Public Law Project

Price tag:

How the costs rules in judicial review undermine the rule of law and access to justice

Lee Marsons, Senior Research Fellow
May 2026

Contents

Public Law Project would like to thank Omonefe Orogun, PLP's Bonavero Fellow 2025, for supporting the foundational research and planning for this project. We would also like to thank Herbert Smith Freehills Kramer (HSFK) for a generous donation which supported this project.

Introduction

Judicial review is a legal process whereby an individual or organisation asks the High Court to decide whether the decisions of a public body breach public law. This is the area of law that concerns the relationship between individuals and the state, including the powers and duties of public bodies and the fundamental rights of individuals.[1] As part of this process, there are rules (called "costs rules") governing when and to what extent parties can recover their legal costs from other parties. These legal costs will include solicitors' fees, barristers' fees, expert fees, and court fees.[2] The general principle is that the losing party pays the legal costs of the winning party.[3]

This report sets out evidence that the costs rules in judicial review are significantly undermining its fundamental purpose – to protect the rule of law by ensuring that public bodies remain within their legal powers and respect people's human rights. **The key finding is that the rule of law has a price tag and that many – if not most – people cannot afford it.**

For most individuals not eligible for legal aid and not independently wealthy, judicial review is in practice out of reach – simply for reasons of money and affordability. This has been called "public law's disgrace".[4] People earning above only £32,000 who are not eligible for legal aid routinely do not pursue claims with strong merits or must abandon them early, because they fear having to pay the legal costs of public bodies if they lose or discontinue their claim. **This turns the rule of law on its head and makes a mockery of access to justice.**

An overwhelming 97% of legal practitioners responding to our research questionnaire, who collectively have represented claimants, public bodies, and interveners in dozens of judicial reviews, identified the costs rules as being an obstacle to the rule of law and access to justice. Worse still, 28% regarded costs rules as a "reasonably big obstacle", 31% as a "very big obstacle", and 11% as the "main obstacle". 76% had experience of claimants who did not pursue an arguable claim for costs reasons.

This is a denial of justice for individuals harmed and disadvantaged by unlawful state decisions. It is also against the public interest. It means that illegality which is – or is at risk of becoming – systemic is not corrected until very late or even at all, disadvantaging many more people than the claimant. Furthermore, economic exclusion from judicial review undermines Parliament's sovereignty, as public bodies who may not be fulfilling their statutory duties cannot be reliably held to account.

The evidence in this report indicates that costs rules produce significant obstacles to the rule of law and access to justice at all stages of judicial review proceedings.

1. The grounds of judicial review are: illegality; procedural impropriety; and irrationality (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. More recently, proportionality has become a ground of review in challenges alleging breaches of human rights protected under the Human Rights Act 1998. There has also been some suggestion that proportionality could be invoked to protect common law rights: *Kennedy v Charity Commission* [2014] UKSC 20 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19.
2. "Costs rules" do not include eligibility for legal aid.
3. Civil Procedure Rules 44.2(2)(a).
4. Tom Hickman KC, Public Law's Disgrace (9 February 2017).

At the pre-action stage prior to taking a judicial review to court:

- Contrary to the practice elsewhere in civil litigation, claimants cannot recover their legal costs at the pre-action stage before they issue a claim, even if a public body concedes that they have acted unlawfully and grants the relief requested by the claimant. This means that claimants can be unfairly saddled with the costs of highlighting the public body's illegality, which may not be affordable.

At the permission stage where a claimant seeks permission to pursue a claim:

- Because protection for claimants against paying a defendant's costs in the form of Costs Capping Orders (CCOs) can only be obtained after permission has been granted by a judge, a claimant can be liable for a defendant's full pre-permission costs if their claim is not granted permission, which can be significant and unpredictable.

- Courts are inconsistently using their powers to grant costs protection through CCOs to facilitate a claimant's access to justice.

- CCOs are only available for a limited number of judicial reviews classified as "public interest proceedings". They cannot be granted where an individual litigates in relation to an issue that only affects them, no matter how significant the impact may be.

At the post-permission stage after the High Court has reached a judgment:

- Without a CCO, there is no overall cap on the legal costs that parties can recover from the losing side in most judicial reviews. This means that claimants, even with strong claims, fear having to sell family homes or exhaust their life savings if they lose a claim at trial.

- Claimants regularly do not recover more than 75% of their legal costs from defendants, even when they win their claim.

- The legal costs of public bodies have increased significantly over the last decade and many seek to claim commercial rates from claimants.[5]

5. Government Legal Department, Hourly rates charged to government departments by GLD lawyers (April 2024).

This report makes several. recommendations to reform costs law in judicial review. Unlike the current rules, these recommendations are designed to facilitate the fundamental purpose of judicial review to vindicate the rule of law and access to justice, while ensuring that claimants who can afford to pay do so and while ensuring fairness to public bodies doing essential work in the public interest.

Stage of proceedings	Recommendation
Pre-action stage	The "Judge Over Your Shoulder" (JOYS) guidance produced by the Government Legal Department (GLD) should be amended to advise that it is good practice, where public bodies concede that their decision was unlawful at the pre-action stage, to proactively consider whether fairness requires them to pay the claimant's pre-action costs.
Permission stage	Claimants should have the ability to apply for Costs Capping Orders, which limit their liability to pay a defendant's costs, as soon as proceedings are commenced, rather than only after permission has been granted.
Permission stage	Costs Capping Orders should be available for all judicial reviews and not just public interest proceedings.
Permission stage	When a claimant's financial means are below a certain level, there should be a presumption in favour of a Costs Capping Order. The Court should have an obligation to set the cap at a level that enables the claimant to bring the claim.
Permission stage	The Attorney-General should issue guidance on the costs that public bodies may normally seek at the permission stage of judicial review proceedings. This guidance should be designed to encourage both predictability and affordability for claimants.
Post-permission	There should be a system of Qualified One Way Costs Shifting (QOCS) in judicial review proceedings, whereby a claimant may only be ordered to pay defendant's costs where it is reasonable, having regard to the claimant's financial resources and the claimant's conduct in the proceedings. This may include a right for defendants to apply to vary QOCS when claimants can afford full costs.
Post-permission	The Administrative Court Judicial Review Guide should be amended so that it expressly refers to the degree of frontloading required by claimant solicitors. The courts should consider this when assessing the reasonableness of a claimant's costs upon winning the judicial review.
Post-permission	The Attorney General should issue guidance advising that where the central government uses the Government Legal Department (GLD) as part of a judicial review case, they should not request rates for that work higher than GLD rates where a claimant loses or discontinues.[6]

6. By "GLD rates", we mean the rates which GLD charges to government departments for use of GLD's services. They can be found here.

This report will proceed in 8 parts:

- **Section 1** will set out the definitions of: judicial review; the rule of law; and access to justice.
- **Section 2** will explain the journey through a judicial review and highlight key legal stages and the costs rules at each stage, which will be used as a framework in the rest of the report.
- **Section 3** will set out the report's methodology.
- **Section 4** will explain the basic problem produced by the costs rules in judicial review, namely that because of fear of paying a defendant's costs if they were to lose or discontinue a claim, claimants regularly do not pursue otherwise strong challenges purely for financial reasons.
- **Section 5** will set out the report's findings for pre-action costs.
- **Section 6** will set out the report's findings for permission stage costs.
- **Section 7** will set out the report's findings for post-permission costs.
- **Section 8** collates the report's recommendations for how the costs rules can be reformed to facilitate the rule of law and access to justice and provides concluding thoughts on how they relate to one another.

Section 1:
Key definitions

Judicial review is a legal process in the High Court "*intended to provide a speedy audit of the legality of public decision-making.*"[7] It *"is designed to protect the public interest in the lawful use of the powers conferred under public law, as well as the private interests of those who may be affected by the abuse of those powers. It is intended to secure the constitutional value of the rule of law, to which public authorities…are or should be committed."*[8] In 2013, the Ministry of Justice went so far as to say that judicial review "*can be characterised as the rule of law in action.*"[9]

Given this, judicial review litigation has a special constitutional status. It is not the same as ordinary civil litigation where parties are defending their own private rights and interests.[10] Judicial review advances the public interest in government according to law.

Public Law Project (PLP) has described the rule of law as *"the antithesis of the arbitrary use of power."*[11] In its 2025 report on the rule of law in the UK, the House of Lords' Constitution Committee explained the importance of the principle as follows: *"The rule of law is about protecting the citizen from an overmighty state. It describes a framework of law and of checks and balances that exist to prevent the arbitrary exercise of government power."*[12]

But the rule of law requires practical mechanisms – such as judicial review – for its enforcement. Law is not self-enforcing. This is where access to justice comes in. Access to justice is "*the right of an individual to have effective access to the courts, so that they have the means to resolve legal disputes.*"[13]

To be practical and effective, the mechanisms of access to justice must be affordable. As the Constitution Committee put it in their 2025 report: *"Accessible and affordable legal advice is a key enabler of the rule of law. It ensures that people can understand and enforce their legal rights, thus facilitating effective access to justice."*[14] Similarly, in 2017, former President of the UK Supreme Court, Lord Neuberger, argued that: *"Obtaining advice and representation does not merely mean that competent lawyers exist; it also must mean that their advice and representation are sensibly affordable to ordinary people and businesses: access to justice is a practical, not a hypothetical, requirement."*[15]

7. *R (TPL1) v Secretary of State for Defence* [2025] EWHC 1729 (Admin).
8. *National Bank of Anguilla v Chief Minister of Anguilla* [2025] UKPC 14 at [89].
9. Ministry of Justice, Judicial review: Proposals for further reform (September 2013, Command Paper 8703), para. 21.
10. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67].
11. Public Law Project, Written evidence to the House of Lords Select Committee on the Constitution Inquiry into the Rule of Law in the UK (August 2025).
12. House of Lords Select Committee on the Constitution, 'The rule of law: Holding the line against tyranny and anarchy' (13th Report of Session 2024-6) p.3.
13. House of Commons Library, 'Access to Justice' (Debate Pack, Number CDP-2017-0001, 9 January 2017).
14. House of Lords Select Committee on the Constitution, 'The rule of law: Holding the line against tyranny and anarchy' (13th Report of Session 2024-6) para. 189.
15. Lord Neuberger, 'Access to Justice: Welcome address to Australian Bar Association Biennial Conference' (3 July 2017).

This report is about the extent to which the costs rules in judicial review facilitate – rather than undermine – its fundamental function to advance the rule of law and access to justice.

Naturally, there are trade-offs. While the rule of law and access to justice are of fundamental constitutional importance, other factors matter too. These include discouraging unmeritorious or vexatious claims; ensuring affordability for the public purse; and encouraging alternative dispute resolution other than through litigation.[16]

The question is to what extent protection of those competing objectives undermines the basic purpose of judicial review to protect and promote the rule of law and access to justice. The evidence in this report provides the concerning answer: that costs rules are significantly undermining that basic purpose, with many, if not most, people systemically excluded from judicial review.

16. Richard Kirkham, 'Quiet moves toward proportionate dispute resolution: The Law Commission's consultation paper on administrative redress' (2008) 30(2) Journal of Social Welfare and Family Law 163-174.

Section 2:
A costs law journey through judicial review proceedings

This section will provide an overview of the key stages of judicial review proceedings and explain the most important rules on costs liability and recovery at each stage. These stages will then be used as a structure to outline findings in the rest of the report.

