



Public Law Project



**Reform of Judicial Review:
Proposals for provision and use of financial
information
(Cm 9117)**

Joint Response by Public Law Project and JUSTICE

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A) INTRODUCTION

1. **JUSTICE** is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK branch of the International Commission of Jurists. JUSTICE’s vision is of fair, accessible and efficient legal processes, in which the individual’s rights are protected, and which reflect the country’s international reputation for upholding and promoting the rule of law.
2. The **Public Law Project** (‘PLP’) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage. PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.
3. Judicial review is the primary means by which individuals may challenge the legality of public decision making. In a country without a written constitution, it plays a particularly important role. Part 4 of the Criminal Justice and Courts Act 2015 (‘the CJCA 2015’) makes a number of changes to judicial review practice and procedure in England and Wales. Sections 85 and 88 make provision for the disclosure of certain financial information by applicants for judicial review, subject to rules of court that might be made at a later date.
4. In July 2015, the Ministry of Justice published *Reform of Judicial Review: Proposals for the provision and use of financial information* (‘the Consultation Document’), and proposals for consultation, intended to inform the consideration of amendments to the Civil Procedure Rules and the Tribunal Procedure Rules necessary to implement Sections 85 and 88 (‘the Rules’) by the Civil Procedure Rule Committee, and the Tribunal Procedure Committee (‘the relevant Rules Committees’).¹
5. JUSTICE and PLP appreciate the opportunity to respond to this consultation, but regret that it has been published over the long summer legal vacation period. This – coupled with the short 8 week period for consultation – has limited the time and capacity that practitioners and those with academic expertise in judicial review may have to engage, and is bound to impact adversely on the quality and usefulness of the responses that are received. In view of the time constraints, where we do not address directly any question in the consultation, that omission should not be read as approval of the Government’s proposals.

Overview

6. This consultation concerns the approach to rules of court that may be made under part 4 of the Criminal Justice and Courts Act 2015. The subject matter of the proposed rules relates to:

¹ Consultation Document, para 42.

- a. the provision of financial information required of all judicial review claimants before permission to apply for judicial review can be granted, pursuant to sections 85 and 86(2); and
 - b. the provision of financial information required to be included in applications for costs capping orders, pursuant to section 88(5).
7. These two aspects of the consultation raise similar issues about interference with claimants' rights to privacy, a fair hearing, and access to the court, which are explained below. However, the rationale behind each aspect is different, and therefore the justification for each must be considered separately.
8. The Consultation Document proposes that disclosure, including in respect of third party information, will be by way of a statement of truth by the claimant in any proposed judicial review.
9. The application of these measures in a manner consistent with the fundamental common law right of access to justice and the constitutional function of judicial review, the right to a fair hearing and the right to respect for private life guaranteed by Articles 6 and 8 ECHR (and the Human Rights Act 1998) will be important to ensure that these measures do not operate as a disproportionate deterrent to claimants seeking to challenge the unlawful behaviour of public authorities.
10. Measures designed to improve recovery of costs should not ultimately be used to limit access to judicial review only to those with substantial independent means by deterring others from pursuing litigation even where their claims are strong. As access to legal aid is restricted and the CJCA 2015 introduces new limits on costs protection, it is likely that individuals and groups without significant funds will explore other avenues of support for litigation, including for public interest litigation. If the mechanism for the handling of information in connection with the recovery of costs, including against third parties, is overly broad or unclear, these avenues are likely to be similarly constrained. As explained below, we are particularly concerned that these new disclosure requirements may have an unjustified and unintended chilling effect on the funding of charities and not for profit organisations who conduct litigation and their ability to bring public interest cases in practice.
11. In this Consultation Response, JUSTICE and PLP provide their analysis of the new financial disclosure provisions in Section 85 and 88, which we hope may assist the Government and the relevant Rules Committees in the interpretation and application of those provisions.

Sections 85 and 88 of the Criminal Justice and Courts Act 2015

12. Section 85(1) amends section 31(3) of the Senior Courts Act 1981 ("SCA 1981"), to provide that no application for judicial review will be granted leave unless the applicant has sufficient interest and has "*provided the court with any information about the financing of the application that is specified in rules of court for the purposes of this paragraph*". This information will be specified in the Rules and may include:

- a. *“information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application, and*
- b. *if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application”.*²

13. The Rules may set a level of financial support below which disclosure of financial information about third parties will not be required.³ This provision was introduced at a late stage during the Act’s passage and was intended to address concerns about the impact of these provisions in practice.⁴ The consultation proposes that this threshold should be set at £1500.⁵

14. The effect of these measures is to remove the discretion of the High Court (and of the Upper Tribunal) to grant permission to apply for judicial review unless certain financial information, to be specified in rules of court, has been provided by the claimant.

15. The type of information that may be specified in the Rules includes *“information about the source, nature and extent of financial resources available, or likely to be available, to the applicant”* to meet its litigation liabilities.⁶ Information may be sought where the applicant is a corporate body that cannot demonstrate it is able to meet its own litigation liabilities *“about [the corporate body’s] members and about their ability to provide financial support for the purposes of the application”.*⁷ The Rules are not required to set a threshold level of financial support beneath which members need not be identified (although there is nothing to prevent the rules committee specifying such a threshold, for example if it considered one necessary to meet the overriding objective of the rules).

