Public Law Project

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PUBLIC LAW PROJECT RESPONSE TO THE *JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM CONSULTATION*

The Public Law Project

1. This submission is made on behalf of the Public Law Project (PLP). PLP is an independent national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, casework, training and policy work. PLP is based in London but has a national presence and standing. We run annual national conferences in London, Manchester and Cardiff, and an expanding range of subsidised training events across England and Wales. Much of our litigation is conducted in the higher courts and we have a high overall success rate, notwithstanding that we undertake complex and challenging work. In recognition of our successful work in promoting access to justice, PLP was named as one of the 2012 *Guardian* charities of the year and awarded the 2013 *Special Rule of Law* award by Halsbury's Laws.

2. PLP is known for its expertise in public law. Sir Henry Brooke, former Lord Justice of Appeal, has described the work of PLP as fulfilling "a real public need", remembering "just how welcome [PLP's] interventions often were in ground breaking cases."[1]

3. PLP produces independent evidence-based research in the area of public law. Since its establishment in 1990, PLP has published the following academic reports:

[1] PLP Five Year Report 2006-2011, available at: http://www.publiclawproject.org.uk/resources/8/plp-review-and-impact-report-2006-2011

- *The effect and value of judicial review in England and Wales* (forthcoming) by Varda Bondy and Maurice Sunkin.
- *Designing redress: a study about grievances against public bodies* (2012) by Varda Bondy and Andrew Le Sueur, the Public Law Project and Queen Mary University of London.[2]
- *Mediation and Judicial Review: A Practical Handbook for Lawyers* (2011) by Varda Bondy and Margaret Doyle, the Public Law Project.[3]
- *Mediation and Judicial Review: An empirical research study* (2009) by Varda Bondy and Linda Mulcahy with Margaret Doyle and Val Reid, the Public Law Project.[4]
- *Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (2009) by Varda Bondy and Maurice Sunkin, the Public Law Project and the University of Essex.[5]
- *The impact of the Human Rights Act 1998 on judicial review* (2003) by Varda Bondy.[6]
- *Third party interventions in judicial review* (2001) by Deana Smith, Karen Ashton and Lee Bridges.[7]
- *Cause for complaint? An evaluation of the effectiveness of the NHS complaints procedure* (1999).[8]
- *Judicial review in perspective, investigation of the trends in the use and operation of the judicial review procedure in England and Wales* (1995) by Bridges, Meszaros and Sunkin, 2nd ed. Cavendish.

Introduction

4. At the outset, PLP raises three overarching concerns about this consultation and the premise that it is based on.

(1) The statutory role of the Lord Chancellor in upholding the rule of law

5. The Lord Chancellor's constitutional role of upholding the rule of law is enshrined in the Constitutional Reform Act 2005 ("CRA 2005"). In taking office the Lord Chancellor swears an oath to respect the rule of law, defend the independence of the judiciary and discharge his duty to ensure the provision of resources for the efficient and effective support of the courts (s17 CRA 2005). The rule of law is not political[9] and it is inapt to characterise judicial review, and the role of charities, NGOs and pressure groups in

[2] Available at: *http://www.publiclawproject.org.uk/resources/123/designing-redress-a-study-about-grievances-against-public-bodies*
[3] Available at: *http://www.publiclawproject.org.uk/resources/122/mediation-in-judicial-review-a-practitioners-handbook*
[4] Available at: *http://www.publiclawproject.org.uk/resources/31/mediation-and-judicial-review*
[5] Available at: http://www.publiclawproject.org.uk/resources/9/the-dynamics-of-judicial-review-litigation
[6] Available at: http://www.publiclawproject.org.uk/resources/33/the-impact-of-the-human-rights-act-1998-on-judicial-review
[7] Available at: http://www.publiclawproject.org.uk/resources/35/third-party-interventions-in-judicial-review
[8] See: http://www.publiclawproject.org.uk/resources/34/cause-for-complaint
[9] See: 'Beware of Kite Flyers, (Lord Justice) Stephen Sedley, London Review of Books 12 September 2013 Vol. 35, No.17 pp 13 – 16 http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers

bringing judicial reviews, as a political tool[10]. As the CRA 2005 recognises in section 1, the rule of law is a constitutional principle. The mechanism of upholding this principle, is judicial review. Both the principle and the mechanism by which it is enforced must be kept above the vagaries of policy and politics and should not be equated with red tape[11].

(2) Access to justice, the public interest and the sovereignty of Parliament

6. The consultation paper makes reference to Parliament *and the elected government* being best placed to identify what is in the public interest (paragraph 24). This is a fundamental misunderstanding of our constitutional settlement. Under traditional constitutional theory Parliament is sovereign. This means that the executive must act in accordance with the will of Parliament, as expressed through statute. If the executive steps outside of the authority granted to it by legislation, it does so in contravention of Parliament's will. When this happens, judicial review is the mechanism by which Parliament's will is enforced: the courts ensure that the executive acts lawfully, in accordance with the powers granted to it by Parliament. If access to judicial review is restricted, it will restrict the ability of citizens and interested bodies to ensure that the executive acts lawfully and that the sovereignty of Parliament is preserved. It is plainly in the public interest for our constitutional settlement to be upheld and for the executive to be forced to act in accordance with the law.

(3) Misleading data and lack of credible evidence

7. This consultation paper is the third in a series of consultations in the last year that seek to restrict access to judicial review. In our response to *Judicial Review: Proposals for Reform* and *Transforming Legal Aid: Delivering a more credible and efficient system* we raised our serious concerns about the lack of an evidence base for the proposals, and the very real danger of relying on anecdotal and impressionistic evidence to justify policy decisions that constitute a profound and constitutionally significant attack on the rule of law and the ability of citizens to hold the executive to account. Those concerns remain. [12]

8. For example in its proposals on standing the latest consultation document identifies around 50 judicial reviews per year that appear to have been lodged by NGOs, charities, pressure groups and faith organisations, but it clarifies in a footnote that this is: "Based on a manual analysis of case level information. Due to uncertainties in recording and interpretation this analysis is largely illustrative" (footnote 38). The Public Law Project's research demonstrates that this figure is incorrect by a significant margin (see further below).