To pursue a judicial review, section 31 of the Senior Courts Act 1981 states that the person or organisation bringing the claim – the claimant – must seek permission from the High Court and show that they have a sufficient interest in the decision that they are challenging.

By virtue of section 31A of the 1981 Act, some judicial reviews – such as many challenges concerning immigration – have been transferred from the High Court to the Upper Tribunal. In 2021, the Home Office proposed implementing a system of fixed recoverable costs in immigration tribunals.[17] At the time of writing, this has not been implemented.

Furthermore, a unique costs regime applies in some environmental protection challenges by virtue of the UK's international obligations under the Aarhus Convention. Since 2013, under the Aarhus Environmental Costs Protection Regime (ECPR), there is a presumption which caps an unsuccessful individual claimant's cost liability to £5,000, an organisational claimant's liability to £10,000, and caps a defendant's liability at £35,000.[18]

a. The need to pay for specialist legal advice and representation

Given the complexity of public law, claimants bringing claims and public bodies defending claims will normally need specialist legal advice and representation from solicitors and barristers.

From the perspective of claimants, unless their lawyers are acting without charging a fee – pro bono – this advice and representation must be paid for, either by claimants themselves; by a third-party funder; or by the government by way of the Ministry of Justice's legal aid scheme.

Because in judicial review a successful claimant virtually never secures money as a remedy,[19] there is no significant market in terms of loans or insurance, as the claimant will not be receiving money to fund these options.

A claimant's lawyers may work on a Conditional Fee Arrangement (CFA) (also called "No Win, No Fee") or Deferred Fee Arrangement (DFA), which makes paying fees conditional on winning a case and delays the time which a claimant is due to pay fees respectively.

17. Robert Thomas and Joe Tomlinson, 'Certainty at all costs? A critical analysis of the proposed introduction of fixed recoverable costs in immigration judicial reviews' (2021) 26(4) Judicial Review 255-263.
18. Part 46.26 Civil Procedure Rules.
19. Jonathan Morgan, IRAL's missing remedy: Compensation for unlawfulness (12 October 2021, UK Constitutional Law Association).

There are some grant-making organisations but these tend to be limited to funding strategic public interest litigation.[20] Other grant-makers fund specific aspects of strategic litigation, such as the Strategic Legal Fund organised by the Immigration Law Practitioners Association (ILPA) which funds pre-litigation research.[21]

Some individuals may be able to obtain civil legal aid via the Legal Aid Agency (LAA) – an arms-length body of the Ministry of Justice – if they satisfy financial conditions:

- Earning less than £2,657 a month before tax (around £32,000 a year);
- Receive a qualifying benefit, such as Universal Credit, Income Support, or income-based Jobseekers' Allowance;
- Have assets of less than £8,000; and
- Equity in a property under £100,000.[22]

Legal aid comes in two varieties – Legal Help and Legal Aid. Legal Help involves state-funded legal support for early initiatives designed to prevent litigation and settle a claim, such as mediation or negotiation. Legal Aid involves state-funded legal advice and representation in courts or tribunals. However, ultimately, only around 25% of people are eligible for civil legal aid in the UK.[23]

Crowdfunding might also be an option. Crowdfunding involves online platforms where individuals or organisations market a potential claim to the public and request money to fund it. This can raise significant sums for a small number of high-profile cases but in general is not a reliable means to secure funding for most claimants.[24]

b. General approach of the courts to awarding costs in judicial review

A first important principle of costs law is that costs are based on the so-called "indemnity principle". This is the idea that costs awarded by judges should reflect what parties in fact paid for their legal advice and representation.[25] Legal aid is an exception to this principle since Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013 states that costs orders in favour of a legally aided party must be determined as though the party was not legally aided.

A second important principle is the "proportionate costs principle". This is the idea that courts should award only those costs which are proportionate to the matters in issue.[26] A court will not order costs which are considered excessive.[27] In considering whether costs are excessive, courts will take account of guideline hourly rates produced by the Ministry of Justice.[28]

20. See, for example, the Digital Freedom Fund.
21. Strategic Legal Fund – ILPA.
22. Legal aid: Financial eligibility.
23. Public Law Project, The Civil Legal Aid Means Test: A system still failing those who need it most (16 June 2022).
24. As part of the research for this report, for example, PLP interviewed Charles Keidan who raised significant sums of money to pursue a judicial review in relation to civil partnerships for opposite-sex couples. For the leading academic research on crowdfunding in judicial review, see: Sam Guy, Mobilising the market: An empirical analysis of crowdfunding for judicial review litigation (2023) 86(2) Modern Law Review 331-363.
25. *Bakhtiyar v Secretary of State for Home Department* [2015] UKUT 519.
26. Civil Procedure Rules 44.3.
27. *Bakhtiyar v Secretary of State for Home Department* [2015] UKUT 519.
28. Solicitors guideline hourly rates.

A third is that an appeal court will not normally interfere with a first instance judge's costs decision unless: the judge erred in principle; the judge omitted relevant considerations or took irrelevant considerations into account; or the decision is wholly wrong to that extent that the judge must have failed to balance relevant factors.[29]

A fourth is that a losing party will normally pay the costs of the winning party.[30] However, the practice is that costs orders are not enforced against claimants funded by legal aid.[31] Where the claimant's lawyers are acting pro bono, a court may make a "pro bono costs order", whereby costs which would have been incurred are paid to a charity which provides legal advice or representation free of charge.[32]

c. Pre-action stage

Prior to lodging an application for judicial review with the High Court, claimants must aim to follow the Pre-Action Protocol for Judicial Review (often called the "PAP"). Effectively, under the PAP parties are required to actively consider how to resolve their dispute without litigation – such as through negotiation, discussion, complaints, internal reviews, or mediation. This will not always be appropriate, such as in urgent cases.[33]

Legal work under the PAP starts by the claimant or their lawyers sending a "letter before claim", identifying the issues in dispute. The letter normally contains the details of the challenged decision; a summary of the facts; and the grounds of challenge. It may also contain requests for information ("disclosure") that the claimant is seeking from the defendant.[34] Defendants should normally respond within 14 days and disclose information unless there are good reasons not to.[35]

If a person is financially eligible, the Ministry of Justice may fund pre-action work via Legal Help.

If the claim is settled between the parties at the pre-action stage in judicial review, there is no mandatory system for the winning party to recover their costs. However, defendants very occasionally agree to pay the claimant's costs as part of settlement agreements where the defendant concedes unlawful behaviour.

This contrasts with the practice in most of civil litigation. For example, under Part 36.13(1) of the Civil Procedure Rules, if a defendant makes an offer to settle which is accepted at the pre-action stage by the claimant, the defendant is liable to pay the claimant's pre-action costs. However, under Part 36.30, if a claimant refuses a defendant's Part 36 offer to settle and obtains damages "less than or equal to" the defendant's offer or more than the defendant's offer but less than the amount requested by the claimant at pre-action, there are certain negative costs consequences for the claimant – such as fixed costs and interest chargeable on damages awards.[36]

29. *R (ABB) v Secretary of State for the Home Department* [2025] EWCA Civ 61 at [45].
30. Civil Procedure Rules 44.2.
31. See, for example, section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Regulation 19 of the Civil Legal Aid (Costs) Regulations 2013.
32. Section 194 of the Legal Services Act 2007.
33. Pre-Action Protocol for Judicial Review.
34. Pre-Action Protocol for Judicial Review, paras.14-19.
35. Pre-Action Protocol for Judicial Review, para. 20.
36. Part 36.30 Civil Procedure Rules.

While Part 36 is frequently used in other areas of civil litigation, it is not routinely used in judicial review proceedings, although it is in principle available. There are at least two reasons for this. First, because the focus of Part 36 is largely on financial offers to settle, whereas the remedy sought in judicial review proceedings will not normally be money.[37] Second, if a claimant rejects a Part 36 offer from a defendant, there are negative costs consequences if the claimant does not "better" that offer at trial after a judgment.[38] In judicial review, it is more challenging to identify what a "better" result than the defendant's offer is. If a defendant offers to reconsider a decision, for example, which is rejected by a claimant and the claimant goes onto win a judicial review but the High Court does not quash the decision,[39] Part 36 offers no guidance on how to assess whether this is a "better" result.

As such, for practical purposes, there is no system for recovering pre-action costs in judicial review claims prior to proceedings being commenced.

d. Permission stage

If a claim is not settled between the parties at the pre-action stage, to apply for judicial review the claimant must lodge a claim seeking permission to do so. The judicial review is then officially commenced for legal purposes. This must be done promptly and no later than three months after the challenged decision was made.[40] This is done in the Administrative Court, a specialist branch of the King's Bench Division of the High Court, or in the Upper Tribunal (Immigration and Asylum Chamber) for certain types of immigration judicial reviews.

i. Papers determination

Claimants first seek permission by lodging a written application. This is called applying "*on the papers*". The judge will refuse the application unless satisfied that there is an arguable ground for judicial review which has a realistic prospect of success.[41]

Within 21 days after that, defendants have an opportunity to lodge an Acknowledgement of Service (AoS) and Summary Grounds of Resistance or Defence ("Summary Grounds"). This sets out an overview of the basis on which the defendant intends to oppose the application for judicial review.[42] Claimants may file a Reply to the AoS and Summary Grounds within seven days.[43]

If a claimant is refused permission on the papers by a judge, they are liable for the costs of any defendants and the costs of interested parties who intervened in the claim. Interested parties are parties other than the claimant and defendant directly affected by the claim, including other public bodies.[44] Defendant's costs may include not only the costs of drafting the AoS and Summary Grounds but also so-called "preparation costs" of deciding whether to contest the claim and on what grounds.[45]

37. Part 36.6, for example, refers to a sum of money which a defendant agrees to pay in settlement.
38. Part 36.30 Civil Procedure Rules.
39. By, for example, issuing a declaration that the decision was unlawful or by suspending the quashing order under section 1 of the Judicial Review and Courts Act 2022.
40. Civil Procedure Rules, Part 54.5.
41. 9.1.3. Administrative Court Judicial Review Guide.
42. Rule 54.8 Civil Procedure Rules.
43. Rule 54.8A Civil Procedure Rules.
44. *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36.
45. *R (Mount Cook) v Westminster City Council* [2003] EWCA Civ 1346.

ii. Oral renewal

If permission is refused on the papers, a claimant can seek a so-called "oral renewal" hearing. This is when the Administrative Court considers permission at an oral hearing, normally with both parties represented.[46]

If a claimant is refused permission at oral renewal, they are liable for a defendant's and interested parties' cost for producing the Acknowledgement of Service, Summary Grounds, and the costs of being represented at the oral hearing.