16. Section 86 governs the use to which the financial information that is filed pursuant to section 85 will be put. It requires the court or tribunal to have regard to the information: *“[w]hen the High Court, the Upper Tribunal or the Court of Appeal is determining by whom and to what extent costs of and incidental to judicial review proceedings are to be paid”.*⁸ The court must *“consider whether to order costs to be paid by a person, other than a party to the proceedings, who is identified in [the information referred to in section 86(3)] as someone who is providing financial support for the purposes of the proceedings or is likely or able to do so”.*

² Sections 31(3A) and 31(3B) SCA 1981

³ Section 31(3B)

⁴ HL Deb, 21 Jan 2015, Col 1343. The Minister, Lord Faulks QC, reported to Parliament that the Government had “listened to concerns raised about this provision, particularly on the potential for a chilling effect on small contributors”.

⁵ See paras pages 16 – 17. Subsections 85(3) and (4) make equivalent amendments to section 16(3) of the Tribunals Courts and Enforcement Act 2007, to achieve the same result in respect of judicial review applications brought in the Upper Tribunal.

⁶ Section 31(3A)(a)

⁷ Section 31(3A)(b)

⁸ Section 86(1)

17. Section 88(5) is concerned with financial disclosure by applicants for costs capping orders. The information disclosed pursuant to Section 88 will be used by the courts to determine whether (a) in the absence of a costs capping order, the applicant would withdraw the application for judicial review or cease to participate in the proceedings, and would be acting reasonably in so doing;⁹ and (b) whether to make a costs capping order and if so what the terms of the order should be.¹⁰ Applicants for costs protection under the common law are currently expected to provide financial information about their resources. However, Section 88 mirrors the provision in Sections 85-86, enabling rules of court to make provision for the disclosure of information about sources of funding available from third parties – or “likely to be available” - including information about members of corporate bodies.

Interpreting and applying the new disclosure requirements

18. Against this background, it is important that the interpretation and application of these statutory provisions and the drafting of the associated rules of court on financial disclosure are interpreted in a manner consistent with the limited purpose of the legislation, the right to respect for private life (Article 8 ECHR) and the right to a fair hearing, as protected by Article 6 ECHR and the common law.

(i) *Purpose of disclosure – sections 85 and 86(1)*

19. The rationale for the provision of financial information pursuant to sections 85 and 86(1) was clearly articulated by the Government during the passage of the Bill. For example, the Minister, Lord Faulks, explained:

*“These clauses do not introduce any new principles concerning the costs liability of non-parties. Their purpose is to increase transparency, so as to allow the courts to exercise their existing powers and discretion more effectively”.*¹¹

*“These clauses should not cause anyone to pay costs who would not do so under the current law, except those who should but of whom the court is unaware.”*¹²

20. The purpose of the provisions is merely to increase the information available to the courts to enable them to use their existing powers to make non-party costs orders, not to increase the class of people against whom such orders should in principle be made.

(ii) *Purpose of disclosure – sections 88(5)*

21. The purpose of disclosure accompanying an application for a costs capping order is to provide the court with information to enable it to determine whether:

⁹ s88(6)(b)and(c)

¹⁰ s89(1)(a).

¹¹ HL Deb, 30 July 2014, Col 1606 <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-0001.htm#14073046000328>

¹² HL Deb, 30 July 2014, Col 1612

- a. in the absence of a costs capping order, the applicant would withdraw the application for judicial review or cease to participate in the proceedings, and would be acting reasonably in so doing (s88(6)(b)and(c)); and
- b. if a costs capping order is made, what the terms of the order should be (s89(1)(a)).

(iii) *Disclosure and the right to private life*

22. Article 8 of the European Convention on Human Rights protects the right to private life, including the protection of personal information. Interference with that right is permitted by Article 8(2), but only to the extent that such interference (a) is in accordance with the law; (b) pursues a legitimate aim; and (c) is necessary in a democratic society. The compulsory provision of financial information to tax authorities has been held to be an interference with the Article 8(1) rights, only justified if the information is needed for tax purposes, its collection is in accordance with law and is not disproportionate.¹³

We consider the provision of personal financial information as a condition for accessing the judicial review court (either as a pre-condition to permission pursuant to section 85, or as a pre-condition to a costs capping order pursuant to section 88(5)) to constitute an interference with Article 8(1), and must therefore be shown to be proportionate for the purposes of Article 8(2).

23. While the statutory aim of these measures – to ensure that information is available to facilitate the court’s consideration of third party costs orders – is clearly legitimate, the disclosure requirements imposed on claimants must be tailored to meet that aim in order to satisfy the requirement of proportionality.

(iv) *Disclosure, access to the courts and the right to a fair hearing*

24. The fundamental right of access to the common law is long recognised.¹⁴ Restrictions on access to court must be compatible with the essence of that right, which will underpin the court’s interpretation of these new statutory restrictions and the application of any rules designed to implement them. Only express – crystal clear – statutory provisions will displace the common law right, which is a fundamental aspect of the rule of law safeguarded by the common law.¹⁵

25. In *Fayed v UK* (Application No: 17101/90), the European Court of Human Rights emphasised that the right to a fair hearing protected by Article 6 ECHR includes a right of access to court:

¹³ *X (Hardy-Spirlet) v Belgium* (Application no. 8904/82) European Commission.

¹⁴ *Raymond v Honey* [1983] 1 AC 1; *R v Lord Chancellor, ex p. Witham* [1998] QB 575

¹⁵ See for example, *The Queen (on the application of) The Children’s Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34. *R (on the application of Evans) and another (Respondents) v Attorney General* (Appellant) [2015] UKSC 21, paras 56 – 58.