[10] 'The Judicial Review system is not a promotional tool for countless Left-wing campaigners', Article by the Lord Chancellor, Chris Grayling, The Daily Mail, 6 September 2013 http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html

[11] See the Prime Minister's speech to the CBI on 19 November 2012 http://www.telegraph.co.uk/finance/economics/9687688/David-Cameron-CBI-speech-in-full.html

[12] See also 'Debunking the Lord Chancellor's misuse of Judicial Review statistics' http://www.publiclawproject.org.uk/resources/127/debunking-the-lord-chancellors-misuse-of-judicial-review-statistics

9. Similarly, in a 'web chat' convened by the Ministry of Justice on 29 October 2013[13] Richard Mason, Deputy Director – Administrative and Civil Justice, responded to a question challenging the Ministry's assertion that judicial review claims were on the rise. He stated, "[…] There's actually been a 27% increase in non-immigration and asylum cases – from around 2,300 in 2007 to around 3000 in 2012". PLP has analysed the complete database from the Administrative Court.[14] We examined all 12,434 issued JRs in 2012, and divided them according to subject matter into three sections: civil JR, criminal JR and immigration/asylum-related JRs (see Appendix 2). According to our calculation, and based on the MoJ's own figures and records, we counted 406 criminal JRs and 9,868 immigration/asylum JRs. The remaining total for non-immigration related civil JRs is accordingly 2,160. This is 840 cases below that claimed by the Ministry on 29 October 2013.

10. The Government has employed misleading and inaccurate statistics to attempt to convince the public that there is a problem which must be solved. When considered in the context of the unprecedented politicisation of judicial review referred to above, the danger of this approach to government accountability and the rule of law, is profound.

Summary of response to the consultation

11. The proposals to reform judicial review will have the effect of making it more difficult, and more expensive to challenge the actions of public bodies. Taken together, the proposals represent a profound and constitutionally significant attack on the ability of individuals, charities and NGOs to access judicial review. Their effect will be to insulate executive action from judicial scrutiny, weakening the rule of law. In particular, PLP opposes the following:

    i. The proposal to change the rules on standing is an attempt to use restrictive procedural rules to undermine access to the courts and prevent public interest points from being raised. It runs contrary to decades of case law that emphasises the constitutional role of charities, NGOs, pressure groups and responsible citizens in bringing judicial reviews in the public interest. This proposal is aimed at preventing meritorious challenges to executive decision-making (see paragraph 178 of the consultation paper, which acknowledges that these cases have a higher success rate than judicial reviews brought by individuals). Furthermore, it is far from clear what the proposal actually means.

    ii. The proposal to limit the availability of protective costs orders ("PCOs") is an attempt to use financial disincentives to prevent organisations acting in the public interest from accessing the courts. It will act as a complete bar to NGOs, charities and campaigning groups being able to bring judicial reviews in most cases, including those where the court considers that it is in the public interest for the organisation to bring the case. The proposal fails to identify any evidence-based problems with the current practice of granting PCOs in accordance with the *Corner House* criteria.

[13] The chat can be viewed here: http://www.justice.gov.uk/ministry-of-justice-webchats
[14] Available here: https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013

iii. The proposal to expose third parties to a costs risk will deter expert, independent interventions in public interest cases. The courts and our most senior judges have identified how helpful such interventions are[15] and preventing them from being made risks undermining the quality of judicial decision-making in relation to public interest issues.

iv. The proposal to increase the costs risk for both claimants and their legal representatives, by restricting payment of legal aid in judicial review cases in which permission to apply for judicial review is not granted, by seeking to make claimants liable for all of the defendant's costs where permission to apply for judicial review is refused, and by seeking to increase the circumstances in which the court is able to make wasted costs orders will have the effect of preventing meritorious cases from being brought, and will allow unfair, unlawful and unreasonable government decision-making to go unchallenged.

v. The proposal to change the test that the court would apply in cases where claimants challenge procedural defects in public bodies' decisions fails to appreciate the important role of judicial review in upholding the standards of procedural fairness and is likely to increase the burden on both claimants and defendants engaged in judicial review proceedings and threatens to place the court in the shoes of the decision maker, a role in which it has no expertise.

Response to the consultation

Standing: questions 9-11

12. The issue identified in the consultation paper is that the Government is concerned that the test for standing in judicial review (as set out in section 31(1) of the Senior Courts Act 1981) is too liberal:

> "[A]llowing judicial review to be used to seek publicity or otherwise hinder the process of proper decision-making. The concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest." (Paragraphs 79-80)

13. **The proposal misunderstands the constitutional role of the court in judicial review cases to prevent abuse of power.** The proposal to prevent challenges brought by people who do not have a direct interest in the matter at hand misunderstands the constitutional role of judicial review. Judicial review is about public law wrongs that, if left unchecked, would undermine the checks and balances inherent in our constitutional settlement. All members of our society have an interest in the proper administration of executive power and it is for this reason that access to judicial review should be not restricted to those directly affected by the matter at hand:

[15] See Baroness Hale's address to PLP's judicial review conference, 14 October 2013 http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians

> "Public law is not at 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; and the 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. If an arguable case of such misuse can be made out on an application for [permission to bring judicial review], the court's only concern is to ensure that it is not being done for an ill motive." Sedley J in *R v Somerset County Council, ex p Dixon* [1998] Env LR 111 at 117-121.

