will never be available where cases proceed to permission and are refused. It will always be discretionary and difficult to enforce. Yet, an application for discretionary payment will require the same work as an application for costs, together with the necessary preparation and additional work on representations made to the LAA on the criteria for eligibility.

⁵² See the analysis of the costs associated with the Government's proposals prepared by Dr Nick Armstrong, Matrix Chambers (<http://legallaidchanges.wordpress.com/2013/06/25/dr-nick-armstrong-matrix-note-on-costs-implications-of-civil-legal-aid-proposals-3/>)

59. The Consultation explains that this new proposed discretion will be administered by the LAA on “the Lord Chancellor’s behalf” and that it will be designed to be determined “depending on the circumstances”.⁵³ JUSTICE considers that this discretion will give little comfort to providers and does not meet our concerns about the likely impact of these measures on judicial review.
60. We are particularly concerned that the language used in the Consultation closely links the discretion to the function of the Lord Chancellor, who not only bears responsibility for these reforms, but may himself be the defendant in litigation brought where the exercise of this particular discretion is sought.
61. As to the criterion to be applied, these are a) the reason that costs were not obtained; b) the extent to which the client obtained the benefit sought in the proceedings; c) the reason why the client obtained that benefit; and d) the likelihood at the point of settlement that permission would have been granted. We consider that these criterion are likely to be extremely difficult to satisfy in practice. In light of the guidance given the Consultation on the likely exceptionality of the payment, we consider that the LAA is likely to be exacting in its assessment of each individual case. Yet, the assessment will be largely objective and may require significant speculation about the motivation of the defendant’s public authority on settlement. In particular, we are concerned that the LAA is invited to consider why a public body has chosen to settle a claim. We struggle to understand why this is necessarily relevant to the determination of whether the work undertaken has been properly conducted and achieved a substantive benefit for the publicly funded client. In any event, in many cases it will be difficult or impossible to determine what the true reason for settlement was. Public authorities are not likely to volunteer the legal advice received on the viability of their defence, for example.
62. In short, these proposals will require all claimant public lawyers to put the business risks of any claim before its merits. It remains our view that individuals with good claims that the State has acted unlawfully may be deprived of a remedy for want of representation. In any event, these proposals – combined with LASPO restrictions on access to publicly funded public law work – will seriously restrict the ability of practitioners to continue to provide services at all, with the consequent impact on individuals ability to access advice and representation.

⁵³ Judicial Review Consultation, paras 125 - 127

Costs on oral permission hearings

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?

63. JUSTICE does not agree that there is any case for changing the status quo, where discretion on costs remains with the court. The only case for reform presented by the Government is based on the bald statistics considered above, with no further information presented on the potential implications of a change in the costs rules. The power of the Court is sufficiently broad to deal with cases where a renewal hearing amounts to an abuse of process. Costs in the case can yet be determined subsequent to any substantive hearing.

64. The First Consultation led to the introduction of fees for oral renewal hearings. The proposal to add the potential of a costs risk to this change could in JUSTICE's view, act as a significant disincentive to individuals who seek to pursue good claims. Yet, a shift to include a presumption on costs could incentivise defendants to front load substantive work in preparation for a renewal hearing safe in the knowledge that costs will be available. The proposal targets one aspect of the judicial review process where claimants control the decision to proceed; if efficiencies are being sought, a more holistic approach would be fairer and more productive, including an examination of the role of the defence and consideration of costs control in connection with defence cases which are considered unarguable or totally without merit, perhaps.

Wasted costs orders

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 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.

65. JUSTICE does not consider that there is any case for reform of the current wasted costs procedure. The test in Section 51(7) SCA 1981 is based on “improper, unreasonable or negligent acts or omissions”. As is explained in the Consultation, there are limits on the powers of representatives to deter clients intentions to pursue arguable but weak litigation. The case of *Ridehalgh v Horsefield* is cited in the Consultation. In that case, the court explained clearly that:

Legal representatives will, of course, whether barristers or solicitors, advise clients ... But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved.

66. The Consultation explains thus, that the proper test is whether individual lawyers have lent their assistance to an abuse of process. However, it does then suggest that reform is necessary to change this approach. No real justification is made for the proposal to look at revision, other than that it could provide a disincentive to litigate in weak cases. We are concerned that this is not only ill-founded but may create a clear tension between the professional responsibilities of solicitors and advocates to represent the best interests of their client and any weakened test on which a wasted costs order may yet be made.

Q26: 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 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?