Sometimes, permission and the merits of a claim are considered at the same time during a so-called "rolled-up hearing". Courts consider the following factors when deciding whether to "roll-up" a hearing:

- The importance of a quick, final decision;
- Whether deciding permission and merits at one hearing is likely to be quicker than a separate permission stage;
- Whether a rolled-up hearing would be substantially longer than a permission hearing; and
- The extent of the burden imposed on a defendant from a rolled-up hearing.[47]

The decision to "roll-up" a hearing is significant from a costs perspective because it means that both parties, if they choose to be represented, will have to pay the costs of representation at a substantive hearing, despite the case potentially being refused permission and no judgment being reached by the court on the substantive claim. A claimant, for example, who is refused permission at a rolled-up hearing will be liable to pay the defendant's costs of both the permission hearing and the substantive hearing – even though there will be no substantive decision on the merits of their claim.

e. Settlement or discontinuance after a claimant lodges a claim

Many judicial review claims are settled between the parties after a claim is lodged and before a final hearing.[48]

If a defendant concedes, they may be liable for the claimant's costs. If a claimant obtains from the settlement all the relief that they sought, they will normally be entitled to full costs. If the claimant obtains partial relief, the claimant may obtain costs depending on a range of factors, including the reasonableness of their conduct. There may also be some cases where the parties reach a compromise that does not reflect the claim. In these instances, the default will be no order for costs against the defendant.[49]

If a court believes that the defendant would have acted the same way irrespective of the claim, the claimant is unlikely to obtain costs unless it is "tolerably clear" that they would have won at trial. Where a defendant claims that there were such "extrinsic reasons" for concession, it will be for the claimant to show that legal proceedings prompted the change or made it occur earlier.[50]

46. *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36.
47. *R (Al Haq) v Secretary of State for the Home Department* [2025] EWHC 173 (Admin).
48. Varda Bondy and Maurice Sunkin, The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing (2009).
49. *M v London Borough of Croydon* [2012] EWCA Civ 595.
50. *R (RL) v London Borough of Croydon* [2018] EWCA Civ 726.

However, a defendant is not entitled simply to claim that a concession was made for unspecified "pragmatic reasons" to avoid costs liability. There must be a clear reason given why a concession was made.[51]

Unless the High Court orders otherwise, a claimant who discontinues a claim after it is lodged is liable for the defendant's costs to the date of the discontinuance. The claimant bears the burden of justifying a departure from this presumption.[52]

f. Following the grant of permission

If permission is granted, a claimant can apply for a "Costs Capping Order" (CCO). This is an order granted by the High Court limiting the claimant's liability in advance for the defendant's costs if the claimant loses at trial. CCOs are governed by sections 88 and 89 of the Criminal Justice and Courts Act 2015.

The High Court may grant a CCO only if it is satisfied that:

1. the proceedings are public interest proceedings;
2. in the absence of a CCO, the claimant would withdraw the application or cease to participate in the proceedings; and
3. it would be reasonable for the applicant to continue proceedings.

The Act defines "public interest proceedings" as proceedings involving:

1. an issue that is of general public importance;
2. where the public interest requires the issue to be resolved; and
3. the proceedings are likely to provide an appropriate means of resolving it.

The factors considered by the High Court prior to granting a CCO include the number of people likely to be directly affected by the judicial review and how significant the impact on those people could be.

g. Judgment and relief stage

If a claimant succeeds at trial in a judicial review claim, the defendant is liable to pay the claimant's costs, including pre-permission and pre-action costs.

Under current legal aid rules, if a claimant loses, legal aid lawyers claim at low hourly rates from the Legal Aid Agency. However, if a claimant succeeds, legal aid lawyers can claim market rates from the losing defendant.[53]

If a claimant loses a judicial review, they are liable for the defendant's costs of defending the legal claim, including pre-permission and pre-action costs. If claimants do not have a CCO, this will in principle be for the defendant's entire costs. The exception is with claimants who are funded via legal aid where, as previously stated, costs orders are not normally enforced.

51. *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895.
52. 24.3.6 Administrative Court Judicial Review Guide.
53. Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013.

Public bodies have a variety of rates for their legal costs. The Government Legal Department (GLD) – the central government's principal in-house legal advisers – work on special rates ("GLD rates").[54] For litigation, GLD solicitors may instruct external barristers from the Attorney-General's Civil Panel. This is a list of barristers called "junior Treasury counsel" who are approved to represent the central government in litigation.[55] Treasury counsel are paid "panel rates".[56]

GLD and panel rates will be lower than commercial rates. There is, however, case law indicating that public bodies can claim rates higher than GLD rates from losing claimants even when using the GLD for legal advice and representation. This is to enable the government to contribute to the overall running costs of GLD.[57]

By contrast, other public bodies – such as regulators – will not always have in-house public law legal departments and may need to seek advice from external law firms, which will normally charge commercial rates.

54. Government Legal Department: Rates charged to departments (2024).
55. Attorney General's Civil Panel Counsel: Appointments, membership lists and off panel counsel.
56. Attorney General's civil panel counsel: practical information.
57. *R (Bakhtiyar) v Secretary of State for the Home Department* [2015] UKUT 519.

Section 3: Methodology

To investigate the extent to which costs rules are undermining the rule of law and access to justice in judicial review, this report made use of two principal methods – questionnaires and interviews.

The questionnaires used a range of closed and open-ended questions, asking practitioners to rank the comparative extent to which specific costs rules impeded the rule of law and access to justice and to explain why in their own words. Interviews were of an informal, semi-structured style, in almost all cases of individuals who had previously completed a questionnaire, designed to explore and interrogate answers in greater detail and to test the perceived effectiveness of certain reform recommendations.

Questionnaires and interviews were directed towards legal practitioners and anyone else with direct experience of judicial review proceedings, either as a claimant, defendant, or intervener.

It was a priority to ensure that responses represented a diverse range of opinions and experiences, including legal representatives for claimants, defendants, interveners, and interested parties. This included contacting most junior Treasury counsel on the Attorney-General's civil panel working in public law both in London and the regions.[58] While just over half - 53% - mainly represented claimants, the remainder had mixed experience representing claimants, defendants, and interveners.

The questionnaire was completed by 36 individuals between September 2025 and February 2026. 15 individuals were interviewed in the same timeframe. Collectively, these practitioners have experience of dozens of judicial reviews.

The demographics of the individuals who responded to the questionnaire and were interviewed is available below in Table 1 and Table 2.[59]

58. Lee Marsons, Price tag: Costs in judicial review – PLP launches its research into costs in judicial review (30 September 2025).
59. Unless stated otherwise, percentages in this report have been rounded to the nearest number.

Table 1: Profession of questionnaire respondents

Solicitor	22	61%
Barrister	14	39%
Solicitor Advocate	0	0%
Paralegal	0	0%
Legal Executive	0	0%
Costs lawyer	0	0%
Costs draftsman	0	0%
Other	0	0%

Table 2: The type of judicial review work mainly done by respondents

Mainly claimants	19	53%
Mainly defendants	6	17%
Both claimants and defendants	7	19%
Mainly third-party interveners	2	6%
All of the above	2	6%

Section 4:
The overall costs regime – The basic problem

Overwhelmingly, the experience of legal practitioners representing claimants, defendants, and interveners is that the costs rules in judicial review are obstacles to the rule of law and access to justice.

Specifically, in the experience of 97% of participants, the costs rules were an obstacle to the rule of law and access to justice, with 25% experiencing the rules as "somewhat of an obstacle", 28% as a "reasonably big obstacle", 31% as a "very big obstacle", and 11% as the "main obstacle".

Table 3: The extent to which the judicial review costs rules are an obstacle to the rule of law and access to justice

No obstacle	1	3%
Somewhat of an obstacle	9	25%
A reasonably big obstacle	10	28%
A very big obstacle	11	31%
The main obstacle	4	11%
I do not know	1	3%

The key theme identified in the questionnaire responses was that, for claimants not eligible for legal aid and not independently wealthy, the risk of losing significant amounts of money – including most or all their savings or having to sell assets such as family homes – to pay costs orders against them was too great. This is the case even if a claim has strong merits and if a claimant's own lawyers are acting pro bono, as claimants are still liable for the defendant's costs if they lose or discontinue a claim.

The evidence from participants is that this leads to a denial of justice in individual cases as people are unable to pursue claims with strong merits. It also means that some legal issues are not resolved until much later than they could have been and even that some government illegality is not challenged at all.

The responses below reflect the types of views expressed by lawyers in the questionnaire:

> "It is very rare for the individuals I represent to meet the financial eligibility requirements for legal aid and they cannot afford to expose themselves to the risk of adverse costs."

> "For the vast majority of ordinary people, the risk of paying adverse costs if a claim for judicial review fails makes it impossible to embark on the process."

> "If not funded by legal aid, judicial review is largely out of reach for claimants."

> "If a claimant does not have access to finance or the 'comfort' of a costs order limiting costs in the event the claim is unsuccessful, it does not matter how meritorious the claim is, claimants are less likely to proceed."

> "For those people who are not eligible for legal aid and who are not very wealthy, the costs of bringing judicial review proceedings due to the adverse costs risk make it prohibitive to bring judicial review applications to court. This is so even if their own lawyers are acting pro bono."

> "There are many legal issues which are never dealt with because of costs issues. If you are representing an individual who is just over the legal aid merits threshold, it is inconceivable to think of situations where they would be able to take on the risk of an adverse costs decision, even if their legal team is willing to act pro bono."

Unsurprisingly given these experiences, 76% of participants knew of claimants not proceeding with an arguable claim after being advised of their potential costs liability and/or recovery. For many this is a frequent experience.

> "Yes, this happens routinely. Even where the merits are assessed to be high, my clients have been unwilling to proceed."

> "Yes. I had this for a Shared Lives carer who had been de-registered in an obviously unlawful 'safeguarding' investigation. I advised prospects of success at 80%+ as it was perhaps the worst kangaroo court I had ever seen. However, the person owned her home and was not willing to risk losing it, so did not proceed."

These experiences are in stark contrast to practitioners representing claimants in commercial judicial reviews – such as corporations – with the financial means to pursue challenges. As one primarily claimant solicitor at an international City law firm said in a questionnaire response: *"In commercial JRs, our clients are typically (though not always) able to wear the cost of proceedings…I cannot recall an instance in which a claimant has said 'we would have brought this arguable claim but for the cost'."*

As several participants noted, this systemic exclusion from judicial review is not just an individual loss for the claimants concerned. As one lawyer summarised it, *"judicial review…[is] an essential part of the landscape for accountability, separation of powers, lawfulness of public bodies etc…[I]ts overall importance is greater than the merits of the individual case being brought."* As such, it is categorically not in the public interest that public bodies can make unlawful decisions and they will regularly not be challenged. That is to risk the growth of – or to worsen – a culture of illegality, the antithesis of the rule of law.

As one primarily claimant King's Counsel barrister explained:

> "The issues experienced by claimants are often not unique. They are symptoms of systemic problems, systemic unlawful decision-making. Look at the high appeal success rates in [Special Education Needs] appeals. If many, if not most, claimants cannot afford to pursue challenges, the longer it takes to correct the system-wide illegality – if that ever happens."

They added that systemic exclusion from judicial review also undermines Parliament's sovereignty:

> "Many judicial reviews are cases to enforce duties imposed on public bodies by Parliament…JR enforces Parliament's sovereignty by making practical the rights that Parliament has granted in an Act of Parliament or other legislation."

In sum, the costs rules in judicial review are near uniformly agreed to be an obstacle to the rule of law and access to justice, with nearly 70% of questionnaire participants regarding them as at least a "reasonably big obstacle". The evidence is that many claimants who are not eligible for legal aid and who are not independently wealthy are unable to risk savings, family homes, and other personal property (if they have any), to vindicate their legal rights against public bodies, even when the merits of their claim are strong. This is a denial of justice both to the individuals concerned and a denial of the public interest in the rule of law.

Homeless family unable to pursue judicial review because of costs rules

Claimant solicitor, questionnaire respondent

"In the summer of 2025, I had a case of a family of four with two young children whose homelessness application was being unlawfully gatekept due to their having over £5,000 in savings.[60] This was despite them sofa-surfing with strangers at the time and facing benefits discrimination in their search for a new private rented home. Their issue was in scope for Legal Aid, but it was unclear whether the Legal Aid Agency would consider them eligible due to their capital.