14. **It is in the public interest that meritorious challenges to government decisions are heard by the courts: technical rules on standing should not be used to insulate executive action from accountability.** In the consultation document the Government accepts that judicial reviews brought by interested groups have a higher success rate than those brought by individuals (paragraph 78). There is a public interest in meritorious cases being heard by the courts where those meritorious cases concern the legality of government action. It is for this reason that the rules on standing for judicial review are flexible. In *AXA General Insurance Limited v HM Advocate* [2011] UKSC 46 Lord Reed warned of situations "such as where the excess of misuse of power affects the public generally, [where] insistence upon a particular interest could prevent the matter from being before the court, and that in turn might disabled the court from performing its function to protect the rule of law." This statement echoes the words of the court in *R v Secretary of State for the Home Department, ex p Bulger* [2001] EWHC Admin 119 at 20: "the threshold for standing in judicial review has generally been set by the courts at a low level. This…is because of the importance in public law that someone should be able to call decision makers to account"[16].

15. The history of the current standing rules further supports this position. The "sufficient interest" test (contained in s31(3) of the Senior Courts Act 1981) was introduced following a recommendation of the Law Commission that the older 'person aggrieved' test be replaced because the courts had been interpreting that test too narrowly. (Law Comm. Cmnd. 6407 (1976), para 48; Law Comm. Working Paper (no 40) (1971) pp 95-101). The Law Commission strongly felt that a broader and more flexible approach to standing was needed. The Law Commission subsequently recommended that those adversely affected by a decision 'should normally be given standing as a matter of course' and that the court should have 'a broad discretion to allow 'public interest and group challenges. (Law Comm No 226, Para 5.22.) The current rules thus reflect a considered and evidence-based position. Nothing approaching this level of consideration or evidence is advanced in the consultation paper.

16. **The proposal is not clear.** The Government proposes to limit access to judicial review to those who have a 'direct interest' in the decision under challenge. It is far from clear

[16] See also R v *Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617, in which Lord Diplock warned of the need to avoid the "grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited tax payer, were prevented by outdated technical rules 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."

what constitutes a 'direct interest' and it is therefore impossible to properly consider and respond to the implications of this proposal. For example, does a membership organisation like Mind or the Howard League for Penal Reform have a direct interest in mental health or prison decisions because they will affect some of their members? Does a trade union have a direct interest in decisions that will affect its members? Does the Law Society have a direct interest in decisions that will affect the solicitors that it represents? If membership organisations do have a direct interest in decisions that affect their members, what is the principled distinction between a membership organisation and a non-membership organisation including a non-membership charity or campaigning group that, while not having members, represents a specific group of people? There is none and any test on standing which made such a distinction would be unworkable as it would be unjust.. Notwithstanding the lack of clarity over the proposal, the need for reform is in any event unnecessary as the current test for standing is well established and its rationale has been carefully considered and developed by the courts (see above).

17. **The consultation fails to identify any evidence that judicial reviews are being used to seek publicity or otherwise hinder the process of proper decision-making**. The case study used in the consultation paper (at p.7) is based on a judicial review brought by a disability rights campaigner against a free school being built on the premises of a garden centre in London that had previously provided facilities to elderly and disabled people in the area. The judicial review was granted permission to proceed to a full hearing. This means that it was an arguable case, not an unmeritorious or time wasting one. Furthermore, interim relief was refused by the judge, which meant that the building work for the school continued for the duration of the legal proceedings. While the judicial review did not ultimately succeed, the local authority accepted that they had failed to comply with their legal obligation to consider the needs of the elderly and disabled in accordance with the Equality Act 2010 and agreed to make a fresh planning application. This lawful application was successful and the school opened in September 2013. It is impossible to see how a case such as this one can be used to support the contention that judicial review is being used solely to hinder decision-making or seek publicity.

18. The consultation paper asserts that around 50 judicial review claims are issued each year, with 20 being granted permission, 13 being heard at a final hearing and 6 being successful for the claimant (paragraph 78). These figures are based on a "manual analysis of case level information" which "due to uncertainties in recording and interpretation" is "largely illustrative" (footnote 38). These figures are insufficiently precise to make a cogent case for reform.

19. Furthermore, research conducted by the Public Law Project and the University of Essex and funded by the Nuffield Foundation[17] concluded that challenges brought by NGOs in respect of wider public interest matters are few and far between. PLP's database contains extensive details on 502 JR final hearing decisions heard in a 20 month period

[17] 'How many JRs are too many? An evidence based response to Judicial Review proposals for further reform. Bondy and Sunkin, UK Consitutional Law Group, 25 October 2013 http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

between July 2010 and February 2012. All the cases are civil JRs, including immigration/asylum cases. In addition, researchers received completed questionnaires from claimant solicitors in respect of 198 cases, from defendant solicitors in respect of 53 cases, and interviewed solicitors and barristers in relation to 56 cases. In this sample, approximately three quarters (77 per cent, 388 cases) of the judicial reviews were brought by individuals. The next largest group of claimants consists of corporations/legal persons, who with 76 cases represent 15 per cent of the sample. A variety of interest groups and charities, were the claimants in 16 cases, comprising three per cent of the sample. The remaining claimants were: 12 local authorities, four other public authorities bringing one case each, (NHS trust, a school, a chief constable, and a commissioner of police), and one case brought by the Secretary of State for the Home Department (on whether sensitive security service information can be considered by the coroner in closed session).

20. Of the 16 cases brought by interest groups and charities, environmental claims (which are protected by the Aarhus Convention) and claims by the EHRC (which has a statutory power to bring proceedings in its own name) will not be affected by the proposal and can therefore be excluded from consideration. The following cases remain:

    - *Children's Rights Alliance for England v Secretary of State for Justice* [2012] EWHC 8 (Admin) in which the claimant challenged a decision of the SSJ to refuse to disclose the names of children subjected to unlawful restraint techniques at centres run by the interested parties. This was an access to justice issue intended to enable children to make their own claims.
    - *British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin) which concerned the interpretation of provisions in the Abortion Act 1967.
    - *Child Poverty Action Group v Secretary of State for Work and Pensions [*2011] EWHC 2616 (Admin) which was a challenge to reforms to housing benefit scheme.
    - *Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin), which was a challenge to the legality of the policy giving less than 72 hours' notice of deportation.