67. JUSTICE does not consider that there is any case for reform of the current law on Protective Costs Orders (PCOs). The development of the PCO rules in public interest litigation has been a valuable tool in ensuring that claimants without significant means who have a good case to pursue, and which raises clear issues of public importance, may be able to pursue their litigation with reassurance that they will be able to gauge and plan for the costs risk that they are undertaking. In the limited number of cases where PCOs are granted, that order may be the difference between a serious question of public importance being considered by the courts or the individuals affected going without a remedy.

68. The Consultation sets out the foundation rules for the granting of PCOs, elaborated in *R (Corner House) v Secretary of State for Trade and Industry*, including the requirements that the issue in the claim be of general public importance and the public interest vested in the issues being resolved. However, the Government view is that the Courts are taking an "increasingly flexible approach" to this criteria and "this expanding approach has tipped the balance too far and now allows PCOs to be used when the Claimant is bringing a judicial review for his or her own benefit". The Government repeats its assertion that judicial review is being used as a "campaign tool with challenges brought by groups which do not have a tangible interest in the claim". We deal above with our concern that this language – which dismisses public interest litigation as a "campaign tool" alone – is inaccurate and unsustainable. The Government thus argues at one and the same time that claimants which seek PCOs either have too great a private interest in a claim or too little. Yet, no clear examples of abuse on either ground is provided. We note recent research by Bondy and Sunkin, which shows only 7 PCOs granted over a 20 month period between 2010-2012. Of those 7, only 3 were non-environmental challenges, of 502 cases surveyed overall (Environmental cases are not covered by this

consultation, by virtue of the application of the Aarhus Convention). These statistics alone appear to undermine the Government's assertion that the availability of PCO has expanded inappropriately or to the detriment of the public interest.

69. We do not consider that it would be appropriate to revise the *Corner House* test. We consider that the current test strikes a fair balance between the public interest in allowing cases to be heard and maintaining the discretion of the court to ensure that fair burdens are placed on the parties in any individual case. Specifically, we consider that it would be unduly restrictive to rule out a PCO in any case where there is an "individual or private interest regardless of whether there is a wider public interest". We consider that the current legal position is more appropriate, where a private interest is a relevant factor in the consideration of whether a PCO is in the public interest, but it is not determinative.⁵⁴ Any other approach could fundamentally undermine the purpose of the order in practice. For example, should a bereaved family seeking to challenge the steps taken by a public authority before their family member's death be precluded from seeking a PCO as a result of their own personal interest in determining the circumstances of the death?
70. In practice, the number of PCOs awarded have been limited. In practice the imposition of costs caps – in some cases substantial - have limited the liability of the relevant public body in cases where orders are made.
71. We see no evidence of any need for further powers of justification or disclosure to be placed on individual claimants – in connection with the source of funding for any claim – or otherwise. Existing case law places an important duty to be frank on applicants for any PCO.⁵⁵ The Consultation asks whether there should be a presumption to consider a cross-cap on costs in any application for a PCO. Such a presumption has been in place since the determination in *Corner House* and it is routine for a cross cap to be considered in PCO applications. The suggestion that PCO and cross-caps should be reciprocal would significantly change their function. The level of a PCO is determined in order to ensure that a claimant is able to bring the claim – a claim where there is a public interest in its determination that would otherwise not be brought – and will be set at a level designed to allow the litigation to proceed according to the means of the claimant. The PCO serves the public interest. On the otherhand, while a costs-cap ensures that the claimant, benefitting from this exceptional procedure, does not act unreasonably, it is

⁵⁴ See *Morgan v Hinton Organics* [2009] EWCA Civ 107

⁵⁵ *R (Badger Trust) v Welsh Ministers* [2010] EWCA Civ 807 at [130]

questionable whether it would serve the public interest for a public body found to have acted unlawfully to be excused from paying costs recoverable at a reasonable, albeit capped, rate.

Intervention and the public interest

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?

72. JUSTICE was one of the most frequent third party interveners before the House of Lords Judicial Committee and has statistically been the most frequent intervener before the Supreme Court since its creation. Our applications to intervene are limited to those cases which raise important constitutional issues and focus on the scope of legal principles designed to protect individual rights within the justice system. Our contributions usually focus on complex legal arguments not necessarily raised by the parties, on the international legal framework and comparative experience. They are generally welcomed by the bench. Most recently, our intervention in the case of *Rahmatullah* has been described as “helpful”⁵⁶ and “powerful and significant”⁵⁷ by two of the Justices in the case. In 1996, together with the Public Law Project, we conducted a review of public interest intervention, *A Matter of Public Interest*, with a view to identifying principles of good practice for third parties in public interest litigation. In 2009, in anticipation that the Supreme Court was likely to hear constitutionally significant cases which might clearly benefit from intervention by informed, specialist interveners, where appropriate, we published *To Assist the Court*,⁵⁸ which considers both the public interest in reasonable, focused intervention in domestic and comparative practice and the proper limits and boundaries of such intervention. We have direct and broad experience of acting in the public interest in preparing written and oral submissions for domestic and international courts.