In the event of trying to proceed without legal aid funding, a potential £2,000+ contribution towards legal fees would have been a big ask from this family, as it had taken them years to build up their savings, which they hoped would be for their children's future. When they finally had to enter hotel accommodation after being asked to leave the stranger's home, the hotel was costing £560 per week. This was spending their savings down rapidly.

We sent a letter before claim, but the family did not get a response from the local authority by the judicial review time limit. After explaining to the clients the costs risks if we lost a judicial review against the local authority, they did not want to take the risk and remained homeless until they had spent down enough for us to be sure they would be eligible for legal aid."

60. While anyone who has savings over £8000 is not eligible for legal aid, for those with savings below £8000 but above £3000, claimants will be liable to make a contribution to their own legal costs: Regulation 29 of the Legal Aid (Financial Resources and Payment for Services) (Legal Persons) Regulations 2013.

Section 5:
Pre-action stage

(a) Pre-action costs cannot be recovered without issuing a claim

As explained in section 2, in judicial review there is no mandatory or practical mechanism for the winning parties' legal costs for pre-action work to be recovered from the losing side until a claim is issued in the High Court. This includes correspondence and negotiations under the Pre-Action Protocol for Judicial Review (PAP).

Over half of participants – 57% – found this to be at least "somewhat of an obstacle" to the rule of law and access to justice. Moreover, 15% of participants found it to be a "reasonably big obstacle" and 9% a "very big obstacle". A sizeable minority of 36% found the absence of pre-action recovery pre-issue to be "no obstacle" to the rule of law and access to justice.

Table 4: The extent to which the non-recoverability of pre-action costs before issue of a claim was perceived to be an obstacle to the rule of law and access to justice

No obstacle	12	36%
Somewhat of an obstacle	11	33%
A reasonably big obstacle	5	15%
A very big obstacle	3	9%
The main obstacle	0	0%
I do not know	2	6%

For participants in the majority, there were four principal themes in questionnaire responses and interviews:

i. **The incentive to issue:** The absence of a workable system creates an incentive for some claimants to issue a claim to recover their pre-action costs, should the defendant later concede or the claimant succeed at trial;

ii. **Unaffordable pre-action costs:** Pre-action work is not necessarily low cost given the need for frontloading in judicial review, burdening claimants with costs which they cannot afford or recover;

iii. **Claimants shouldering the financial burden of highlighting illegality:** The unfairness of a public body only recognising and conceding an unlawful decision because of significant pre-action work by claimants and with claimants unable to recover the financial costs to them of highlighting that unlawful conduct; and

iv. **Encouraging pre-action delay and inaction by public bodies:** Given the lateness that some public bodies engage with pre-action correspondence, claimant lawyers can undertake several weeks or months of work almost to the point of issuing a claim – at which stage the public body suddenly concedes, with none of those costs being recoverable despite the inaction of the public body being the direct cause of significant legal work.

i. The costs incentive to issue

The first key theme is that only permitting claimants to recover their costs *after* a claim is issued creates an incentive to issue to recover pre-action costs.

While most practitioners had not specifically advised claimants to issue purely to recover pre-action costs, they could nevertheless *"see that it could encourage protective issuing."* One participant went so far as to call it a *"perverse incentive to issue"*.

This is not only a claimant lawyer perspective. As one barrister with mixed experience representing both claimants and defendants acknowledged: *"From a defendant's perspective, I think it encourages protective issuing of claims."*

This will not always or inevitably be the case. The costs incentive to issue a claim must be seen alongside the costs risk to claimants associated with issuing. If a claimant issues and discontinues or issues and loses, they will be liable for the defendant's costs, which radically – if not entirely removes – the incentive to issue. As one claimant solicitor put it: *"[T]he risk of paying adverse costs post issue if the claim fails or is discontinued is much greater."*

However, for claims assessed as having good merits, the evidence from practitioners is that there is a concrete incentive to issue, in the hope or expectation that the defendant will later concede or that the claimant will win at trial and recover costs.

This is concerning because there will often be a sizeable difference in costs pre- and post- issue. As one claimant solicitor explained: *"[C]osts would be incurred preparing the Statement of Facts and Grounds, the claimant's statement, preparing the bundle etc. This can be quite time consuming and therefore incur quite significant costs."* Another claimant solicitor put it as follows: *"If you're issuing the full JR then it increases the costs for the claimant massively….In a fully pleaded JR, you're having to file everything at the start, statement of facts and grounds, accompanying witness statements, plus all your evidence."*

One primarily claimant King's Counsel barrister put it even more bluntly: *"If you were trying to design a system that increased the risk of incurring unnecessary costs by the claimant, you would have this one."* Indeed, data from questionnaire responses indicates that common pre-action costs before issue can be around £1,000 to £5,000, rising to £5,000 - £15,000 after issue following permission stage work.

The incentive to issue is especially acute for claimants with solicitors being paid via legal aid. This is for two reasons connected to current legal aid remuneration and regulations. First, because unless a judicial review claim succeeds after issue, claimant solicitors funded via legal aid are limited to claiming low legal aid rates from the Legal Aid Agency. However, if they win after issue, they can recover market rates from defendants.[61] Second, because, if an application for permission to bring a judicial review is refused, claimant solicitors funded via legal aid cannot be paid. However, if a claim is issued and then settled between the parties, the Legal Aid Agency has a discretion to pay the claimant solicitors at legal aid rates.[62]

61. Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013.
62. Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013.

As a legal aid claimant solicitor outlined the consequences:

> "In a JR, if you settle at the pre-action stage and the claimant obtains what they sought, then there is no option to recover costs from the defendant…Claimant lawyers…are reliant on needing to get the claim issued so that if it then settles, they are able to get paid properly…[T]he costs regime provides a massive incentive on claimant lawyers to actually get to issuing, so that you get the beneficial costs consequences if the claim then settles with the claimant getting the relief sought."

Some practitioners also argued that the practical absence of a system for recovering pre-action costs before issue had wider significance in terms of the types of cases legal aid solicitors accepted. Because legal aid lawyers were likely to be paid considerably more after issue than pre-issue, the incentive is to only accept cases that solicitors predict will be issued, rather than settled pre-action, in order that fee-earning targets can be reached.

As such, the evidence from practitioners – especially legal aid lawyers – is that the absence of a workable system for the recovery of a claimant's pre-action costs prior to issue, imposes a concrete incentive to get to the point of issue so that at least some costs can be recovered. This is a "*perverse*" incentive that can unnecessarily increase costs for all participants – claimants, defendants, and courts – because it encourages litigation, or at least additional legal work, where it may not be needed.

ii. Pre-action work can be unaffordable for many claimants

The second key theme is that in some cases pre-action costs can amount to large amounts of money, which can be unaffordable for people who are not eligible for legal aid or independently wealthy.

Often, pre-action costs can amount to relatively modest sums of money compared to later stages. As one defendant barrister put it: *"In my experience, claimants are often content to test the claim up to the permission stage, knowing that there is some but reasonably limited costs risk."*

Several claimant solicitors expressed similar sentiments. One noted that: *"Pre-action costs are both manageable and predictable. Many individuals and organisations can find the relatively modest sum - perhaps £3,000 to £5,000 - to pay for pre-action work."* Another suggested that pre-action *"costs were relatively modest and, though annoying, the claimant could accept the costs."*

However, while pre-action costs can be modest comparatively speaking, they may still be large amounts of money for many claimants and even be unaffordable. As one claimant solicitor noted: *"For the people who are not eligible for Legal Help, it is an obstacle because pre-action work is not necessarily low cost."*

An interviewee, another claimant solicitor, framed the problem in terms of the "frontloading" needed in judicial review. By this, they meant that a lot of work in judicial review must be done at the earliest stages. This includes drafting detailed pre-action letters; undertaking detailed negotiations with public bodies; explaining complicated public law issues to clients multiple times and in different ways; explaining the costs risks to clients at different stages of the process; and requesting significant disclosure and documentation from public bodies. Communication challenges, such as the need to use an interpreter, can further increase costs.

Frontloading means that pre-action costs can rack up very quickly and to a degree that many people would not consider "*manageable*". Based on responses in the questionnaire, the average cost of pre-action work can range from £1,000 to £3,000, up to £5,000 - £10,000 depending on the needs of the claimant and the issues involved. For many claimants, this would not be an affordable option.

iii. Forcing victims to shoulder the costs of unlawful state decision-making

The third key theme concerns the basic unfairness of individuals who are victims of unlawful acts being forced to shoulder the financial costs of communicating to a public body that it has acted unlawfully. As one claimant solicitor argued: *"Where a public authority climbs down after a slam dunk PAP, it does seem wrong that there is no way of getting your costs paid, other than issuing a claim."*

As one interviewee, a largely claimant King's Counsel barrister put it: *"There's essentially no negative consequence for a public authority receiving a pre-action letter. And I do think it's bad for public administration...[I]f you're sent a pre-action letter and that's the point where you change your mind, there should be a consequence for that. Citizens shouldn't be put to the cost of bringing the fact that the state has acted unlawfully to the state's attention."*

In sum, pre-action costs being non-recoverable prior to issue means that individuals who cannot afford it are forced to shoulder the cost of unlawful decision-making twice over. First through the disadvantage that they have suffered through the unlawful decision and second by not being able to recover their costs when communicating that unlawful conduct to the public body via the PAP – even if the public body ultimately and fully concedes that their decision was unlawful.

iv. Public bodies bearing no costs for poor engagement

The fourth key theme is that the non-recoverability of pre-action costs could encourage – or at least not discourage – poor engagement and behaviour from defendants at the pre-action stage. This unnecessarily increases costs for claimants and undermines the purpose of the PAP, which is to encourage early engagement and resolution of disputes. Further, it means that defendants end up having to pay higher costs if they later concede or lose a claim after a claimant issues.

One primarily claimant King's Counsel barrister put it this way in an interview:

> "Public authorities can behave very poorly as long as claims aren't issued...
>
> Even the first piece of correspondence from claimant solicitors is often the end of quite a significant amount of engagement – such as complaints – which may well have resulted in zero movement. It's only the pre-action letter stage that the public authority really bothered to engage with what's being said and that's undesirable."

A claimant solicitor expressed similar concerns: *"There are certain claims and certain defendants where the purpose behind the pre-action correspondence is not fulfilled and the costs position plays into that e.g. the Home Office as defendant will often not respond substantively in pre-action correspondence."*

Several claimant solicitors reported the experience, for example, of undertaking multiple rounds of pre-action correspondence, with no to very modest serious engagement from public bodies. Due to this, they responsibly and rationally begin preparing to issue a judicial review claim, at which stage the public body may suddenly concede or agree to reconsider a decision to avoid litigation. For a claimant, while they are naturally pleased that the decision is being reconsidered, none of those pre-action costs are recoverable from the defendant, despite the inaction being the direct cause of that significant legal work.

(b) The potential for recoverable costs under the PAP pre-issue

Given these concerns, the questionnaire asked practitioners whether they would support a system for recovering pre-action costs where a claim is not issued – either because a defendant concedes the claim or because the claimant withdraws the claim. Practitioners expressed a range of views for and against this proposal.

i. Arguments in favour of a system for recovering costs under the PAP pre-issue

For practitioners in favour, they identified several advantages of a system where pre-action costs are recoverable prior to issue.