21. Only in the Children's Rights Alliance for England case was standing considered to be an issue and here the discussion concerned the 'victim' test in section 7 of the Human Rights Act 1998 rather than the sufficiency of interest test. While it was decided that the organisation was not a victim Foskett J commented that:

    > 'Given the serious nature of the issues raised concerning young and vulnerable individuals, it would seem strange that a reputable charity such as the Claimant should not be entitled to come to court and raise the kind of issues raised' (para 213).

22. **The proposal fails to understand the fundamental role played by judicial review in promoting proper decision-making.** Leaving aside the obvious point that 'proper decision-making' is lawful decision making, which judicial review is there to ensure, independent research has shown the beneficial effect that judicial review can have on

decision-makers. In *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales*, Sunkin, Platt and Calvo demonstrate that, "rather than detracting from the quality of local government, an increased level of challenge appears to lead to improvements in levels of performance and is therefore helpful to authorities, rather than a hindrance."[18] The report makes two key findings:

> "1. All things being equal better performing authorities (as measured by government indicators) were less likely to be challenged than worse performing authorities. This indicates that there is a connection between official measures of quality and the public perceptions of quality. It also suggests that challenge is linked to quality of services and is not unnecessarily stimulated by lawyers.
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> 2. We also found evidence that authorities improve (at least in terms of the official measures) when the scale of challenge against them increases. We do not know why this is the case, but it indicates that authorities learn from challenges particularly when the pattern of litigation increases from levels that they have become accustomed to."[19]

23. The importance of judicial review in the promotion of proper decision-making has long been recognised by the government itself, for example, in the Cabinet Secretary's foreword to the 2006 edition of *The Judge Over Your Shoulder*. This described judicial review as "a key source of guidance for improving policy development and decision-making in the public service."[20]

24. **If NGOs, charities, faith groups and campaigning groups cannot bring judicial reviews, some government action will be impossible to challenge.** This is because there are times when an individual is not able to bring a challenge. This might be because an unlawful policy exists, but has not affected any individuals yet and so could not be challenged by an individual claimant or because the people affected by an unlawful policy are unable to bring a challenge. For example, in a judicial review brought by the immigration detention charity Medical Justice, the courts decided that the Home Office policy of deporting people with less than 72 hours' notice, so that they did not have time to get legal advice, was unlawful because it violated the common law right of access to the courts.[21] This challenge could not have been brought by the individuals affected by the unlawful policy, because they had been deported without sufficient time to get legal advice on the lawfulness of their deportation or the lawfulness of the policy as a whole. Only an NGO could challenge the unlawful policy, and if Medical Justice had not brought the challenge, the unlawful policy might still be in existence.

25. Another example is where an individual claimant can no longer proceed with his or her case, but it is in the public interest for the judicial review to be heard by the courts. In *R v Sefton Metropolitan Borough Council ex parte Help the Aged and others*, for example,

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[18] *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales*, M. Sunkin, C. Platt and K. Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009), summary. Available at: https://www.iser.essex.ac.uk/publications/working-papers/iser/2009-05.pdf

[19] *Ibid.,* summary. See also the case study at p.16-17.

[20] Available at: www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf

[21] *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

Help the Aged were substituted as the claimant, following the death of the individual litigant. In other cases, individual claimants are sometimes "bought off" by defendants (i.e. claimants are given what they ask for without the defendant agreeing to change the wider decision or policy under challenge). In such cases, unless a substitute claimant is found, the wider decision or policy would be left unchallenged, even though it might unlawfully affect many others.

26. **The Aarhus Convention establishes principles on the importance of judicial review for public interest litigation in the environmental context.** No principled reason has been advanced by the Government for curtailing the availability of judicial review in all cases in all other areas of law.

27. In light of the above, PLP's response to questions 9-11 is as follows:

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?

No. There is no problem with cases being brought where the claimant has little or no direct interest in the matter.

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?

No. There is no basis for restricting the current standing test and none of the existing alternatives would be reasonable or justified.

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

No. PLP disputes the premise that judicial review is used as a campaigning tool and that a problem exists in relation to the current rules on judicial review.

<u>Procedural defects: questions 12-16</u>

28. The Government's case, at paragraph 99, is that:

> "[J]udicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made 'no difference'."

29. **The current test of inevitability strikes the correct balance, and no evidence has been provided to demonstrate the contrary.** Where, in deciding a judicial review

claim, the court identifies a procedural flaw in the decision-making process, the judge will proceed to consider whether to grant the claimant a remedy. Currently the judges apply a "no difference" test: they consider whether the procedural flaw would inevitably have made no difference to the decision under challenge, and if they conclude that it did not make any difference, they are likely to refuse to quash the unlawful decision and to remit it to the decision maker for fresh consideration. The courts recognise the boundaries of their role in this area. For example, in *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, May LJ stated (at para.10): "I have already noted that neither [counsel] contended that the judge's second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision."

30. Similarly, in *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344 Bingham LJ stated:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
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> 2. As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.
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> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
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> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
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> 5. This is a field in which appearances are generally thought to matter.
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> 6. Where a decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."