⁵⁶ Who guards the Guardians, Baroness Hale, Public Law Project Conference, Judicial Review: Trends and Forecasts, 14 October 2013.

⁵⁷ http://www.justice.org.uk/data/files/Rahmatullah_JUSTICE_PRESS_RELEASE_FINAL_-_311012.pdf (Lord Kerr)

⁵⁸ A copy of *To Assist the Court* is included with the hard copy of this submission. <http://www.justice.org.uk/resources.php/32/to-assist-the-court>

73. The motivation behind the Government's decision to consult on the role of interveners is explained thus: if standing is restricted, more people may seek to intervene. The Consultation explains the Government view that parties would benefit from greater clarity and understanding about the implications of an intervention, particularly for costs, at the earliest stage. We are concerned that these proposals should not proceed on the basis of a misunderstanding about the role and function of a public interest intervener or without a clear understanding of current practice. In particular:

- a. The Consultation refers to individuals who "choose to intervene". While parties may choose to pursue an intervention, the scope and character of any intervention is ultimately at the discretion of the court hearing the relevant claim. While procedural rules may vary in the High Court, the Court of Appeal and the Supreme Court, in each instance a would-be intervener must make an application to intervene supported by grounds. As we explain in *To Assist the Court*, this will in most cases require an intervener to illustrate that they will bring value to a case not likely to be met by the parties and their contribution will assist the court in its consideration of the case. For example, in the Supreme Court Rules, Rule 15, expressly refers to interventions by individuals with an interest in proceedings brought by way of judicial review *or*:

any official body or non-governmental organization seeking to make submissions in the public interest.

Further guidance is provided in Practice Direction 8, which references the guidance of Lord Hoffmann that:

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything.⁵⁹

Although no such specific guidance is given in connection with reasonable intervention in the High Court and the Court of Appeal, it is understood by practice that submissions made must assist the court by adding something tangible to its

⁵⁹ *In Re A Child (Northern Ireland)* [2008] UKHL 66

consideration of the case, in order that such intervention will serve the public interest.

- b. At no point does the Consultation recognise that the purpose of most interventions is to serve the public interest by placing information or argument which will add value to a case before the court. It is extremely unusual – but not unknown - for third parties to be granted permission to intervene (rather than be joined) to represent their own personal interests.⁶⁰ It is regrettable that the Consultation does not attempt to assess or quantify the value to the public interest of interventions undertaken for that purpose. Although this may be difficult to quantify in monetary terms, the support of the senior judiciary for reasonable third party interventions is clear. As Baroness Hale recently pointed out:

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. [...]

But from our – or at least my - point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied.⁶¹

- c. Whether in the Supreme Court, Court of Appeal or the High Court, the scope of an intervention can be controlled by the bench, for example, with specific guidance provided by the Supreme Court Rules on the conduct of a reasonable intervener. For example, although the consent of the parties to an intervention is not required, it is always sought before an intervention is pursued. Similarly, the scope of an intervention is expected to be reasonable and proportionate to the value to be added, with specific guidelines offered by the Supreme Court that written submissions should usually be less than 20 pages. Where an intervener acts unreasonably, it is open to the Court to make an order as to costs. We return

⁶⁰ See for example, *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. In this immigration removal cases, the appellants 12 year old son intervened to put before the court representation on the impact which removal would have on him personally.

⁶¹ Who Guards the Guardians, Public Law Project Conference: Judicial Review Trends and Forecasts, 14 October 2013. <http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians>

to this issue below, but the desire to avoid imposing any unreasonable burdens on the parties and to avoid increased costs associated with disproportionate additions to a case will be foremost in the mind of a reasonable intervener and their representatives.

Interveners own costs

74. We are concerned that the Government has chosen to consult on whether or not interveners should routinely be required to meet their own costs. It is already common and accepted practice that interveners will meet their own costs in the case. In each of JUSTICE's interventions, it is a priority that we secure pro bono assistance of both counsel and solicitors before we will take a decision to proceed. In light of the fact that we limit our interventions to cases of constitutional and legal importance, we are routinely provided with high-quality representation on that basis. However, we do have limited resources and we work to limit the costs of any intervention both for our organization and each of the parties. We have no knowledge of any intervener either seeking or being awarded an order for their costs.