First, it could reduce the "*perverse incentive*" on claimant lawyers, especially those funded via legal aid, to issue a claim in order to be adequately paid. This could most obviously benefit claimants who will not need to go through the expense of issuing. But this could also benefit defendants who end up conceding – or lose – claims later on. Without such a concrete incentive to issue, claimants may be less prone to issue, giving more time to negotiate with defendants. The result is that defendants could be liable for much more limited pre-issue costs compared with post-issue costs.

Second, it would ensure that claimants can recover pre-action costs which could otherwise be unaffordable if they were left out-of-pocket.

Third, it would prevent individuals from bearing the unfair financial costs of highlighting to public bodies that they had acted unlawfully.

Fourth, allowing a claimant to recover pre-action costs could encourage earlier engagement by public bodies with pre-action correspondence. This is because currently public bodies may refuse to engage until very late in the pre-action process with no costs consequences if a claim is settled pre-issue – even if the claimant is required to undertake unnecessary work because of a defendant's delay or silence.

Some participants took the view that if public bodies were exposed to costs risk at the pre-action stage, they would be encouraged to engage earlier because there would be a concrete costs risk for failing to engage, even if the case settled pre-issue. As one claimant King's Counsel barrister suggested: *"If you bring forward the [costs] risk to the pre-action stage, it might incentivise earlier engagement."*

Fifth, several practitioners noted that the practical inability of successful claimants to recover their pre-action costs where they succeed prior to issue makes judicial review very different to other civil litigation. This is despite recognition of the constitutional status of judicial review and recognition of the significant power differentials present in a judicial review, with power normally, though not inevitably, favouring the public body.

For example, in most civil litigation, Part 36 of the Civil Procedure Rules is used far more frequently. Part 36 states that if a defendant makes an offer to settle, a claimant is entitled to their pre-action costs (Part 36.13). By contrast, the evidence from practitioners is that Part 36 is not routinely used in judicial review proceedings.

As one primarily claimant King's Counsel barrister explained in support of the recoverability of pre-action costs: *"Yes, absolutely, with disputes on costs to be resolved by the court if necessary. I cannot see a sufficient reason for having a different position in judicial review than that which applies to civil claims, say which are settled via Part 36 offers at pre-issue stage, with costs paid."*

Another claimant solicitor agreed, noting: *"Yes….As we understand it, this is the position generally in civil claims, such as personal injury or actions against the police."*

ii. Arguments against a system for recovering costs under the PAP pre-issue

Other practitioners, however, had significant concerns with making PAP costs recoverable pre-issue.

First, participants noted that the current system is simple and clear: no parties can recover their costs prior to issuing a claim. Participants were concerned that any additional costs rules would complicate the law and have to be enforced. As one practitioner argued: *"I think it would be complicated to enforce where proceedings are not commenced, and where proceedings are commenced I think the parties' do tend to seek recovery of pre-action costs."*

Participants warned that if pre-action costs were recoverable prior to issue, parties would inevitably contest costs liability, which would raise disputes that would need to be resolved, potentially by a court. This would include, for example, defendants contesting whether they withdrew or reconsidered a decision or policy because of the pre-action letter, or external political, administrative or legal reasons. By contrast, in ordinary civil litigation, it is much more difficult for defendants to argue that their decision to pay damages was unrelated to the pre-action letter.

This potential for disputes could lead to another "*perverse*" outcome that, in attempting to recover pre-action costs, further costs are incurred resolving disputes about pre-action costs – possibly in excess of the sum of money originally being recovered.

Some practitioners further warned that some defendants, knowing that claimants may not be able to afford to challenge refusals to pay pre-action costs if a defendant claims that their behaviour was unconnected to the pre-action letter, could simply develop a practice of refusing to pay pre-action costs and *"bluffing the claimant into challenging it in court"*.

Other practitioners, however, suggested that this problem could be avoided by imposing a rule or at least a strong presumption that where the defendant takes action in a claimant's favour following a pre-action letter – such as reconsidering a decision or withdrawing a policy – they will be required to pay the claimant's pre-action costs. Exceptions could include, for example, where the pre-action letter identifies no respectable legal claims.

Second, some practitioners expressed concern that while pushing a defendant's costs liability to the pre-action stage may encourage earlier engagement, it nevertheless may make defendants less likely to concede at that stage, as they could become liable for the claimant's costs if they do concede. Participants noted that the current system of being able to concede at the pre-action stage with no costs consequences may encourage public bodies to concede early with no fear of adverse costs.

The following responses illustrate this::

> "No. This…may make defendants less likely to settle pre-issue."

> "It might make defendants even more defensive and discourage early settlement."

As one primarily defendant barrister lucidly put it: *"I think encouraging settlement of public law issues without costs consequences is a good thing and might be discouraged if there were cost consequences to concessions."*

Another claimant solicitor noted that the absence of pre-action costs liability: *"is a really strong reason why local authorities concede unlawful or marginally unlawful conduct. They want to avoid the costs of a JR so seek to resolve matters at an early stage rather than battling on. I think it is a really important motivation for public bodies to rectify unlawful conduct."*

In the words of one claimant solicitor, no pre-action costs liability provides defendants with an *"off-ramp"*, an easy way to save face, by making a concession at no cost.

Others strongly contested this suggestion, noting the fact that costs will almost always be significantly higher post-issue than pre-issue. Therefore, a defendant will almost always be better off resolving a claim at the pre-action stage than after issue.

As one primarily claimant King's Counsel barrister said at interview: *"[T]he reality is that post-issue costs are always going to vastly exceed pre-issue costs. A rational defendant who receives a cogent pre-action letter and thinks 'we're in trouble here, we better have another think about all this' is surely going to still do that and pay £1,500 or whatever…[Y]ou're better off paying a little rather than a lot."*

However, a senior claimant solicitor at an NGO disagreed with this, commenting at interview that, *"we can't assume that defendants act only based on rationality. Some defendants might not concede where they previously might have done."*

Third, practitioners expressed concern that if claimants were liable for defendants' costs pre-action where claimants withdrew a claim at that stage, it would be very damaging from a rule of law perspective. Participants summarised the key concern as follows: *"I'd be nervous about how this could lead to reluctance even to send a pre-action letter for fear the defendant will try to recover costs."*

Another claimant solicitor put the same point even more fervently:

> "In JRs brought by low-income people, pre-issue costs being recoverable by local authorities or government bodies from claimants could be a disaster. I will regularly take homeless cases where we will send a Letter Before Claim for JR under the Legal Help scheme, where our client has no cost protection yet, but could get it if the public authority does not back down and we have to apply for Legal Aid to issue the claim..[P]re-issue costs risk would be a disaster if they weren't protected from risk when seeking to enforce their rights. So I think any such legal framework would need to be carefully administered to enable low-income people to enforce their rights without fear."

In 2024, the Civil Justice Council (CJC) – an official, independent body designed to advise the Ministry of Justice on civil justice issues – did not recommend a new system for recovering pre-action costs precisely for reasons two and three, related to the potential disincentive for defendants to concede and discouraging claimants to send a pre-action letter.[63]

Fourth, some practitioners noted that there are cases where a claim has to be issued for a decision to be overturned. For example, when a decision is so-called *"functus officio"*, it cannot be retaken by a public body. Once it is made, there is no functional way to overturn the decision but through a court quashing it. This is the case, for example, in planning decisions. In this limited class of cases, a system for recovering pre-action costs pre-issue may not be workable in the same way, as a case would have to be issued for the decision to be overturned and then reconsidered.

iii. Recommended way forward for the recovery of costs under the PAP pre-issue

In sum, the recoverability of pre-action costs pre-issue is a question on which there are sincere differences of view, even – and if may fairly be said, especially – among claimant lawyers.

On balance, PLP supports investigating further a limited form of pre-issue costs recovery under the PAP.

Given the power imbalance ordinarily at play between public bodies and claimants, PLP's view is that it should not be possible for defendants to recover their pre-action costs from claimants. As the evidence in this report underlines, claimants frequently do not pursue claims for fear of having to pay defendant's costs if they lose. Imposing pre-action costs liability on claimants who withdraw a pre-action letter, for example, would simply replicate the negative consequences of the post-issue regime on the pre-issue regime. This would be disastrous for the rule of law and access to justice.

In addition, PLP considers that the evidence is inconclusive as to whether pre-action costs liability will encourage changes of defendant behaviour to either engage earlier or not to concede when otherwise they would have done. Practitioners' varying predictions are based on equally valid professional experiences and personal instincts. There will also be other incentives – both costs and non-costs – which influence engagement and concession behaviour by defendants.

PLP is also of the view that if legal aid remuneration rates and regulations create a concrete incentive to issue a claim, this is better resolved through amendments to those regulations, rather than reforms to the general costs rules – which is the focus of this report.[64]

Nevertheless, there are claimants who are not eligible for legal aid and who are not independently wealthy. For these individuals, even comparatively modest sums at the pre-action stage of a few thousand pounds may be unaffordable and essential to recover. Moreover, there is the basic unfairness of forcing claimants to pay for bringing the state's illegality to the state's attention, which creates a double punishment – the initial unlawful behaviour and the need to pay to correct it, with no hope of recovery even if the claimant is proved right.

63. Civil Justice Council, Review of the Pre-Action Protocols: Phase Two Report (Final), 5.21.
64. See, for example, PLP's response to the Ministry of Justice's Review of Civil Legal Aid in February 2024, where PLP recommended that hourly rates should be adopted across civil legal aid which make the work sustainable and attractive enough to stimulate growth in the sector. PLP recommends that these rates are established by an independent panel.

On these bases, PLP concludes that there is a strong argument to nudge public bodies into more flexibly, proactively, and honestly considering whether fairness requires that the claimant's pre-action costs are paid. This may include, for example, where the claimant is not eligible for legal aid but is of limited means and where the public body fully concedes that its decision was unlawful. The most obvious way of facilitating this would be revisions to the "Judge Over Your Shoulder" (JOYS) guidance produced by the Government Legal Department, which sets out the law of judicial review and good practice for public bodies. While this guidance is most directly addressed to central government and the UK Civil Service,[65] it also recognises that its lessons are useful and relevant for other public bodies – such as local government, NHS bodies, and arms-length bodies.[66]

To promote fairness for public bodies, the Attorney-General could issue guidance on what is reasonable costs recovery for pre-action work after consultation with the legal professions, to promote predictability and certainty for public bodies.

Recommendation 1:
The "Judge Over Your Shoulder" (JOYS) guidance should be amended to advise that it is good practice for public bodies to proactively consider whether fairness requires that they should pay a claimant's pre-action costs where the defendant concedes at least part of a claim.

Factors which a public body could consider when making this assessment include: the extent of the concession; the financial means of the claimant; and whether the claimant is likely to suffer significant hardship from not being able to recover their pre-action costs.

The guidance should advise that the level of costs paid should reflect a fair assessment of the extent of the concession.

To accompany this, the Attorney-General should issue guidance on what is reasonable costs recovery for pre-action work after consultation.

65. Government Legal Department, The Judge Over Your Shoulder (2022), p.4.
66. Government Legal Department, The Judge Over Your Shoulder (2022), para. 1.1 and para. 1.2.