31. No evidence is provided in the consultation paper to show that this approach is problematic.

32. **There are important and well established public policy reasons for maintaining the current high threshold before a court withholds a quashing order.** The dichotomy between "procedural defect" and "substantive illegality" that the consultation document seeks to draw at paragraph 99 is misconceived: judicial review is routinely concerned with challenges to the lawfulness of procedure. The judicial review court has in general

no expertise to consider the merits of a public body's decision, and is loath to do so. Were the "no difference" test to be modified as is proposed, it would necessarily involve the court in matters it is ill equipped to adjudicate on. This will add to costs and require additional court time.

33. **'Perfectly reasonable decisions or actions' are not challengeable by judicial review. The proposal will therefore not meet its stated aim.** Where decisions or actions are "perfectly reasonable", judicial review challenges will be filtered out of the system at the permission stage.

34. **The proposal may incentivise bad decision-making.** The proposal may incentivise some public bodies to seek to insulate decisions from challenge where they are advised that the procedure being followed is or may be unlawful, by qualifying decisions with a rider that a particular issue of legal significance would not have made any difference had it been decided in a different way. This outcome would be inconsistent with decisions being reached on their merits, and so inconsistent with good public administration.

35. **Good public administration requires decision makers to be aware when they have got the law wrong.** Dealing with issues of remedy at the end of proceedings makes sense both in terms of the most efficient use of the court's resources, and also because it is an important part of good public administration that decision makers are aware when they get the requirements of the law wrong. Where cases involving challenges to unlawful decision making (which are the ones that will be caught by this proposal) are filtered out at the permission stage, decision makers will not receive guidance from the court to enable them to avoid future unlawful decisions.

36. **There will be increased costs and "bottlenecking" of proceedings if consideration of the "no difference" test must take place at the permission stage**. The government acknowledges that option (1) risks turning the permission stage into a full dress rehearsal for the final hearing. PLP considers that this is very likely to be the case, and costs for the courts and both parties will be inflated as a result. Defendants are likely to consider it advantageous to assert the "no difference" argument in the Acknowledgement of Service in order to seek to avoid a full hearing – particularly if it is made easier to meet the test by lowering of the applicable threshold. Where the point is taken in the AOS, there will be an increased need for oral hearings (which will be longer), lengthier pleadings, and more extensive case preparation, all of which will drive up costs for the parties and take up valuable court time.

37. **The proposals would aggravate the chilling effect on legally aided claimants' representatives if the Government's legal aid proposal is implemented.** If the Government's proposal for paying for pre-permission work in legal aid cases are implemented, the increased uncertainty and costs that would result from bringing forward consideration of judicial review remedies to the permission stage would have an additional chilling effect on legally aided claimants' representatives' willingness to act.

38. In light of the above, PLP responds to questions 12-16 as follows:

Option 1 - Bring forward the Consideration

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

No. This will result in increased costs for claimants, defendants and the courts. It will also invite the court to stray into the merits of the substantive decision at a stage when it is ill-equipped to do so.

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?

There is no way that the increased time and cost that this proposal will generate can be mitigated.

Option 2 – Apply a lower test

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?

No. No evidence has been provided to show that the current threshold of inevitability is too high.

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?

No.

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

No.

<u>Rebalancing financial incentives: questions 19-34</u>

39. Before addressing each section in turn, PLP makes two overarching criticisms of the premise from which this set of proposals proceeds:

    i. **Judicial review is unlike normal civil litigation, so requires special costs rules. No evidence has been provided to support changing the rules in favour of defendants.** The differences between judicial review and normal civil litigation stem from the inequality of power (most cases are brought by individuals against the State), differences in purpose (judicial review is intended to prevent abuses of power by the State), and differences in procedure (there are very tight timescales for bringing a claim for judicial review, and no procedure by which claimants can inspect

the documents held by the defendant before deciding whether to proceed with a case). For these reasons special costs rules have been developed by the courts to protect non-State parties from financial ruin if a case is lost. These special rules were carefully considered in a major review of costs rules by Lord Justice Jackson, published in 2009, who made recommendations to protect judicial review claimants from being deterred from bringing good claims by the risks of having to pay excessive costs if the case is lost. The Government's proposals run counter to Lord Justice Jackson's expert report, and no evidence has been provided that Lord Justice Jackson's conclusions were incorrect.

ii. **In any event, financial incentives have already been rebalanced.** The Government's April 2013 reforms included the introduction of a fee for requests for an oral permission hearing, and the removal of the right to an oral hearing where a claim is certified as being totally without merit by the paper permission judge. At paragraph 112, the Government confirms that it expects that these reforms will result in fewer oral permission hearings "in the future". The Government should review the effectiveness of its April 2013 reforms before proceeding with the proposed further reforms.

Paying for permission work in judicial review cases: questions 19-20

40. PLP responded in detail to this proposal in its response to the last consultation. The revised proposal does nothing to meet the objections that were raised. For the sake of completeness our original objections are appended to this response at Appendix 1. What follows here are some additional objections to the modified proposal.

41. **The proposal proceeds on a false basis.** The proposal to increase the costs and risks to claimants and their representatives suffer from the same fundamental flaw as the Government's past and present proposals for restricting legal aid payments to claimants' representatives; namely, they proceed on the false basis (at paragraph 150) that:

> "[t]he [claimant's] legal representative is in the best position to advise their client of the likelihood of success, first prior to the initial application on the papers for permission and then again at the oral renewal hearing".

42. In fact, as judicial review practitioners know well, it is the defendant who is best placed to assess the merits of the vast majority of claims for judicial review because it is the defendant (not the claimant's representative) that has access to all the relevant information about how a decision was reached.