- a. The right of access to the courts is not absolute but may be subject to limitations. These are permitted by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals”.
 - b. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.
 - c. A limitation will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.
26. The requirement to disclose personal financial information in order to secure access to the court has been expressly recognised by the Court of Appeal as having a chilling effect on claimants’ willingness to bring judicial review proceedings, precisely because it is so invasive of privacy. In *R(Garner) v Elmbridge Borough Council and another*, the Court of Appeal considered an appeal against the refusal of the Administrative Court to grant a Protective Costs Order to the claimant in judicial review proceedings. One of the grounds on which a PCO had been refused at first instance was that there was insufficient evidence about the claimant’s means to enable the judge to conclude that without a PCO he would have discontinued the proceedings and would have been acting reasonably in so doing (one of the Corner House principles). The lack of evidence arose because of the claimant’s evident reluctance to provide evidence about his means.
27. The case was an environmental challenge to which Article 9(4) of the Aarhus Convention applied. This provided that the proceedings must not be “prohibitively expensive”. On appeal, Sullivan LJ considered whether, in determining what would be “prohibitively expensive” in that case, the court should apply a subjective test (which would be based on the resources available to that particular claimant), or an objective test, which could be applied to all claimants, regardless of their financial circumstances. He concluded that a purely subjective test would have a deterrent effect. He stated:

“There is a further aspect to the purely subjective approach which may well have the effect of deterring members of the public from challenging the lawfulness of environmental decisions contrary to the underlying purposes of the directive.

Mr Macaulay said that he was unwilling to undergo a means test in a public forum. Applicants for public funding from the Legal Services Commission have to disclose details of their means to the Legal Services Commission, but they do so in a private process; they do not have to disclose details of their means and personal affairs, for example who has an interest in the house in which they are living, how much it is worth et cetera, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in

an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision

The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.”

28. The phenomenon that the Court was considering in *Garner*, and which it decided would have a chilling effect on the willingness of members of the public to bring judicial review proceedings, was the forced disclosure of a claimant's financial circumstances, even though such information was only going to be disclosed in private to the Legal Services Commission, and could be considered by the court sitting in closed session. Yet, subject to the Rules to be promulgated by the relevant Rules Committees, the features that caused the Court of Appeal to observe a chilling effect will apply, pursuant to section 85, in every judicial review case.
29. Section 85(1) CJA 2015 creates a new barrier to the grant of permission to apply for judicial review. Section 88(5) imposes a condition on applicants for costs capping orders, which are only granted where an applicant would otherwise be unable to access the court. Both provisions are by their nature barriers to the determination of a claim, and constitute interference with the right of access to the court protected by Article 6(1) of the European Convention on Human Rights and by the common law. This is particularly so in light of the chilling effect identified by the Court of Appeal in *Garner*, which is liable to deter both claimants for judicial review and applicants for costs capping applications (which are required only where the judicial review claimant could not otherwise access the court).
30. Rules made under these provisions must therefore be proportionate and must not exceed what is required to give effect to the different legislative aims of the financial disclosure required pursuant to section 85(2) and 88(5).

Construction of sections 85(2) and 88(5)

31. In relation to section 85(2), while it may be proportionate to require information about existing or committed funders of judicial review claims to be provided to the court, it would in our view not be proportionate – and therefore inconsistent with Articles 6 and 8 and s3(1) of the HRA - to identify an individual as being “likely to” contribute to the funding of a case, or a resource as “likely to be available” unless there is a very cogent basis for believing that such a contribution would be “likely” to be made. It is difficult to envisage circumstances in which funds that have not been committed to funding litigation (albeit perhaps contingently) could be relevant to the court's discretion to make a non-party costs order.

32. The financial information disclosed pursuant to section 85(2) will be required only when the court considers making a non-party costs order. Provided the court has an accurate picture of the financial circumstances pertaining at the time it attributes costs (including details of any committed but not yet transferred funds), it will not be necessary to require the claimant to speculate about financial resources that may or may not accrue in the future. Accordingly, we consider that it is arguable that the “likely to be available” class of financial resources referred to in section 85(2) should be read as comprising only those resources which have already been committed, but not yet transferred. Any other construction would require the provision of information that goes beyond what is required to fulfil the statutory purpose.
33. In relation to section 88(5) disclosure, we accept that an applicant for a costs capping order should be required to give the court an accurate picture of resources that will become available during the course of the proceedings, since the court will be concerned to have a full picture of the claimant’s financial position for the duration of the proceedings. However, we do not accept that this requires claimants to speculate whether funds are likely to accrue over an unspecified period in the future. What the court will require, in line with current practice in relation to Protective Costs Orders, is for applicants for costs capping orders to give an accurate picture of assets and liabilities, and those contingencies of which the applicant is aware. As with any other judicial review claimant, an applicant for a costs capping order has a duty of full disclosure, which will require him or her to update the court with any relevant changes to the financial information lodged with the application. To require more information than this would be unnecessary, unclear and unduly onerous. We consider therefore that, as for section 85(2), it is arguable that the “likely to be available” class of financial resources referred to in section 88(5) CJCA should be read as comprising only those resources which have been contingently committed, but not yet transferred.
34. In each of these sections, while Parliament has created a broad enabling power, the detail of these measures is designed to be provided by the Rules of Court, consistent with their objectives. If the Rules merely replicate the underlying statutory language, without consideration to the objective to be achieved, they may undermine the intention of Parliament.¹⁶

B. CONSULTATION DOCUMENT QUESTIONS

- 1) Do you agree that a multiple choice declaration is appropriate? Please provide reasons.**
 - 2) Do you agree with the government’s proposed approach at paragraph 52(a)–(e)? Please provide reasons.**
35. We agree with the Government’s analysis that a multiple choice declaration might, in practice, be the least onerous option for both claimants and the courts, provided that the Rules make it clear what, in practice, is required and that the requirements imposed on

¹⁶ *R (Reilly & Anor) v Secretary of State for Work and Pensions* [2013] UKSC 68, paras 49 – 52.

individuals are consistent with the purpose of the underlying legislation, and compatible with the right of access to justice and the right to respect for private life protected by the common law, Articles 6 and 8 ECHR.