Interveners and costs risks

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?

75. We are concerned that this proposal has been included in this Consultation. As explained above, courts routinely retain the discretion to make an order as to costs against any intervener who acts unreasonably. It is the routine practice of JUSTICE to ask both parties in the case for assurance that they will not seek any order as to costs. In practice, the general approach of the UK courts has been that the costs additional as a result of an intervention are treated as costs in the case. This has been seen as appropriate given the purpose of a public interest intervention being to assist the court and add value in the determination of a case. This position has been formalised in the Supreme Court Rules, where Rule 15 provides that there will generally no order for costs for or against an intervener, but retaining the discretion to order costs, particularly where

an intervener effectively steps into the shoes of one party or another.⁶² JUSTICE considers that this is a sensible settlement. It reflects the value of reasonable intervention to the court, ensures that interveners must be in a position to support the costs of their own contribution and yet retains a discretion to act where an intervener imposes an unreasonable burden on the parties to the case or acts as a party.

76. As explained above, the cost of a reasonable intervention should be limited. However, disbursements and the costs associated with the parties reading, considering and, if necessary, responding to the points made in an intervention, may yet give rise to a significant costs risk. A shift in the presumption proposed would be a significant deterrent to many interveners, many of whom will operate with extremely limited resources and who will be subject to the oversight of a Board of Trustees, for whom risk management will be extremely important. JUSTICE considers that the proposed new presumption would operate to the detriment of the public interest and would, in practice, deter many interveners who seek to act in the public interest to assist the court and to ensure the informed and rational development of the law.

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?

77. Our experience, as an intervener, is that the threat of costs orders alone may be sufficient to stifle or derail a constructive application for intervention. JUSTICE takes its programme of interventions seriously and will carefully consider the value it can add in any given case. We contribute significant valuable resources from our limited budget to the conduct of our cases already. The threat of an as-yet-undetermined possible costs risk, to be calculated on the basis of an interpretation of whether costs are “significant” in any given case would operate as a serious consideration as to whether to pursue a particular application. A high profile example of the potential deterrent effect of costs risk is given in *To Assist the Court*:

⁶² Rule 15: “will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent).”

In the *S and Marper* case, for instance, the Treasury Solicitor's Department successfully used the threat of adverse costs against Liberty to deter it from intervening before the House of Lords in 2004, despite the fact that Liberty had been granted leave... In that case, the Law Lords went on to find that the retention of DNA of innocent people was not an interference with their right to respect for private life under Article 8. Liberty was granted leave to intervene... before the European Court of Human Rights...and, in December 2008, the Grand Chamber... unanimously held consistently with Liberty's intervention that such DNA retention was a violation of Article 8. Had the Law Lords had the benefit of Liberty's intervention in 2004, it is possible that this may have persuaded their Lordships to reach a different conclusion, saving five years of unnecessary further litigation to Strasbourg.

78. We are concerned that the purpose of these proposals is to openly deter the work of organisations who may seek to intervene in litigation before our courts. The existing rules on intervention place the control of the work of third parties squarely in the hands of individual judges. An intervention is only given permission to proceed if the bench consider it may add value. In an adversarial system, where little resources are allocated towards research facilities and support for our senior judiciary, it is unsurprising that judges, and specifically, the senior judiciary, find interventions helpful in determining claims where significant issues of public interest are raised. In this context, it is understandable that the Government has been unable to produce specific evidence of a problem posed by individual interventions or by the role of interveners more generally.

Leapfrogging

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?

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

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.

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?

79. JUSTICE considers that others are best placed to comment on the proposed extension of the rules on “leapfrog” appeals. We are concerned that the Supreme Court will have limited time and resources and must remain in control of their own listings, in order to ensure the fair management of their time and the prompt consideration of the most pressing issues for determination, whether according to the individual impact of an issue or the constitutional significance of any case.