Section 6:
Permission stage costs

a. High and unpredictable permission stage costs bills from public bodies

As explained in section 2, where a claim is refused at the permission stage, the claimant is liable for the main defendant's costs and the costs of any additional defendants and interested parties. This includes the costs of directly producing the Acknowledgement of Service (AoS) and Summary Grounds of Defence, as well as so-called "preparation" costs, such as deciding whether to resist a claim and on what grounds.[67]

For 80% of participants, this rule is at least "somewhat of an obstacle" to the rule of law and access to justice. More specifically, for 37% it is "somewhat" of an obstacle, for 26% a "reasonably big obstacle", and for 17% a "very big obstacle".

Table 5: The extent to which defendant's permission stage costs were an obstacle to the rule of law and access to justice

No obstacle	7	20%
Somewhat of an obstacle	13	37%
A reasonably big obstacle	9	26%
A very big obstacle	6	17%
The main obstacle	0	0%
I do not know	2	6%

The key theme identified by practitioners is that costs of public bodies at the permission stage could vary considerably, leading to uncertain and unpredictable costs liability. This made it difficult to advise clients on what their liability could be and unwillingness to take the risk of pursuing claims. Moreover, many participants noted that permission stage costs are increasingly high, with public bodies now frequently requesting *"very large costs bills"*.

As one claimant solicitor working at an NGO summarised the problem:

> "The current costs regime is a very big obstacle to access to justice in judicial review because the risk of an adverse costs order prevents many claims being brought. Even with the possible availability of a [Costs Capping Order], the claimant is still at risk for the pre-permission costs; these can be very high and they are also unpredictable, which is part of the problem."

67. *R (Mount Cook) v Westminster City Council* [2003] EWCA Civ 1346.

Other participants agreed with this assessment:

> "Because the uncertainty over a claimant's liability for costs up to permission and the possibility that these will be very high is often too big a risk for some claimants to take."

> "Clients without costs protection…must be advised of the dangers and will withdraw unless the claim is critical."

> "I think this deters litigation…Many areas of government policy… include broad ministerial powers or prerogatives, and so are inherently difficult to challenge. We need litigation to test and probe the government, especially when it seeks to [use delegated powers] in lieu of primary legislation, where Parliament may impose greater accountability. The permission stage has the important aim of weeding out inarguable cases, but it is still a high barrier that needs to be overcome and attracting costs liability automatically is disproportionate to achieving that aim."

While there is judicial guidance that permission stage costs are intended to be modest,[68] there is no benchmark or cap as such. Indeed, the experience of many practitioners is that public bodies are increasingly requesting very large costs bills at the permission stage.

Participants noted that there are some objective and justifiable reasons for this. These include: inflation; the increased complexity of some claims; application of the duty of candour at the permission stage; and more early requests by claimants for disclosure. Moreover, additional work by defendants at the permission stage can be beneficial for claimants, since it can encourage the narrowing of issues and concessions in their favour.

Other reasons include a willingness from the courts to allow defendants to recover rates from claimants which are higher than Government Legal Department (GLD) rates.[69] For many practitioners, this has enabled a growing defendant practice to seek recovery at solicitors' guideline hourly rates,[70] rather than GLD rates.[71]

Consistently high permission stage costs can have negative consequences for the rule of law and access to justice by putting even the early stage of proceedings out of financial reach for many people. For example, based on the data provided in questionnaire responses, the average figure requested by public bodies at the permission stage is around £10,000, with higher end estimates ranging from £30,000 to £50,000. In one instance related to a large infrastructure challenge, one public body requested permission stage costs of £200,000.

68. *R (Roudham and Larling Parish Council) v Breckland Council* [2008] EWCA Civ 714.
69. *Bakhtiyar v Secretary of State for Home Department* [2015] UKUT 519.
70. Solicitors' guideline hourly rates.
71. Government Legal Department, Hourly rates charged to government departments by GLD lawyers (April 2024).

As one barrister put it:

> "[D]efendants (particularly central government) are now routinely putting in very large cost bills at the permission stage. Although I can advise my clients that they are unlikely to have to pay anything like these sums, I cannot give any certainty in this regard. As such, there are some clients who do not proceed with arguable claims for fear of having to pay large amounts of adverse costs at the permission stage."

Another barrister agreed with this assessment:

> "Yes, undoubtedly. When I started in practice in 2008, it was rare to see a Defendant seek more than a few thousand in costs for their AoS. Now even a straightforward JR for an individual against a local authority might result in a claim for £10,000+."

Some practitioners argued that having a system of fixed costs at the permission stage imposing a cap on what defendants could recover from claimants would enhance certainty and predictability. This would then enable claimants to make more informed judgement calls about whether they were able to bear permission stage costs liability if they were refused permission. As one claimant solicitor put it: *"Not knowing the likely costs from the other side before proceedings are launched is a considerable obstacle. If there were a fixed costs regime at permission, people would find it easier to take a crystallised risk."*

Equally, when asked about the potential of fixed costs at permission, another claimant solicitor underlined that *"certainty without affordability is meaningless"*, noting that if the cap is set at a high rate, while it may be certain it would still not affordable for many claimants.

By contrast, during interviews, some defendant lawyers expressed caution about, though not strong oppositions towards, permission stage fixed costs. First, they argued that it is reasonable for defendants to undertake significant work to dismiss some challenges at an early stage – especially when important central government policies are challenged or where a claimant contests the compatibility of an Act of Parliament with the European Convention on Human Rights, for example. This work will inevitably incur costs higher than the fixed rate.

Second, interviewees noted that in some instances, claimants would be able to afford to pay full permission stage costs, such as wealthy individuals or corporate claimants.

Interestingly, some claimant lawyers were more strongly opposed to fixed costs at permission than defendant lawyers. These claimant lawyers argued that a new system of fixed costs at permission – even if it initially only imposed a cap on how much defendants could recover from claimants – may provide an unwelcome avenue for a future government hostile to judicial review to impose low fixed costs recovery on what claimants can claim from defendants. This is especially so when a previous government had already raised the idea of, though not implemented, fixed recoverable costs in immigration judicial reviews.[72] Claimant lawyers expressed strong concern that, combined with low legal aid rates, fixing costs that claimants can recover from defendants at permission could sound the *"death knell of the non-corporate judicial review sector"*.

72. Robert Thomas and Joe Tomlinson, Certainty at all costs? A critical analysis of the proposed introduction of fixed recoverable costs in immigration judicial reviews (2022) 26(4) Judicial Review 255-263

This was particularly the view among claimant lawyers who also had experience of representing parties in personal injury claims, where fixed costs have previously been introduced. The view of these practitioners was that fixed rates had been set far too low to cover the work, to the extent that solicitors often struggled to maintain a viable legal practice.[73]

Given these risks, PLP is opposed to introducing fixed recoverable costs at the permission stage in judicial review proceedings. Nevertheless, PLP is convinced that further concrete action can be taken to promote predictability and affordability at the permission stage and we offer a recommendation below to advance this objective.

Recommendation 2:
The Attorney-General should issue guidance on the amount of costs that central government bodies may normally seek at the permission stage. This guidance should be designed to promote both predictability and affordability for claimants. The Attorney-General should consult prior to deciding the figures.

b. Powers to cap costs are limited and are used inconsistently

A Costs Capping Order (CCO) is an order granted by the High Court limiting – and sometimes entirely removing – a claimant's liability to pay a defendant's costs if they lose a claim. Under section 88(3) of the Criminal Justice and Courts Act 2015, a CCO can only be awarded *after* permission is granted by the High Court.

This contrasts with the regime applicable prior to CCOs. Before 2015, a regime known as Protective Costs Orders (PCOs) applied and these orders could be granted before permission at any stage after proceedings were commenced. This was done via an application for a PCO by the claimant.[74] As such, as highlighted in the previous section, there is no predictable or affordable cap on the permission stage costs for which claimants may be liable if they are refused permission.

Moreover, under section 88(6) of the 2015 Act, CCOs are only available for so-called "public interest proceedings" where, among other things, the High Court considers the issue to be of general public importance.[75]

In the pre-2015 regime of PCOs, there was a similar rule that a claimant should have "no private interest" in the claim. In practice, this was not applied rigorously, with the courts recognising that a claim that benefited the claimant personally could also benefit others in similar circumstances.[76] A claim with no discernible public or wider benefit, however, could not secure a PCO. Indeed, in 2008, PLP described PCOs as "fairly restrictive".[77]

73. Chris Richards, The extension of fixed costs – two steps forward and five steps back (13 October 2023, Exchange Chambers).
74. *R (Corner House) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at [73].
75. Section 88(7) of the Criminal Justice and Courts Act 2015.
76. *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749.
77. Public Law Project, Third Party Interventions – A Practical Guide (2008), p.14.

Practitioners were asked whether in their experience the courts were using their powers to grant CCOs in a way that facilitates the rule of law and access to justice. 63% of participants believed that courts were only "sometimes" using their power to grant CCOs effectively to facilitate the rule of law and access to justice. Only 22% of participants believed that courts "usually" were using their powers effectively, with 13% believing that courts were "not usually" using these powers effectively.

The key theme highlighted by practitioners was of inconsistent and unpredictable use of CCO powers by courts, with orders varying considerably both among judges and with the same judge. While participants often had some good experiences with CCOs, they also had very bad experiences. Below is a representative flavour of the experiences of practitioners:

> "CCOs are very rarely granted in my experience."

> "Sometimes, the court expects you to find more money even when you've explained how difficult this will be for the claimant to do. Then [the claimant has] to choose between dropping the case or putting their organisation at risk."

> "Costs Capping Orders do not assist individuals in my experience (the level of capping is still too high) and they are of course only available if leave is granted. However, they have been of some assistance when acting for NGOs and charities."

Furthermore, some claimant solicitors who worked at charities argued that some judges demonstrated limited understanding of how funding at charities works. Some solicitors who were interviewed, for example, referred to judicial decisions on CCOs that charity claimants should use the charity's reserves to pay for the defendant's costs if they lose.[78] These practitioners noted that reserves are intended to be limited to emergencies so that the charity can continue to pay staffing and other essential costs. These CCO decisions may mean that some charities must choose between pursuing important litigation or making staff redundant in the event of a financial emergency.

As one questionnaire participant put it: *"In my experience, [judges]…have little understanding of claimants who despite having a professional structure around them have never undertaken a JR and needed extra help and support."*

Furthermore, practitioners were asked whether claimants should be able to apply for a CCO before permission is granted when they issue proceedings, as was the case under the pre-2015 PCO regime.

Several claimant lawyers argued that this would be a welcome reform. Indeed, one solicitor responded that: *"The cost capping regime is fundamentally flawed, because it is only available post permission."* The consequence is twofold. First, that claimants cannot secure protection against paying a defendant's permission stage costs if they are refused permission. Second, that there can be extended uncertainty about whether the claimant will be liable for post-permission costs and at what level, while a court is considering the permission application. This risk can discourage claimants from pursuing claims.

78. *R (Silkie Carlo) v Commissioner of the Police of the Metropolis* [2025] EWHC 2355 (Admin).

As one participant noted:

> "In one recent case, the court refused permission on the papers and later a rolled-up hearing was ordered, so over 18 months after the case was issued, there was no CCO as there was no grant of permission. Although there was an agreement with the defendant, there was less certainty than if the court had granted a CCO."