36. The government's proposed approach is set out in paragraph 51 as follows:

The claimant would be required to declare which of the following applied and provide the additional information (indicated in each case at "i") where applicable:

- a. *the claimant is not a corporate body and intends to meet all likely liabilities arising from the claim from their own financial resources;*
 - i. *in which case, no further information would be required;*
- b. *legal aid has been applied for and the application is pending or has been granted;*
 - i. *in which case, the claimant need not set out further information as a result of these proposals. Where legal aid is granted claimants are (by reference to regulation 38 of the Civil Legal Aid (Procedure) Regulations 2012) already meant to note this on the claim form and provide the certificate to the court when proceedings are, or already have been, issued;*
- c. *the claimant is a corporate body that has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review;*
 - i. *in which case, no further information would be required;*
- d. *funding other than from the claimant's resources or legal aid;*
 - i. *in which case, where the total contribution and/or likely contribution is in excess of the threshold the name and address of the contributor, and the size of the contribution, would need to be provided; and*
- e. *the claimant is a corporate body that is unable to demonstrate that it has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review;*
 - i. *in which case, the names, addresses and interest in the claimant of its members would be required.*

37. We do not agree with the proposals at subparagraphs 51d and e above. The information sought therein goes far beyond what is necessary to achieve the legitimate aim of giving effect to the statutory purpose.

Funders of judicial review proceedings and third party costs orders

38. The proposal makes no connection between making a contribution towards the running of a case and the likelihood that a third party costs order may be made against an individual. This means that claimants may be required to provide information to the court about individuals against whom there is no realistic prospect of a costs order being made. The consultation paper accepts, at paragraph 20, that:

“Doing no more than providing funding for the application will not be sufficient [to attract liability for a third party costs order] – the third party must be seeking to drive the litigation and to benefit from a potential remedy in the case”

39. We agree that this is a broadly correct summary of the case law on third party costs orders. It is also an acceptance by the Government that the proposed disclosure is far wider than is required to provide the court with potential useful information about those that may be liable for a third party costs order. The Consultation Document proceeds on the basis that *“funding can be a strong indicator of that influence”*.

40. We take issue with this statement. The proposed disclosure would give the court no information at all about whether the funders identified are seeking to drive the litigation or benefit from a potential remedy in the case. For the Rules to be proportionate, and in accordance with the statutory purpose, the list of funders required to be disclosed (supported by a statement of truth) must be refined to include only those who are either driving or controlling the litigation or who stand to benefit from a potential remedy in the case, consistent with the common law approach to third party costs orders. Setting funding alone as a trigger for disclosure would, in our view, go beyond the common law approach, by which funding alone – or pure philanthropy – has not generally been sufficient to justify the award of costs against a third party.

41. Further, the Rules should take into account the specific characteristics of judicial review litigation. Unlike the private law cases in which the case law on non-party costs orders has been developed, every citizen has an interest in judicial review proceedings, insofar as the proceedings may vindicate the rule of law. If any interest in the outcome, however remote, were capable of attracting a third party costs order, it would have the consequence of deterring right thinking citizens from seeking to uphold the rule of law. As Lord Diplock stated in *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules [in that case, of locus standi] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

42. The constitutional role of judicial review identified by Lord Diplock is relevant to the identification of those that stand to benefit from judicial review proceedings. The authorities governing the circumstances in which funders with an interest in the

proceedings should be subject to third party costs orders were developed in private law cases, where benefit in the outcome was clear to establish and essentially financial in nature. Judicial review proceedings, by contrast, are potentially of benefit to everyone insofar as the proceedings may vindicate the rule of law. For example, judicial review proceedings to challenge the closure of a hospital may attract funders with different degrees of interests in the outcome, from a funder who might wish to ensure the continuity of their own treatment or that of a family member, to a concerned member of the local community or a concerned member of the wider public. All could be said to have an interest in the outcome.

43. The Rules should not deter those with a remote interest from supporting judicial review proceedings in order to uphold the rule of law. There is no authority for the proposition that funders of public law proceedings who do not exert control over the proceedings and whose interest in the outcome is remote would ever in practice attract a third party costs order. Moreover, a requirement for disclosure of would-be funders that is not limited to those whose interests are clearly definable, and proximate to those of the claimant, is liable to have an inappropriate deterrent effect. The Rules should accordingly limit disclosure to information about those acting to control or direct the litigation, or with a clearly definable, high level of personal interest, which we consider should be properly expressed as a financial interest in the proceedings. Any more intrusive approach would not serve the stated purpose of the CJCA 2015, would lack clarity, and would be damaging to the rule of law.

Speculation about future funding

44. The language proposed in the Consultation Document would invite potential claimants to speculate about “likely” funding. It is difficult to envisage circumstances in which funds that have not already been committed to funding litigation (albeit perhaps contingently) could be relevant to the court’s discretion to make a non-party costs order. As the Minister emphasised during the passage of the Act, this duty should not be overly onerous or speculative:

“An applicant will not be required to provide a forensic breakdown of their financial position, but will be expected to provide sufficient information for the court to know the actual or intended sources of funding for a claim.”¹⁷

45. It should not be necessary to require the claimant to speculate about financial resources that may or may not accrue in the future, nor arguably is that permitted on a true construction of section 85 of the CJCA 2015. Subject to our view that any requirement should be connected to direction, control or benefit, only a direct commitment to support a particular claim should trigger the requirement to disclose.
46. A broader disclosure obligation requiring claimants to speculate about future funding, would impose a duty on judicial review claimants that would lack clarity, would go beyond what is necessary, and would be liable to deter people from making donations to charitable and not for profit organisations which might pursue judicial review claims. This

¹⁷ HC Deb, 27 March 2014, Col 447.

would represent a potential threat to the ability of some charities and not for profit organisations to conduct public interest litigation.