80. In addition, taken cumulatively, the proposals in the Bill suggest that a) cases of “national importance” such as deportation cases or cases involving infrastructure development where the Government considers that delay would be damaging to the national interest might be leapfrogged even when they don’t raise an issue of law that would qualify under the existing rules; b) the requirement for both parties to consent might be removed; and c) the courts and tribunals where leapfrog is available may be extended to include SIAC and other tribunals. Although not mentioned directly in the Consultation, it is reasonable to suggest that the Government had cases like that of *Abu Qatada* and HS2 in mind when formulating these proposals. Although we do not comment in detail on these measures, we note that although leapfrogging may save time and resources, the Supreme Court is a final court of last resort. The cases which it determines are those which raise significant issues of public importance. We would consider any detailed proposal which might permit the Government to control the circumstances when any case it deemed “nationally important” might be automatically brought before the Supreme Court without the consent of the other party. The Justices must continue to control their own docket and must be the ultimate arbiter of whether any appeal – leapfrog or otherwise – should be listed before them.

Impact Assessment and Equality Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

81. In our response to *Transforming legal aid*, we expressed serious concern about the content and quality of the Impact Assessments prepared. We were particularly concerned that assertions were unsupported by evidence; figures were not fully explained; impacts not fully explored; and in some cases, no effort made to measure obvious impacts which many consultation responses were able to identify with sufficient certainty that a clearer analysis by Government was warranted. The same flaws are repeated in the three Impact Assessments prepared to accompany this consultation ((*MoJ 215*, *MoJ 212*, *MoJ 210*). A few examples should suffice to illustrate our concerns:

- a. Notably, while no clear figures are placed on the Government's assessment that a significant number of judicial review claims are "frivolous", it is difficult to measure whether the proposals are a necessary, let alone proportionate, response. Further, the only option explored in the Impact Assessment covering restrictions to legal aid is the Government proposal. Without evidence that alternatives have been explored and justification for their rejection provided, it seems difficult to gauge whether the Government has seriously considered the scale of the "problem" identified and the range of possible opportunities to address it.
- b. In connection with the changes to legal aid, it is notable that the impact on individuals who may no longer be able to secure advice and assistance is not included as a non-monetised cost; similarly, the impact on HMCTS of an increase in likely litigants in person is not explored. This is included as a "risk or uncertainty" but with little further consideration. The risk is dismissed as "HMCTS operates on a cost recovery basis in the longer term". This fails to address the potential for increased pressures on court time that ensues with associated increases in litigants in person before the courts. Contrast this omission with the inclusion of likely benefits from savings in court costs if claims are not pursued. Given the number of responses to *Transforming legal aid* which raised these concerns, it is disappointing that no recognition has been made of these likely impacts.

- c. The assumptions upon which the Assessment of these measures are based are surprising given the response to *Transforming legal aid*. As part of that process, the Government recognised that the changes proposed would impact upon good claims as well as weak ones. It is now consulting on the discretionary scheme which it hopes will mitigate that impact (we disagree, as explained above). However, the first assumption is “at the margin there may be a reduction in the number of weaker Judicial Review applications, and that these probably would not have secured permission had they been pursued”. We are concerned that this underestimates the impact of these changes significantly. The Assessment goes on to explain that the discretion of the LAA is designed to ensure that “legal aid providers do not refuse to take on genuinely meritorious ...cases”. As explained above, this assumption is, in our view, seriously flawed.
- d. In the Assessment of the proposed changes to the “no-difference” test, little information is given in connection with the likely costs and risks associated with the change. It accepts that there may be some increased costs as individuals – both defendants and claimants – put more effort into preparing their cases earlier. As explained above, we consider that the effort that will be needed to identify “no-difference” in these cases will be substantial, and may in effect involve a duplication of a substantive hearing. We do not agree with the assumption that “public bodies will be able to correctly identify cases that meet the “no difference” test”. The responsibility for the judgment in these cases lies with the judge, not with the defendant public body, albeit that their evidence as to how they may have acted differently may be relevant. As explained above, this judicial consideration will require substantive analysis and, in our view, if expanded beyond current practice, may stray into constitutionally inappropriate territory.
- e. On the impact of the proposals on standing, there is no consideration of the positive public benefit of claims litigated in the public interest, to secure a change to damaging or costly public practices (see for example, *WDM*). It is also assumed that “there would be the same volume of challenges but that these would be pursued via alternative dispute resolution services”. It is difficult to see how this assumption could have been reached. In many cases where an individual or an organisation seeks judicial review in order to challenge a law, policy or practice which is believed to be unlawful, the goal is to secure a binding remedy which will lead to a change in the law, policy or practice. Without the assurance of a binding remedy, it is by no means assured that individuals or organisations who act in the public interest will act. Equally, if they do act, there is no consideration of the likelihood that those alternative remedies may be less

likely to secure a binding resolution (with the corresponding detriment to the public good).

JUSTICE
November 2013