However, some defendant lawyers argued that the protection of a CCO should not apply before a court has found a claim to have a realistic prospect of success by granting permission. Equally, some claimant lawyers noted that under the pre-2015 PCO regime, courts already considered whether a claim had a realistic prospect of success prior to granting a PCO and could also do so under an amended CCO regime that applied pre-permission.[79]

In addition, when asked at interview, some interviewees highlighted the *"protection gap"* that CCOs are only available for public interest proceedings, rather than all judicial reviews. "Public interest proceedings" are judicial reviews which have a general public importance beyond the individual bringing the claim. The consequence is that even in a claim of strong merits that is of profound importance to an individual, the claimant cannot obtain a CCO – even where this would be the only affordable way for them to pursue a judicial review.

Furthermore, some participants noted that this statutory limitation fails to recognise that an individual judicial review also promotes the public interest in the rule of law, which is a full society benefit. Practitioners added that, in some cases, it is difficult if not impossible to state in advance that a claim has major implications beyond the individual claimant. Implications may only become clear in time or even after the decision is released, depending on the reasoning of the court.

As one primarily claimant King's Counsel barrister explained:

> "There is a protection gap because CCOs can only be granted for a limited class of judicial reviews. You could have a decision that has seriously affected a person's life, reputation, livelihood, income, or profession...and they still cannot obtain a CCO unless they can show their claim has an additional importance to the public. This excludes really important individual challenges from going ahead."

79. *R (Corner House) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at [73].

Recommendation 3:
The Criminal Justice and Courts Act 2015 should be amended so that courts can grant CCOs in all judicial review claims, not only "public interest proceedings".

This could be achieved by amending section 88(6) to provide that before granting a CCO, a court may consider the following factors and any other factors it considers relevant:

(a) Whether the proceedings are public interest proceedings;
(b) The impact of the decision in issue on the claimant;
(c) The importance of the rights or issues at stake in the proceedings;
(d) The importance of a binding determination of the legal question in issue;
(e) The importance of facilitating the rule of law and access to justice;
(f) Whether the claim has a realistic prospect of success.

Recommendation 4:
The Criminal Justice and Courts Act 2015 should be amended so that where a claimant can establish that their financial resources are below a certain level, there is a presumption in favour of granting a CCO, where the claimant is not in receipt of legal aid. In setting the cap, the High Court should have a duty to promote the claimant's access to justice.

To ensure that this figure can be adjusted over time, the Lord Chancellor should have the power to increase this figure through delegated legislation. The Lord Chancellor should consult before deciding the figure.

Recommendation 5:
Section 88(3) of the Criminal Justice and Courts Act 2015 should be repealed and replaced with a provision granting claimants the ability to apply for a CCO prior to permission being granted, namely at any stage after proceedings being commenced.

c. Rolled-up hearings can increase costs for claimants

Courts have the discretion to hold a permission hearing at the same time as a hearing for the substantive legal claim. This is referred to as a "rolled-up hearing". While this can ensure that judicial reviews are resolved more quickly, it can considerably increase costs for claimants. Rolled-up hearings mean that even if a claimant is refused permission, they will be liable for the defendant's costs of defending the substantive hearing too.

In essence, a claimant is required to pay for at least two hearings – despite not even being granted permission by the High Court to proceed with their judicial review.

In his summary in *Al-Haq* of the relevant factors to consider when deciding whether to order a rolled-up hearing outlined in section 2, Mr Justice Chamberlain made no express reference to the additional costs risk for claimants.

This is problematic because some practitioners expressly noted the connection between high permission stage costs and rolled-up hearings: *"I mainly work on public interest litigation. It is not possible to get a CCO before permission is granted. Costs exposure is potentially very high especially where the court orders a rolled-up hearing. This exposure can be limited by agreeing costs with the other side; however, this may not be possible."*

Recommendation 6:
The Administrative Court Guide should be amended to require courts to take account of the costs consequences for claimants who are refused permission before deciding to "roll-up" a hearing.

Section 7:
Post-permission costs

a. No overall costs cap for claimants

In judicial review proceedings, unless the claimant has a CCO, there is in general no overall cap on either parties' liability to pay the winning party's costs.

The exception to this is the Aarhus Environmental Costs Protection Regime, which applies in some environmental claims by virtue of the UK's membership of the Aarhus Convention. Under the Aarhus rules, there is a presumption which caps an unsuccessful individual claimant's cost liability to £5,000, an organisational claimant's liability to £10,000, and caps a defendant's liability at £35,000.

Practitioners were asked whether in their experience the Aarhus regime was more effective at promoting access to justice than the non-Aarhus regime. Practitioners with experience of both regimes near uniformly answered that the Aarhus regime was more effective. The key theme was that claimants of limited means had the confidence to pursue claims, knowing in advance what their overall costs liability is going to be.

Below is a representation of the experience of practioners:

> "The Aarhus costs regime in environmental claims works reasonably well in protecting claimants from adverse costs orders."

> "Aarhus in environmental JRs eliminates this problem by capping liability at £5,000 or £10,000."

> "In the environmental field Aarhus provides excellent accessibility."

> "In environmental cases the Aarhus costs capping system works well and is applied by default by the courts."

> "The situation is slightly different in the environment space where Aarhus operates quite effectively."

As one claimant solicitor put it bluntly: *"Yes, significantly more effective. The difference is massive."*

During interview, a King's Counsel barrister who primarily represents defendants in planning and infrastructure matters argued:

> "Costs risk for claimants is a real barrier but with environmental claims caught by Aarhus it's different...What it means is it removes costs as a barrier to meritorious claims where people are worried about costs...I am on board with Aarhus."

For these reasons, in 2017, as part of Lord Justice Jackson's review of fixed recoverable costs, a working group chaired by Martin Westgate KC suggested that the extension of the Aarhus rules to all judicial reviews would improve access to justice. Further, the Westgate working group made recommendations about how this could be achieved. [80]

Nevertheless, some practitioners had concerns with the Aarhus regime. One primarily defendant King' Counsel barrister, for example, argued that, while Aarhus tended to work very well for *"savvy"* NGOs and charities who were able to raise funds via crowdfunding, it had not necessarily worked as well for individuals or smaller organisations wishing to pursue challenges. This was because the rates in the Aarhus caps – £5,000 for individuals and £10,000 for organisations – could still amount to very large sums of money for many individuals and for smaller organisations, especially on top of their own legal costs if they did not have lawyers acting pro bono.

In addition, some practitioners noted that the maximum amount of £35,000 that claimants can recover from losing defendants was *"set a long time ago and had never been increased"*. Therefore, in practice, £35,000 did not cover the legal work completed for successful claimants and solicitors often needed other ways to cover their costs, such as crowdfunding.

Finally, practitioners were asked what an Aarhus-type model added to a strengthened CCO regime – such as that suggested in section 6. Participants answered that CCOs are applied only on a case-by-case basis and that ultimately courts may refuse to grant them. Meanwhile, a default overall cap provided predictability and certainty from the very start. It also meant that parties are not put to the cost of applying for and/or opposing a CCO. As one respondent put it: *"In my experience, obtaining a CCO adds a layer of procedural complexity that can act as an obstacle to access to justice."*

As such, while clear that it did not eliminate costs obstacles to access to justice, practitioners were near uniformly of the view that the Aarhus model of providing an overall costs cap stated in advance facilitated access to justice for claimants by providing certainty and predictability to a far greater degree than the general costs rules in judicial review.

The key disadvantage of Aarhus from an access to justice perspective, however, was the outdated and unrealistic cap of £35,000 which claimants could recover from defendants and the fact that £5,000 would still be unaffordable for many individuals not eligible for legal aid.

b. Qualified One-Way Cost Shifting (QOCS)

Another mechanism for facilitating access to justice is Qualified One-Way Costs Shifting (QOCS). Aarhus works by providing a default cap on a claimant's overall liability and a default cap on a defendant's liability. By contrast, at its strongest, QOCS removes a claimant's liability to pay a defendant's costs but makes a defendant liable to pay a successful claimant's costs:

80. Report of a working group chaired by Martin Westgate QC on how the Aarhus rules might be developed for general application across the whole landscape of judicial review cases (2017).

> [T]he claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful. The qualifications to this are that unreasonable (or otherwise unjustified) party behaviour may lead to a different costs order, and the financial resources available to the parties may justify there being two way costs shifting in particular cases." [81]

QOCS need not go so far as excluding completely a claimant's liability to pay a successful defendant's costs. Other options include Aarhus-style default caps. For example, one alternative suggested by Lord Justice Jackson as part of his review of costs in civil litigation is limiting a claimant's liability to £3,000 up to the permission stage and £5,000 after permission.[82]

Whatever its specifics, like the Aarhus regime, QOCS is a way of ensuring that meritorious claims are not deterred by fear of adverse costs if the claimant is unsuccessful.[83] In his 2009 review of civil litigation costs, Lord Justice Jackson highlighted examples of where he believed QOCS may be appropriate:

> In my view qualified one way costs shifting may be appropriate on grounds of social policy, where the parties are in an asymmetric relationship. Examples of parties who are generally in an asymmetric relationship with their opponents are claimants in housing disrepair cases, claimants in actions against the police, claimants seeking judicial review and individuals making claims for defamation or breach of privacy against the media." [84]

Lord Justice Jackson argued that this should not encourage weak claims because *"judicial review proceedings have the benefit of a "permission" stage, which filters out unmeritorious cases."* [85]

Ultimately, Lord Justice Jackson recommended that QOCS should be implemented uniformly for all judicial review proceedings. His main recommendation was that a claimant's liability to pay a defendant's costs should be limited to that which it would be reasonable for the claimant to pay, having regard to their financial resources and their conduct in the proceedings. His alternative recommendation was that there should be a cap on a claimant's liability of £3,000 until the permission stage and £5000 if permission is granted, with a claimant's means and conduct still considered when assessing whether this was reasonable.[86]

Despite these recommendations, QOCS has never been implemented in this context and in a supplemental report in 2017, Jackson LJ opined that it may never come.[87]

81. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 2.6, p.xvii.
82. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 2.21, p.304
83. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 2.7, p.xvii.
84. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 5.11, p.89.
85. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 5.8, p.xxi.
86. Lord Justice Jackson, Review of Civil Litigation Costs (December 2009), para 4.5 to 4.7, p.311-2.
87. Lord Justice Jackson, Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs (July 2017).

The questionnaire asked practitioners if they supported Lord Justice Jackson's proposals for QOCS in judicial review. Some participants, largely claimant lawyers and those who represented both claimants and defendants, were strongly in favour. They pointed to their experience that costs were often a decisive factor in claimants of limited means not pursuing otherwise arguable claims. In the opinion of these practitioners, QOCS could ensure that claimants brought cases based on their merits, rather than based on their ability to pay.

Below is a representative flavour of responses:

> "Yes, because the cost of judicial review is generally prohibitive for my clients."

> "From my experience working with low-income claimants in JR, yes, one-way costs shifting would be a way of levelling the playing field for claimants who have an arguable case but less means."

> "Yes, it would redress the massive imbalance that currently exists between individuals and the state."

> "Yes, there is a huge barrier to justice where someone faces the risk of an unlimited adverse costs decision."

Other practitioners, largely but not exclusively defendant lawyers, were strongly opposed to QOCS, principally on monetary grounds and on the ground that it could encourage unmeritorious claims. As one bluntly put it: *"Absolutely not. The cost to the public sector would be vast and UK Plc is bust."* Another echoed these concerns: *"No, there is too much chance of encouraging unmeritorious claims and significant additional pressure on the public purse."*

One interviewee, a primarily defendant King's Counsel barrister, argued that for better or for worse money is often what *"focuses minds"* in litigation. With no costs liability whatsoever, claimants would be more willing to pursue low-quality claims, knowing that there would be no costs consequences.