Members of claimant companies

47. In relation to the disclosure proposed in paragraph 51e, the Consultation Document explains the Government view that the information disclosed will be limited, and that as the information will already be held by organisations, it will be administratively simple to produce. However, insofar as the disclosure is not linked to the court's power to make an order for costs against an individual, the question remains why the information should be provided at all.
48. There is limited evidence that corporate bodies are routinely used to avoid costs otherwise recoverable. Many corporate bodies who pursue a judicial review will have the funds to cover their own costs in any challenge. The purpose of the Government's proposals is to target a few (if a handful) of cases where individual litigants may have acted unconscionably.
49. The proposed disclosure requirements will place a corporate body conducting judicial review litigation where the litigation is supported by third party funding under two duties; first, to disclose any direct funding provided by third parties above the financial threshold of £1500; and second, automatically to provide information about all of their members regardless of any financial contribution made or any degree of control or benefit involved.
50. Corporate governance structures vary significantly from one organisation to another. A corporate body may be a single shareholder entity, where the only member is itself a company, or a charity or a not-for-profit entity where the members are the Trustees or the Board of the organisation (i.e. volunteers who have no financial interest in the corporation or the litigation). Equally, some membership organisations treat all of their subscribers as "members" of the corporate body for the purpose of its Governance. While the information which the Government proposes should be disclosed may relate to Trustees, and might be held by Companies House and the Charity Commission, it might equally relate to thousands of individual subscribers.
51. The requirement to disclose information about the members of corporate bodies is extremely broadly cast. It would include the identification of members without any private interest in the outcome of the proceedings, who may have no knowledge of the involvement of the organisation in the proceedings, who in no sense drive the litigation, and who do not stand to benefit from it. A member may even disagree with the decision of the organisation to pursue the claim. Disclosure of such information could not conceivably assist the court – without more - in making a third party costs order. As above, unless the Rules fall within the scope of the statutory purpose for which the disclosure is required, they are liable to fail to meet the demands of proportionality and necessity. These requirements are particularly important in relation to the disclosure of information about members of corporate bodies, given that such disclosure would represent a departure from the ordinary respect accorded to the corporate veil.

52. Applying the principled approach outlined above, we consider that to satisfy the requirements of proportionality, and to comply with the statutory purpose, the Rules should only require disclosure of information about those members of a claimant company who:

- a. drive or control the litigation, in their personal capacity, distinct from any commitment they may have to a role in the Governance of the organisation; and/or
- b. have a direct financial interest in the proceedings (beyond the benefit accruing to all members if the company prevails in the litigation, and so does not have to pay the other side's costs).¹⁸

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

53. We agree that judicial review claimants should not need to provide their estimate of costs, because (1) a costs estimate at the outset would not provide meaningful information, (2) it would impose an unnecessarily onerous and unfair burden on claimants, and (3) it would result in extra unnecessary work for the court to compile and process the information provided.

54. Unlike in private law litigation, judicial review proceedings are generally commenced in conditions of urgency at a stage when there has been no disclosure of documents by the defendants. There is no duty of disclosure on defendants until after the Acknowledgement of Service has been filed. Consequently, when proceedings are issued, it is generally the case that the defendant alone is able to determine (1) whether permission should be conceded, (2) whether the defendant needs to make material disclosure, and if so, how extensive such disclosure will be, and (3) in what circumstances and on what grounds the defendant will contest the proceedings.

55. This disparity in information available to the parties to judicial review proceedings tends not to arise so acutely in other types of civil litigation, where limitation periods are significantly longer. Nevertheless, the general difficulty in estimating costs at the outset in civil litigation is reflected in Part 3.13 of the Civil Procedure Rules, which provides that costs budgets (which are not mandatory in judicial review cases) are only required after service of the defence.

56. Costs estimates produced by a judicial review claimant on commencing proceedings will necessarily be contingent on the information available to, and the approach taken by, the defendant, and will therefore be difficult for the claimant to produce. An estimate would not provide helpful information for the court, but would add to the administrative burden of both the claimant and the court. It would be unfair for this burden to be placed on only the claimant side, when the assessment depends so much on the defendant's future conduct.

¹⁸ As such a benefit - without more - could not conceivably found a third party costs order.

57. In our view, the statement of truth supporting the claimant's choice of tick box both gives sufficient comfort that the tick box exercise has been carried out with reasonable care in good faith, and also adequate sanctioning powers if there is reason to believe it has not been.

4) Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 61? Please provide reasons.

58. Paragraphs 59 to 61 of the Consultation Document propose that:

“[D]uring the course of proceedings the claimant should be subject to a duty to update the court if there is a material change to their financial circumstances. This will make sure that the court has information which is appropriately accurate when it comes to take decisions on costs. Additionally, it will limit the potential to circumvent the intended effect of sections 85 and 86 by simply obtaining funding after the financial information had been provided.

The government, however, accepts that it would be impracticable to include a requirement that each and every change to the relative funding position, no matter how minor, be reported to the court. It proposes that the changes to which the duty would apply would be those which are, in the opinion of the person making the declaration, significant in the context of liabilities arising or likely to arise in the context of the application or judicial review.”