43. **The modification offers very little comfort – it does nothing to reduce the uncertainty over whether legal representatives will be paid, and is unlikely to benefit claimant lawyers in most cases.** There is much scope for uncertainty about the manner in which the exhaustive criteria will be applied by the LAA and the discretion is likely to operate in a very narrow range of cases. Legal aid practitioners' recent experience would suggest that there is very little prospect of a liberal approach being taken to the application of the criteria by the LAA. The modified proposal raises the following particular concerns:

i. Payment will be discretionary and in practical terms will be impossible to enforce.

ii. The costs of attempting to secure payment will be disproportionate. Practitioners will have to make detailed representations addressing the reasons why they meet the proposed criteria and this may take many hours work, all of which will be unremunerated. The impact assessment fails to take account of these costs.

iii. The criteria are so exacting that there are unlikely to result in any substantial exercise of discretion in favour of practitioners. They overlap with, and in some respects are more strict than those used by the courts. In particular they invite the LAA to make an assessment as to whether or not the claim was "meritorious at its conclusion" (para.126). It is hard to tell what this means. An example of a case where the LAA will be expected to award costs is where a claim has become academic because of the actions of a third party (para.126). But in that case the claim would no longer be meritorious at its conclusion. Once it is accepted that payment is to be made in this kind of case then it is hard to see what the principled difference is between this and other cases where some supervening matter leads to the claim not proceeding, for example fresh disclosure or a decision of the higher courts. In each case payment is warranted despite the fact that the new material led to permission not being granted. It is unfair to penalise solicitors from bringing cases which were correctly brought at the time they were commenced (with the information available to the claimant at that time), but which subsequently failed for reasons (such as subsequent disclosure by the defendant) outside the claimant's control. The discretion is aiming at fair remuneration for work properly done and the test for that is not whether the claim succeeded (or would have succeeded). However the introduction of such a test would run entirely contrary to established principles of costs assessment which looks at the reasonableness of the work at the time it is done.

iv. We have serious reservations about criterion (iii): "the reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings". We do not consider this to be relevant in the majority of cases. It is far from clear why the defendant's motives in wishing to settle a claim are relevant to the question whether the claimant's lawyers should be paid by the LAA for the work they have done. Legal aid is provided to the client, for their benefit and to promote the client's interests by ensuring that practitioners are paid for work that they reasonably do. Provided they have done the work reasonably and properly, and provided they have achieved a positive outcome for the client then they should be paid. The point can be tested by asking what the response would be if a private client refused to pay his solicitors because, having achieved success, he was not satisfied that the Defendant settled the claim for the right reasons. This would obviously not be a reason to refuse payment.

v. The modification significantly relies on the LAA's ability to reasonably and properly assess the merits of a case. However recent experience of legal aid practitioners of the LAA's overall approach to assessment of merits does not give instil confidence in the LAA's ability to do so.

44. **The modification aggravates rather than alleviates the original concerns because the uncertainty over whether payment will be forthcoming is increased, as is the work required to be done by the solicitor at risk.** The uncertainty over whether payment will be forthcoming is liable to be increased beyond the conclusion of the proceedings - in the absence of a costs order a further bureaucratic and time-consuming process will have to be embarked upon by the claimant's representative. The effect of the proposal is likely to be that a substantial number of practitioners will find it impossible to continue to offer publicly funded judicial review work with a consequent loss of access to justice for many vulnerable clients. Even if practitioners are able to continue to do the work they will only be able to do so in cases where they assess the merits as sufficiently high to justify taking the risk. This undermines the criteria in the Legal Aid (Merits Criteria) Regulations 2012.

45. In light of the above, PLP's response to questions 10-20 is as follows:

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.

No, PLP does not 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.

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

No. PLP does not agree with the criteria that are proposed.

<u>Costs of oral permission hearings: question 21</u>

46. **This proposal is one-sided and does not properly address the aim it purports to serve**. It does nothing to address wasteful action on the part of defendants such as not responding or responding late to pre-action correspondence, failing to provide any or any adequate disclosure, or unjustifiably defending proceedings. Any genuine attempt to consider 'rebalancing' the costs of judicial review would address these issues.

47. **The existing approach to costs is flexible and allows judges to do justice on a case by case basis**. The current approach reflects the fact that attendance at an oral hearing is optional for a defendant, who will already have set out their opposition to the claim in detailed terms.

48. **The proposal will have a chilling effect on meritorious cases.** It is inevitable that this proposal will result in claimants' representatives choosing not to renew applications for judicial review because they are fearful of an adverse costs order. This concern is all the more acute given the other proposals to impose financial disincentives on claimants. The

result will be that meritorious claims will go unheard, and solicitors will be placed in direct conflict with their clients on the issue of whether to renew and risk costs, or to concede defeat.

49. **The proposal is premature.** As stated above, the Government's April 2013 reforms included the introduction of a fee for requests for an oral permission hearing, and the removal of the right to an oral hearing where a claim is certified as being totally without merit by the paper permission judge. At paragraph 112, the Government confirms that it expects that these reforms will result in fewer oral permission hearings "in the future". The Government should review the effectiveness of its April 2013 reforms before proceeding with the proposed further reforms.

50. In light of the above, PLP's response to question 21 is as follows:

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?

No.

Wasted costs orders: questions 22-25

51. The Government observes that Wasted Costs Orders (WCOs) against claimants' legal representatives are rarely made (paragraph 147). Although it does not identify any cases where a WCO should have been made, but was not, the Government proposes that further changes should be made to "rebalance financial incentives which contribute to claimants' decisions whether or not to bring and pursue applications" (paragraph 149). The Government is therefore proposing that WCOs should be available for a wider range of conduct than is currently set out section 51(7) of the Senior Courts Act 1981, which allows the court to penalise a legal representative for "any improper, unreasonable or negligent act or omission".

52. **It is unclear why there is a need for reform of the current system of WCOs and no evidence is provided to illuminate this**. WCOs already penalise legal representatives for improper, negligent or unreasonable conduct. The Government accepts that a number have been made in judicial review proceedings (paragraph 147).