Outside of practitioners strongly in favour or against QOCS, some practitioners took a nuanced stance, believing that they could support QOCS with conditions to ensure affordability for defendants and to ensure that it did not unduly encourage speculative claims. Suggestions included setting a cap on a claimant's liability rather than entirely excluding liability and introducing further safeguards to discourage unmeritorious claims.

Below is a representative sample of individuals of this point of view:

> "[J]udicial reviews are an essential part of the landscape for accountability, separation of powers, lawfulness of public bodies etc. Its overall importance is greater than the merits of the individual case being brought. It would be better to have QOCS but with a strengthened ability to preserve the public purse by way of weeding out hopeless JRs."

> “Yes, but the cap should be sufficiently high to discourage speculative claims.”

> “In public law judicial review I would support this. However, I think the cap would need to apply after permission to ensure unreasonable cases are not afforded as much costs protection.”

> “Yes. QOCS would at least get claimants to permission stage when the defendant will have produced a defence for the claim and a review of the strength on merits can be undertaken again. By that time more information and argument is usually produced which is helpful to both parties. The costs of getting to this stage should not be prohibitive and now JRs are issued online, claimants bundles tend to be smaller which also reduces costs.”

> “I would be supportive provided that there is clear guidance that sums payable by defendants to claimants has to be proportionate and measurable.”

Some practitioners also suggested that QOCS could be problematic if applied to all claimants – including those who could afford full costs, such as commercial claimants. While recognising that the problem would only arise in a very small number of cases, as one primarily defendant King’s Counsel barrister explained:

> “Commercial parties with equal financial muscle to government regularly litigate judicial reviews. It would give them an unfair advantage.”

Practitioners highly supportive of QOCS were not unsympathetic to these suggestions. They argued that Lord Justice Jackson’s recommendation contained a built-in safeguard against unmeritorious claims in that it limited a claimant’s liability to that which is reasonable – having regard to both their financial resources and their conduct in the proceedings. If a claimant acted unreasonably in pursuing a judicial review, such as attempting to pursue a wholly implausible claim – either up till permission or beyond – a court would have the discretion to disapply QOCS.

Further, most agreed that it should be possible to disapply QOCS in the case of claimants who were well-resourced individuals or organisations.

Recommendation 7:
The Ministry of Justice should consult on introducing a system of Qualified One-Way Costs Shifting (QOCS) in judicial review.

Given the very significant obstacle that costs impose on the rule of law and access to justice and given the public interest in, and constitutional status of, judicial review, PLP recommends that a claimant's costs liability should be limited to that which is reasonable, taking into account the claimant's financial resources and conduct in the proceedings.

PLP could also support Lord Justice Jackson's alternative idea of default figures of £3,000 on a claimant's liability up to permission and £5,000 if permission is granted, with the claimant's financial resources still considered in assessing whether this is reasonable.[88]

To ensure simplicity, this should apply to all judicial reviews, including those currently covered by the Aarhus regime.

Defendants should be given the right to apply to vary QOCS where the claimant is able to afford full costs.

Recommendation 8:
Given the tendency of public bodies to request rates in excess of Government Legal Department (GLD) rates, the Attorney-General should issue guidance advising that where central government uses the GLD as part of judicial review proceedings, it is limited to recovering GLD rates from claimants where the claimant loses or discontinues.

c. Claimants do not recover their full costs even when successful

As recently as February 2026, the Court of Appeal confirmed that a successful claimant in judicial review proceedings should not be deprived of their full costs unless there is a substantial reason.[89]

In practice, however, experiences can be different. Several claimant lawyers noted that even when a claimant wins a judicial review, they are unlikely to recover their full legal costs. Overall, practitioners estimated that successful claimants often recover under 75% of their legal costs.

Under Civil Procedure Rule 44.3, courts may order costs recovery on either the "standard basis" or the "indemnity basis". On the standard basis, the Court will allow only those costs which are proportionate and will resolve any doubt in favour of the paying party. By contrast, on the indemnity basis, the court resolves any doubt in favour of the receiving party. The Court will assess costs on the indemnity basis in cases where the losing party has acted unreasonably in bringing, maintaining or defending the claim. Ordinarily, courts will award costs on the standard basis.[90]

88. The Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs (2017).
89. *R (ABB) v Secretary of State for the Home Department* [2026] EWCA Civ 61.
90. *R (PZX) v Secretary of State for the Home Department* [2022] EWHC 2890 (Admin).

Practitioners expressed concern that judges did not appreciate the degree of frontloading required in judicial review proceedings. The consequence is that essential work is not recognised in costs awards.

As one respondent explained: *"[I]t does seem unfair that the courts apply a general 60-65% recovery for successful parties even though the rates may be very reasonable, the merits were strong and everybody behaved well throughout. This alone puts people off."* Another claimant solicitor reiterated this concern: *"Claimants…have to find their own costs and, in the event the claim is successful, are still unlikely to recover more than 75% of the costs incurred."*

Recommendation 9:
The Administrative Court Judicial Review Guide should be amended so expressly refers to the degree of frontloading required by claimant solicitors. The courts should consider this when assessing the reasonableness of claimant costs.

d. Insufficient space to make relevant written submissions on costs

Under Rule 9.5(2) of the Civil Procedure Rules, parties are required to make written submissions on costs. Normally, these submissions should be no more than 2 pages.

Some practitioners suggested that this was an inadequate length that failed to appreciate the importance of costs decisions for many parties, including claimants. They argued that this page limit also failed to appreciate that costs law itself could be a complex area, which different strands of jurisprudence which may need to be addressed – the tension between discontinuance and concession being a case in point.

Practitioners added that a slightly longer page limit could continue to balance brevity with the need to address important practical and legal points, such as explaining to the judge the chronology, extent and consequences of a public body's unreasonable conduct.

As one participant put it: *"The page number limit for costs submissions is…far too short to give a chronology of public authority inaction, get into the case law and make focussed submissions."*

Recommendation 10:
The Administrative Court Judicial Review Guide should increase the page limit to 4 pages.

Conclusion

The evidence in this report demonstrates that the costs rules are a very significant – and sometimes the most impenetrable – obstacle to vindicating the rule of law and access to justice. Claimants earning only £32,000 not eligible for legal aid and not independently wealthy, fear having to pay the defendant's costs if they lose or discontinue a claim. This can often amount to vast amounts of money which most claimants cannot afford, at least without selling family homes or using up life savings. The result is that many strong claims are not brought or are dropped earlier than they would have been – purely for reasons of affordability.

This undermines the fundamental purpose of judicial review to facilitate the rule of law and access to justice.

This report makes a series of recommendations to rebalance the system in favour of the rule of law and access to justice, while ensuring fairness for public bodies and guaranteeing that claimants who can afford to pay their own way do so.

The recommendations in this report are interrelated and have implications for each other. For example, if QOCS is introduced in judicial review (**Recommendation 7**), it is unlikely that many – if not most – claimants will need to make use of CCOs (**Recommendations 3, 4 and 5**), as costs protection will be set in advance without the need to apply for a CCO.

Therefore, PLP's priority is **Recommendation 7**: The introduction of QOCS in judicial review proceedings. This would replace Aarhus and the need for most CCOs. If this does not occur, our priorities are **Recommendations 3, 4 and 5**: A strengthened CCO regime extending the right to apply for a CCO to all judicial reviews; prior to permission being granted once proceedings are commenced; and a presumption in favour of CCOs where a claimant's means are below are certain level.

Even if **Recommendation 7** related to QOCS in judicial review is implemented, **Recommendations 1, 6, 9 and 10** would remain essential as QOCS would not of itself alter the concerns at issue in those recommendations.

If **Recommendations 3, 4 and 5** or **Recommendation 7** are not implemented, the remaining recommendations continue to be essential and will improve access to justice for claimants who can least afford it and who are most economically excluded at present.

Recommendation 1:

The "Judge Over Your Shoulder" (JOYS) guidance should be amended to advise that it is good practice for public bodies to proactively consider whether fairness requires that they should pay a claimant's pre-action costs where the defendant concedes at least part of a claim.

Factors which a public body could consider when making this assessment include: the extent of the concession; the financial means of the claimant; and whether the claimant is likely to suffer significant hardship from not being able to recover their pre-action costs.

The guidance should advise that the level of costs paid should reflect a fair assessment of the extent of the concession.

To accompany this, the Attorney-General should issue guidance on what is reasonable costs recovery for pre-action work after consultation.

Recommendation 2:

The Attorney-General should issue guidance on the amount of costs that central government bodies may normally seek at the permission stage.

This guidance should be designed to promote both predictability and affordability for claimants.

The Attorney-General should consult prior to deciding the figures.

Recommendation 3:

The Criminal Justice and Courts Act 2015 should be amended so that courts can grant CCOs in all judicial review claims, not only "public interest proceedings".

This could be achieved by amending section 88(6) to provide that before granting a CCO, a court may consider the following factors and any other factors it considers relevant:

(a) Whether the proceedings are public interest proceedings;
(b) The impact of the decision in issue on the claimant;
(c) The importance of the rights or issues at stake in the proceedings;
(d) The importance of a binding determination of the legal question in issue;
(e) The importance of facilitating the rule of law and access to justice;
(f) Whether the claim has a realistic prospect of success.

Recommendation 4:

The Criminal Justice and Courts Act 2015 should be amended so that where a claimant can establish that their financial resources are below a certain level, there is a presumption in favour of granting a CCO, where the claimant is not in receipt of legal aid. In setting the cap, the High Court should have a duty to promote the claimant's access to justice.

To ensure that this figure can be adjusted over time, the Lord Chancellor should have the power to increase this figure through delegated legislation. The Lord Chancellor should consult before deciding the figure.

Recommendation 5:

Section 88(3) of the Criminal Justice and Courts Act 2015 should be repealed and replaced with a provision granting claimants the ability to apply for a CCO prior to permission being granted, namely at any stage after proceedings being commenced.

Recommendation 6:

The Administrative Court Guide should be amended to require courts to take account of the costs consequences for claimants who are refused permission before deciding to "roll-up" a hearing.

Recommendation 7:

The Ministry of Justice should consult on introducing a system of Qualified One-Way Costs Shifting (QOCS) in judicial review.

PLP recommends that a claimant's costs liability should be limited to that which is reasonable, taking into account the claimant's financial resources and conduct in the proceedings.

PLP could also support Lord Justice Jackson's alternative idea of default figures of £3,000 on a claimant's liability up to permission and £5,000 if permission is granted, with the claimant's financial resources still considered in assessing whether this is reasonable.

To ensure simplicity, this should apply to all judicial reviews, including those currently covered by the Aarhus regime.

Defendants should be given the right to apply to vary QOCS where the claimant is able to afford full costs.

Recommendation 8:

Given the tendency of public bodies to request rates in excess of Government Legal Department (GLD) rates, the Attorney-General should issue guidance advising that where central government uses the GLD as part of judicial review proceedings, it is limited to recovering GLD rates from claimants where the claimant loses or discontinues.

Recommendation 9:

The Administrative Court Judicial Review Guide should be amended so expressly refers to the degree of frontloading required by claimant solicitors. The courts should consider this when assessing the reasonableness of claimant costs.

Recommendation 10:

The Administrative Court Judicial Review Guide should increase the page limit to four pages.

publiclawproject.org.uk