59. At paragraph 52 of the Consultation Document, it is asserted that the court would “*retain a power to request information on estimated costs if it requires it*”. We do not understand on what basis the court might exercise such a power. The purpose of the financial disclosure given pursuant to section 85(2) has nothing to do with costs management, but rather the ability of the court to identify third parties against whom third party costs orders might lie. The information disclosed by the claimant pursuant to section 85(2) will be relevant only at the time that the court is considering making a costs order in the proceedings - at the earliest at permission.

60. The information disclosed by the claimant pursuant to section 85(2) will be relevant only at the time that the court is considering making a costs order in the proceedings - at the earliest at permission. There would appear to be no reason for the court to review the information before it is needed. We would be concerned if these Rules were to create a new *de facto* costs management role for the court in judicial review; this would go far beyond the purpose of the underlying legislation and the intention of Parliament in creating this new limited power to collate information for the purposes of permitting the court to better consider third party costs orders.

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

61. The degree to which the information served is handled, and to whom it is provided, is clearly relevant to the assessment of whether these measures are capable of being

operated compatibly with the common law right of access to justice and Articles 6 and 8 ECHR. While the extent of a disclosure's publication will be relevant, it cannot be determinative. As the court in Gardner explained:

"The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision."

62. It is yet far from clear how the financial information disclosed will be processed when it is provided to the court. The mechanics of disclosure will be highly relevant to its legality:

- a. Service on the defendant and interested parties is not necessary to enable the court to fulfil its section 86(3) duty. We therefore agree that the disclosure should be limited in so far as is possible, except in so far as the information may be useful to the court's determination of any third party costs orders. With this in mind, it is appropriate that limited information is provided about the individuals whose data may be caught by the new rules (name and address, amount of funding or interest in the relevant corporate body).
- b. However, in practice, this information, provided exceptionally, should not be permitted to play any relevant part in the consideration of the claim as and until the information is necessary to allow the court to consider whether a third party costs order would be appropriate. In practice, this may mean that the material is provided to the registry at the outset of an application, and disclosed to the trial judge in updated form only when costs are to be attributed.

63. Subject to our broader concerns about the application of these disclosure requirements (see our response to question 2), we do not agree that they should apply similarly to all applications. Where judicial review proceedings are brought by corporate bodies which are charitable (or which operate on a not-for-profit basis), it would be inappropriate to require the automatic provision of information about members and their interests without further evidence that a third party costs order against them would be possible. That is because:

- a. Publication of information about members would have a deterrent effect on volunteer trustees' and board members' willingness to authorise judicial review litigation, and would create a conflict between trustees' and board members' private interests and their duty to act in the best interests of the charity or the not-for-profit organisation. Some trustees or potential trustees may be deterred from acting as trustees by the possibility of being held personally liable for costs in judicial review proceedings brought by the charity. Active participation in civic life should be encouraged, not deterred.
- b. As explained above, corporate bodies can organise their membership in any number of ways. As drafted, the Rules could require disclosure of information about a handful of individuals or an entire database of information held by an

organisation about perhaps thousands of people based only on the virtue of their subscription to an organisation.

- c. Trustees or Board Members information may already be publically available (through Charities Commission or Companies House). In these circumstances, it begs the question why this information should specifically be provided in circumstances where an organisation pursues litigation. There is no requirement for Trustees or Board members to meet the liabilities of their organisations in companies law, and no authority to support the routine application of third party costs orders to them. Trustees of claimant charities or not for profit organisations who do not have a direct private interest in the litigation or exercise a controlling influence in their personal capacity are – following existing case law – unlikely to find themselves subject to an adverse costs order. Yet, by automatically linking this information to the responsibility of the court to adjudicate on costs, these new Rules could have an adverse impact on individuals' willingness to support organisations which litigate.
- d. The requirement that individual members financial information be subject to disclosure may act as a significant deterrent in the limited circumstances when an organisation might seek a judicial review. This is particularly so given the small numbers of judicial review claims brought by charities and not-for-profit organisations.
- e. These arguments are particularly cogent in respect of those organisations which are registered charities. In so far as these measures are designed to deter unconscionable conduct in the course of litigation, charitable Trustees will be subject to the regulation of charities law and the oversight of the Charities Commission, a significant deterrent to improper conduct, whether in the conduct of litigation or other activities to meet the organisation's charitable objectives.
- f. The Government consulted on the introduction of more restrictive rules on standing, to prevent civil society and other organisations bringing judicial review claims in the public interest. This proposal was rejected. Although they are few, the circumstances where civil society and charitable organisations have pursued claims to preserve the wider public interest, or on behalf of vulnerable or excluded organisations, have been important and influential for the rule of law. The Rules presently being consulted on should not result in the same chilling effect without a substantive alteration to the law of standing.

64. We are particularly concerned that the application of the proposed obligation in paragraph 51 (d) will have a particular chilling impact on the funding of charities and not for profit organisations who litigate by major donors and charitable trusts. Although there may be no significant change in practice by the courts in respect of third party costs by pure philanthropic funders, without clarity on this issue, this new disclosure requirement could have a significant impact on the funding of organisations who pursue judicial reviews or who have done so in the past (which we explain further, below).

Financial Information Threshold

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

65. For the reasons set out above, we do not believe any disclosure requirement should be triggered by the provision of financial information alone. We dispute the premise of the Consultation Document that the provision of financial support alone may be a sufficient indicator of direction and control sufficient to engage the court's power to make a third party costs order.

66. We welcome that this threshold will give some significant comfort to small donors such as those making contributions through crowd-funding efforts. In cases akin to the community funded challenge to the closure of services at Lewisham hospital, this could have significant implications for enabling cases to proceed, consistent with the rule of law.

67. However, it will not provide significant reassurance to large grant making bodies or donors to organisations who litigate, whether in providing unrestricted funds or in providing direct support for individual public interest cases or litigation programmes. This kind of pure philanthropy has never attracted liability for third party costs, and, as we explain above, the CJCA 2015 was not designed to create such liability.