53. **The courts have made it clear that there are important public policy reasons why pursuing a weak case should never – for that reason - result in a WCO**. The leading case on WCOs, *Ridehalgh v Horsefield* [1994] Ch 205, is cited in the consultation document at [145], where the court's conclusions in that case are summarised. However the reasons for those conclusions are not set out in the consultation document. The leading judgment was given by Sir Thomas Bingham MR, who stated: "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. 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. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it." The court contrasted a lawyer bringing a weak case with

"lend[ing] his assistance to proceedings which are an abuse of the process of the court", such as failing to make full disclosure, or pursing a case known to be dishonest, which could result in a WCO.

54. **The proposal will have a disproportionate and unfair impact on judicial review claimants of limited financial means.** Weak cases in judicial review proceedings are already liable to be dealt with by an award of costs against the losing party (not the representative) in the normal way, at the permission stage which identifies and filters out weak cases. A wider use of WCOs will be pursued by defendants against the legal representatives of claimants without financial resources, as defendants will not be able to recover costs from such claimants even if they obtain an order for costs against them. The result is therefore to discourage legal representatives from bringing judicial review claims on behalf of those of limited means. This is a matter of particular concern given the crucial role judicial review performs in safeguarding the fundamental rights of minorities, including those without financial resources. As is clear from the judgment of Lord Bingham cited above, the courts are aware of the dangers of WCOs being misused in this way and the current limits set by the courts on their use has this very important consideration firmly in mind.

55. In light of the above, PLP's response to questions 22-25 is as follows:

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?

PLP does not consider that the approach to WCOs should be modified.

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

PLP does not consider that the approach to WCOs needs to be further streamlined.

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

No, and no.

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.

There is no scope to make changes to WCOs in judicial review cases or any other type of case.

<u>Protective Costs Orders: questions 26-30</u>

56. The consultation paper states:

> "The Government considers that the use of PCOs in non-environmental cases should be rebalanced to encourage better consideration by the claimant on

whether to bring and pursue applications for judicial review. The Government wishes to achieve an appropriate balance in the costs regimes to ensure that access to justice is maintained but to ensure that parties are not unduly insulated from the costs of their litigation in inappropriate cases" (Paragraph 161).

57. **The courts have recognised that PCOs are needed so that cases can be brought in the public interest, where the claimant might otherwise be put off by the risk of an adverse costs order if they lose.** PCOs have developed because they are needed to level the playing field between claimants and defendants in public law. PCOs are only made where the proposed litigation is in the public interest, i.e. cases which raise a serious issue which affects or may affect the public generally or a section of it. Even if the claimant loses a public interest case, the court's decision can still help to clarify the law and deter unlawful decision making in future. Any constraints on the courts' powers to make PCOs will deter claims that would serve the public interest.

58. **A body of case law has been developed by the courts establishing a comprehensive set of principles that govern when and how PCOs are made. No justification for interfering with this case law has been put forward.** Judges are accustomed to using their discretion when considering whether to grant a PCO. The current judicial consensus is that a private interest is a factor to take into account in making a PCO, but it is not enough on its own to prevent a PCO from being granted.[22] Nowhere in the consultation paper is there any consideration of the impact on the rule of law of preventing PCOs from being granted where the applicant has a private interest, for example by considering how many cases that have been brought in the public interest would not be brought following implementation of the more restrictive PCO regime that the Government is contemplating.

59. **The "private interest" test that the Government wants to introduce has been widely criticised.** That is because it prevents public interest cases from coming before the courts where the claimant has a private interest in the outcome however slight the private interest may be, and however overwhelming the public interest may be in the case being brought before the court.[23]

60. **The proposal is not proportionate nor has the Government demonstrated that there is a problem with how PCOs currently operate.** The consultation document contains no evidence of how many PCOs are granted each year. Joint research conducted by PLP and the University of Essex, funded by the Nuffield Foundation[24], reveals that during the 20 month period between July 2010 and February 2012 there

[22] See for instance *Morgan v Hinton Organics* [2009] EWCA Civ 107.
[23] See for instance *Goodson v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172 where the claimant sought a proper enquiry into the circumstances of her father's death. A PCO was refused on the basis that Mrs Goodson had a private interest in the outcome of the case. That decision has been widely criticised. The enquiry Mrs Goodson sought forms part of the right to life under Article 2 ECHR. Such fundamental rights should not be frustrated by an inability to access the courts.
[24] http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted:

- *Child Poverty Action Group v SSDWP* [2011] EWHC 2616 (Admin); Challenge to reforms to Housing Benefit scheme and calculations/limits to housing benefit.
- *ClientEarth v SSEFRA* [2011] EWHC 3623 (Admin); Breach of EU environmental law.
- *Garner v Elmbridge* [2011] EWHC 86 (Admin); Protection of palace from unsightly development out of keeping with setting.
- *Griffin v LB Newham* [2011] EWHC 53 (Admin); Challenge to expansion of London City airport.
- *Medical Justice v SSHD* [2010] EWHC 1925 (Admin); Legality of policy of giving less than 72 hours' notice of deportation.
- *Warley v Wealdon District Council* [2011] EWHC 2083 (Admin); Challenge to planning permission to allow floodlights.
- *Public Interest Lawyers v LSC* [2010] EWHC 3259 (Admin); an application for a PCO in relation to the award of contracts to provide publicly funded legal services for public law work and mental health law. In this case there was a costs cap, exposing the claimant to £100,000 of adverse costs.

61. Of these seven cases, four (*Griffin*, *Warley*, *Garner* and *ClientEarth*) were environmental challenges, which are not affected by the proposed reforms (paragraph 156). This leaves only three PCOs out of 502 cases over a 20 months period. This plainly suggests that the Government's assessment of the scale of the problem it perceives is exaggerated, and militates strongly against the proportionality of the proposal.

62. **NGOs would be in a Catch-22 position.** If the Government's proposals on standing are implemented, anyone who had standing to bring a judicial review claim would be excluded from getting a PCO. NGOs would therefore be placed in a Catch-22 situation: the proposals on standing, if implemented, would mean that NGOs would not be able to bring claims for judicial review unless they were directly affected by the decision under challenge; but the proposals on PCOs would mean that any NGO able to meet the new standing test would be barred from obtaining a PCO.

63. In light of the above, PLP's response to questions 26-30 is as follows:

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

It is not appropriate to stipulate that PCOs will not be available where there is an individual or private 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?

There is no need to modify the principles for making a PCO. The right balance between the parties is already achieved, as is the balance between the need to provide access to the courts and 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?

In PLP's experience information on the funding arrangements for a case is already required for a PCO application.

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

No. There is no need to modify the principles governing PCOs in this way. The courts already consider whether a costs cap is appropriate (see e.g. *Public Interest Lawyers v LSC* [2010] EWHC 3259) and there is no need or justification for a presumption that one should be in place.

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?

No. There is no need to modify the principles governing PCOs in this way. The courts already consider whether cross caps should be imposed and there is no need or justification for interfering with the court's discretion in this area.

Costs arising from the involvement of third party interveners and non-parties: questions 31-34

64. **There is no evidence that interventions generally add much if at all to the overall costs of the case**. An intervener may provide evidence or legal argument the court or the parties would otherwise have had to pay to obtain. By ensuring all relevant issues and information are before the court when it makes its decision, an intervention may save the costs of further litigation to clarify issues that would not otherwise have been raised. In cases where one of the parties is unrepresented, an intervention may save the court the cost of appointing an 'advocate to the court', appointed by the Attorney General at the behest of the court to assist the court.[25]

65. **Courts have a wide discretion as to the terms on which they allow interventions.** The court often confines interveners to making representations on the papers of a limited length and/or or to oral submissions of a limited length that do not significantly affect the

[25] See for instance Lassal C-162/09, a case raising an important point of EU law referred by the CA to the CJEU on appeal by the DWP against an Upper Tribunal decision. The claimant was unrepresented, CPAG intervened to represent the interests of claimants in general. Had CPAG not intervened, the CA may well have had to appoint an advocate to the court to represent the interests of the claimant.

time estimate for the hearing. The Supreme Court has a comprehensive set of rules and practice directions governing interventions by third parties, including costs. Rule 46(3) provides that orders for costs "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 in as the sole or principal appellant or respondent)." By Practice Direction 6.9.6 "Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal." In our experience, the practice of the Supreme Court is generally applied in the Administrative Court i.e. that interveners are expected to bear their own costs.

66. **An intervener may have particular expertise to contribute to a case either in specialist legal arguments or in evidence they can provide.** Interventions may be brought by individuals, by charities and NGOs, by companies and by public bodies; Government ministers are frequent interveners in cases in the UK courts.[26] If the proposal is implemented, the result will be that the court will only be able to hear from organisations with something useful to say if they can afford to bear the costs. Many charities and NGOs who are concerned with large sections of society affected by the courts' decisions, would be unable to afford the costs risk. So interventions would continue to be made, but only by those representing well-resourced financial interests.

67. **Interventions assist the court and improve the quality of decision making in public interest cases.** In a recent speech given by Baroness Hale[27], Justice of the Supreme Court, the important and helpful role of interveners was emphasised:

> "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. I believe, for example, that it was Liberty who supplied the killer argument in the Belmarsh case (*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68). And Justice intervened helpfully, for example, in the habeas corpus case of the man detained at Bhagram air base since 2004: *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614."

68. Furthermore, Baroness Hale emphasised that an "important class of interveners are government departments themselves":

> "They intervene principally in order to protect the legislation and policy for which they are responsible. A good example is again *Seldon v Clarkson, Wright and Jakes*: having successfully defended its age discrimination regulations in Luxembourg, the Secretary of State for Business, Innovation

[26] See for instance R(G) v London Borough of Southwark [2009] UKHL 26 (Secretary of State for Children, Schools and Families intervening), Birmingham City Council v Ali and others [2009] UKHL 36 (Secretary of State for Communities and Local Government intervening)
[27] http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians

and Skills intervened in a private discrimination dispute in order to promote the department's view of how the legislation ought to work. A similar example is *X v Mid-Sussex Citizen's Advice Bureau* [2012] UKSC 59, [2013] ICR 249, where the Secretary of State for Culture, Media and Sport intervened to safeguard the government's view that 'occupation' in anti-discrimination law did not include volunteering; the Christian Institute intervened to the same effect, and other third sector organisations wrote to support the CAB's case; while the Commission for Equality and Human Rights supported the claimant.

It should not be thought that the government's interventions go all one way. Sometimes they can surprise us. The best example is *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433, on the meaning of 'violence' and 'domestic violence' in the homelessness legislation. The Court of Appeal had held that this was limited to direct physical contact, but the Secretary of State for Communities and Local Government intervened in support of a much wider definition. This intervention was backed up by a large amount of helpful national and international material and dovetailed quite neatly with the material on victims of domestic violence presented by the Women's Aid Federation of England."

69. It follows from the above that PLP's response to questions 31-34 is as follows:

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?

PLP's experience is that interveners usually bear their own costs and do not seek costs from the other parties. PLP does not think that this should be crystallised into a rule or a presumption: the courts have the discretion to decide what should happen in each intervention so as to do justice to the case.

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?

No.

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

No. PLP does not consider that claimants should be required to provide any more information than is currently required. PLP does not consider that the courts should be given greater powers to award costs against non-parties, and does not consider that there would be a practical or workable way of doing this.

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?

No.

For the reasons stated in this response, we urge the Government to take these proposals no further.

Please do not hesitate to contact the Public Law Project if you require any further information about the points made in this response.

Yours faithfully

The Public Law Project