68. Without further limitations on the disclosure requirements to better reflect the court's jurisprudence on third party costs, we are concerned that this measure will have a significantly chilling effect on charitable giving – and on the ability of charities and not-for-profit organisations to litigate - which the financial threshold will not alleviate.

69. We remain concerned that the creation of a financial threshold should not be used to create a presumption of direction and control imputed simply as a result of a financial contribution.

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

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

70. The estimates of costs provided in the Consultation Document – prepared by individual legal practices such as the Public Law Project and Leigh Day, or by individual barristers¹⁹ - are necessarily based on limited information. The Government is best placed to ascertain the cost per case paid to claimants by the Legal Aid Agency where a claim is unsuccessful, and by the relevant Government department where a claim succeeds.

¹⁹ Such as Kerry Barker, whose paper *Making a successful claim for judicial review* contains an estimate attributed to Guildhall Chambers (where Mr Barker practises), in the Consultation Document.

71. While we are concerned about the impact of the financial threshold in practice (above), we are also concerned that £1500 is an entirely insufficient indicator of any element of direction or control:

- a. The Consultation Document explains that £1500 has been chosen as an “*appropriately significant sum*” in light of the information available on the costs of judicial review. This figure is particularly linked to the likely quantum of costs at permission stage. We do not consider that there is any obvious reason why the threshold figure should be assessed by reference to costs at permission; the duty on claimants extends to disclosing funding arrangements for the whole case not only in connection with the permission application. In our view, any threshold figure should be fixed by reference to the (much higher) envisaged costs of the substantive proceedings, suggesting a significantly higher figure than £1500.
- b. The Government suggests that the cost of judicial review is generally between £11,000 - £22,000. Even as a proportion of those figures, £1,500 is a relatively small sum and should not be used as a shortcut to imply that sufficient evidence of direction and control exist to justify an examination of third party costs.
- c. CPR 45.43-44, and Practice Direction 45.5.2 establish a fixed costs regime for judicial review claims that are subject to Article 9(4) of the Aarhus Convention (following the case of *Garner* referred to above), whereby defendants’ costs exposure is capped at £35,000.
- d. Recent research by Bondy, Sunkin and Platt suggests that while judicial review costs may include low value cases costing under £14,000 (around 23%), claims may cost significantly more. Only 26% of claims fit most closely within the Governments estimates (£14,000 - £25,000), while 30% of claims cost between £25,000 - £49,000 and 20% cost over £49,000. Concluding their research, they observe that:

“relative to cases that ‘turn on own facts’, policy and practice and wider public interest cases are associated with higher costs”.

We consider that by their nature, many cases brought by claimants seeking funding from third parties will be cases involving challenges to policy and practice and wider public interest cases. For all the reasons above, we consider that the Government assumptions in relation to the cost of such cases is likely to be too low.

Costs Capping Orders

- 9) **Do you agree with the government’s proposal for a more detailed picture of the applicant’s finances on an application for a costs capping order than is required with an application for permission? Please provide reasons.**
- 11) **Do you agree with the government’s proposal for the information on members which an applicant must provide when it is a corporate body**

unable to demonstrate that it is likely to have the resources available to meet liabilities arising in connection with the application for judicial review? Please provide reasons.

72. Each type of financial disclosure at issue in this consultation needs to be considered in the context of its statutory purpose. The purpose for which financial information disclosed pursuant to section 88(5) will be used is to enable the court to determine:

- a. in the absence of a costs capping order, the applicant would withdraw the application for judicial review or cease to participate in the proceedings, and would be acting reasonably in so doing (s88(6)(b)and(c)); and
- b. whether to make a costs capping order and if so what the terms of the order should be, including by reference to “the financial resources of any person who provides, or may provide, financial support to the parties” (s89(1)(a)).

73. Financial disclosure in relation to an application for a costs capping order is in general made both to the court, and to defendants and interested parties. The interference with applicants’ right to respect for privacy, and the corresponding need for the interference to be justified, is therefore greater, not less.

74. The guiding principle in relation to any Rules made pursuant to section 88(5) of the Criminal Justice and Courts Act 2015 should be that the information to be produced should not go beyond that which, if it were not produced, would result in a court properly refusing a Costs Capping Order.

75. We agree that an applicant for a costs capping order should be required to give the court an accurate picture of resources that will become available during the course of the proceedings, detailing all assets and liabilities, and those contingencies of which the applicant is aware. We agree in large part with the proposal formulated at paragraph 95 of the consultation document, that:

“The applicant will be required to give information about their financial position, including identifying likely financial support from third parties. This would not include a requirement for the applicant to detail every aspect of their finances no matter how minimal. Instead, the government anticipates that in most situations the information required to provide that picture would include a breakdown of the applicant’s significant assets, such as real property, and liabilities, their income and significant regular expenditure”.

76. However we have the following areas of disagreement and concern about the Government’s detailed proposals:

- a. Applicants should not be required to speculate about financial support that is “likely to be available” in future. There is arguably no need for Rules to require such speculation for the court to properly apply the statutory tests (on their true construction) in sections 88(6)(b) and (c), or section 89(1)(a). Disclosure should be limited to funds that have been committed, albeit perhaps contingently.

- b. We are concerned that the proposal at paragraph 95 is not couched in exhaustive terms – that the disclosure might “include” the matters referred to in paragraph 95, is not problematic (subject to the area of disagreement noted above). However we do not consider there is any justification for additional more intrusive disclosure.
- c. Similarly, we are concerned that the matters listed in paragraph 95 are qualified to apply only “*in most situations*”. Given that the number of cases that will be affected by these provisions is small (although such cases may include public interest litigation of general public importance), it is not clear why such a qualification may be necessary.

77. In relation to members of corporate bodies seeking a costs capping order, the Consultation Document proposes, at paragraph 99, that the court might wish to consider “*whether the claimant might seek further capital from its members if [it] were to face costs at the end of the proceedings*”. We are unaware of any case in which a defendant or interested party in judicial review proceedings has argued that members of a claimant corporate body should be required to contribute their private funds to the resources available for the body’s public interest litigation. Nor should the Rules entertain such a prospect, which would have an extremely damaging impact on public interest litigation, particularly public interest litigation brought by charity and not for profit judicial review claimants.

78. In our view, information about the members of corporate bodies should only be relevant to the court’s discretion to make a costs capping order where the members have a personal role in directing or controlling the litigation beyond any role they may play in an organisation’s governance, and/or a direct financial interest in the proceedings (beyond the benefit accruing to all members if the company prevails in the litigation, and so does not have to pay the other side’s costs). In other cases, the court will consider whether to make a costs capping order on the basis of information about the company’s assets and liabilities, including financial support from third parties, as broadly indicated in paragraph 95 of the Consultation Document. Other information about members will be irrelevant and should not need to be disclosed.

79. In relation to members of corporate bodies who are charities or not for profit organisations who are trustees or board members, we repeat our response to Q 5. The conflict of interests that would be created by publication of information about members is particularly inappropriate where cases are brought in the public interest and the individuals concerned are volunteers acting without a personal interest in the outcome of the claim.

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

80. We do not see that the Rules should prescribe the documents by which the disclosure is given. It is enough that the disclosure is supported by a statement of truth. Where key

documents are lacking, the court will be able either to draw such inferences as it sees fit, or else to direct the applicant to provide further information.

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

81. We agree that the financial information disclosed pursuant to section 88(5) should generally be served on the defendant and interested parties to enable them to make submissions on whether a costs capping order should be made. However that agreement is subject to two qualifications, namely:

- a. There should be provision whereby “means testing” of third parties in the public domain can and should be avoided, so that material should in an appropriate case be able to be submitted to the court alone and not to defendants or interested parties.
- b. The need for privacy of third parties to be protected from publication to defendants and interested parties will be greater the more intrusive the disclosure requirements are in relation to third parties. We have based our comments on the general proposal in paragraph 95 of the Consultation Document, but as observed above, that does not purport to give a complete picture of the disclosure proposed.

Costs and benefit analysis

13) Do you agree with the assumptions and conclusions outlined in the Impact Assessment?

82. We are concerned that the Impact Assessment provided contains a limited assessment of the potential impact of these measures. As explained above, while the provision of information about funding may appear administratively simple and, in many cases, may be innocuous, these measures are so broad that they may have a broader impact than intended and may have a chilling effect on the ability of individuals without means and organisations who take public interest cases to challenge unlawful public decision making.

83. While we welcome the recognition by the Government that the number of cases which these proposals are intended to affect are small (paragraph 109), for reasons explained above, we are concerned that, as drafted, the proposed Rules may have a wider deterrent impact than intended.

84. For the reasons explained above, we are concerned that the costs of judicial review estimated at paragraphs 110 – 112 may generally be too low. While we accept that the data available on the immediate cost of judicial review claims is low, recent research by

Bondy, Sunkin and Platt²⁰ crucially indicates that those claims which involve higher costs may include some of the cases with the greatest public impact and may result in a significant public benefit.

85. We are concerned that while paragraph 113 considers the potential administrative burden on corporate organisations which litigate, it includes a very limited impression of membership and corporate governance (explained above at paragraphs 5).
86. The equalities impact assessment recognises that earlier consultation respondents expressed particular concern about the impact of judicial review reforms (including in connection with financial disclosure) as individuals from disenfranchised communities or higher support needs, including those with protected characteristics, are more likely, in practice, to use judicial review. Although the Government indicates that statistics are not centrally held about court users, JUSTICE and PLP consider that, in the absence of statistics, the significance of judicial review for communities likely to be protected by the Equality Act 2010 should not be understated. The Government's view is that, regardless of any such impact, however measured, the measures proposed "*will not have a disproportionately adverse impact*". We regret that the Impact Assessment provides little explanation of the Government's justification. For the reasons explained above, we disagree that the Government's proposals will ensure that the new disclosure requirements apply fairly and proportionately.
87. The Ministry of Justice has recently been criticised by both the National Audit Office and the Public Accounts Committee for its limited understanding of the evidence base for reforms to legal aid.²¹ In both cases, this criticism was particularly concerned about the limited nature of the impact assessment performed and the impact of the measures both on access to justice and on the wider budgets of other departments. We are concerned that, in cases where reform may impact on access to judicial review, in light of the important constitutional function which it serves; there is a particular imperative for the impact of measures to be fully explored before they are introduced. With this in mind, we regret that the impact assessment provided has largely focused on the administrative burden on individuals and organisations of completing a "tick-box" form before proceeding with an application for judicial review, with no closer examination of the potential impact which the disclosure requirement may have more broadly on access to funding for judicial review by individuals with limited means and on organisations who litigate in the public interest and their ability to challenge unlawful actions by public bodies.

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²⁰ *Judicial Review: the nature of claims, their outcomes and consequences*, V Bondy; L Platt; M Sunkin, to be published October 2015.

²¹ NAO, *Implementing reforms to civil legal aid*, November 2014; Public Accounts Committee, Thirty-sixth Report of Session 2014–15, *Implementing reforms to civil legal aid*, HC 808.