

Public Law Project

Briefing on response to consultation *Judicial Review: Proposals for Reform*

The data referenced in this briefing is drawn substantially from the work of the Public Law Project in conjunction with the University of Essex. Sections of this document are drawn from a blog post by Varda Bondy at the Public Law Project and Maurice Sunkin at the University of Essex, the full version of which is available at: <http://ukconstitutionallaw.org/blog/>

The Consultation

1. In December 2012 the government launched a consultation on Reforming Judicial Review:
www.justice.gov.uk/news/press-releases/moj/judicial-review-consultation
2. This note explains why the consultation should matter to all those concerned about preserving judicial review as one of the most important checks on abuse and misuse of state power. When carefully analysed, it is clear that the key proposals could seriously damage access to justice if implemented in their current form – it is vital that these implications are understood and the proposals resisted.
3. This note addresses the myths and inaccuracies that appear in the consultation document itself, drawing on the data produced by the Public Law Project and the University of Essex. We're sending you this draft because you expressed an interest in seeing PLP's research in more detail. This draft will form part of our response to the consultation. We are also sending you a document that looks at consultation questions and offers some short bullet points to consider when writing a response. This second document has been circulated widely so do please feel free to share it.
4. The consultation has received some attention from legal commentators and bloggers, which might help in formulating responses:
 - <http://ukhumanrightsblog.com/2012/12/13/quicker-costlier-and-less-appealing-plans-for-judicial-review-reform-revealed/>
 - www.newlawjournal.co.uk/nlj/content/judicial-review-reform
 - www.planningportal.gov.uk/general/news/stories/2012/dec12/201212/201212_5
 - www.edf.org.uk/blog/?p=22431
 - <http://ukconstitutionallaw.org/blog/>

Summary of the proposals

5. Changes to the time limit for bringing judicial review:
 - i. 30 day time limit for bringing judicial review arising from Public Contracts Regulations 2006 i.e. procurement cases; and
 - ii. Six week time limit for bringing JR of planning decisions.Note also that the consultation asks, "Are there any other types of cases in which a shorter time limit might be appropriate? If so, give details."

6. Challenges to on-going breaches or multiple decisions to be brought promptly and in any event within three months of the time when the claimant knew or ought to have known of the grounds arising.
7. Removal of the right to an oral renewal at the permission stage where:
 - i. There has been a prior judicial process hearing substantially the same issue as that raised in the judicial review proceedings; and
 - ii. A judge considering the permission application on the papers has deemed it 'totally without merit'. An appeal against this decision would lie to the Court of Appeal on the papers only.
8. Payment of a fee (£215, rising to £235 under proposals contained in the consultation on fees) for an oral renewal of permission to apply for JR which would be refunded if permission is granted.

The absence of evidence

9. PLP are seriously concerned at the lack of evidence supporting these proposals and the highly impressionistic way in which the basis for the reforms is formulated:
 - Paragraph 2 asserts that “judicial review may be subject to abuses” (emphasis added). No examples are given.
 - Paragraph 3 makes the wholly unsubstantiated assertion that judicial review can have the effect of “stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery.” No examples are given.
 - Paragraph 27 admits that “[t]here is only limited information available on how Judicial Review cases progress through the courts.”
 - Paragraph 30 states in relation to the outcome of judicial review claims that “we do not currently collect data centrally on these matters”.
 - Paragraph 35 states that the government “believe[s] that the threat of judicial review has an unduly negative effect on decision makers” and claims that there is “some concern” that judicial review leads to overly cautious decision-making. No evidence is provided in support of this belief or concern.
 - At paragraphs 64 and 79 the government relies on unspecified “anecdotal evidence”.
 - Paragraph 110 acknowledges that “we do not collect comprehensive information about court users generally, and specifically those involved in Judicial Review proceedings, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform.”
 - Paragraph 111 further admits that “there is little collated information about the resolution of those Judicial Reviews brought on grounds to ensure that public bodies carry out their Public Sector Equality Duties under the Equality Act 2010.”
10. The Equality Impact Assessment further demonstrates the absence of relevant evidence:

- At page 2 it states, “It has not been possible to monetise the aggregate benefits accurately as it is not known what volume of applications are not made within the proposed time limit.”
- At page 3 it states, “It has not been possible to monetise the aggregate benefits accurately as the number of oral renewals which would be affected by the proposals is not known with certainty.”
- Paragraph 2.3, page 10 states, “This Impact Assessment provides a qualitative assessment of the main costs, benefits and impacts. This is due to a lack of detailed financial information on the JR process and because there is insufficient information at this stage to anticipate the extent of potential behavioural responses.”

11. In the absence of any meaningful centrally collected quantitative data on judicial review, the government has failed to identify a need for change or to justify reasonableness and proportionality of the specific proposals that it is putting forward. The absence of evidence also makes it difficult to properly respond to the consultation, and the short consulting period (13 December 2012 – 24 January 2013: a total of only 24 working days) makes it almost impossible for respondents to gather their own evidence.

The number of judicial review cases is on the rise?

12. The consultation paper makes a number of statistical assertions about judicial review that do not stand up to scrutiny.
13. At paragraph 28 the consultation document states that, “There has been a significant growth in the use of judicial review to challenge the decisions of public bodies. In 1974, there were 160 applications for JR, by 1998 this had risen to over 4,500, and by 2011 had reached over 11,000.”
14. There are a number of problems with these figures. Firstly, comparisons with the use of judicial review that go back as far as 1974 are almost completely meaningless, not least because prior to *O’Reilly v Mackman* [1983] 2 AC 237 claimants did not need to use judicial review in public law matters and the number of challenges to the legality of government decisions brought by way of ordinary civil proceedings was (and remains) unknown. We simply do not know how often government was challenged in the courts prior to the early 1980s and there is no data on this.
15. Secondly, the increase in the scale of judicial review litigation is substantially attributable to immigration and asylum cases. This is recognised by the government and is not an expressly targeted area for reform under these proposals.
16. Once asylum and immigration cases are placed to one side, it is widely recognised that there has been little change in the volume of judicial claims over the last ten years. The graph provided in the consultation document confirms this: the number of judicial review applications in the ‘others’ category (i.e. not immigration and asylum or criminal judicial reviews), have remained static since 2005. In fact, since the mid-1990s the number of

claims has remained fairly stable at the 2000 per annum mark.¹ As Harlow and Rawlings remind us, these numbers are “infinitesimal” compared with the scale of government decision making.² It is quite clear that beyond immigration and asylum, there has been no radical growth in the use of judicial review and quite possibly no increase at all.

17. Furthermore, according to the Ministry of Justice’s own statistics the number of substantive judicial review hearings is steadily decreasing. In 2010 the number of substantive judicial review hearings decreased by 6 per cent on 2009³ and in 2011 the number decreased by 14 per cent on 2010.⁴ This further undermines the government’s blanket assertion that “there has been a significant growth in the use of judicial review to challenge decisions of public authorities” (paragraph 26 of the consultation document).

Low success rate at permission stage?

18. At paragraph 31 of the consultation document the government asserts that only approximately one in six applications for permission to bring judicial review were successful. This statistic is misleading and significantly exaggerates the actual failure rate of claims.

19. The official Ministry of Justice statistics cited divide judicial review applications into three categories: Immigration/Asylum, Criminal and Others.⁵ As neither Immigration and Asylum, nor Criminal judicial reviews are at issue here, we must examine the figures for civil judicial reviews (‘Others’) which include all other categories such as Housing, Education, Community Care, Planning etc. The 2011 statistics on judicial review show that in the ‘Others’ category 2,036 cases were considered for permission of which 1,509 (74%) were refused and 527 (26%) were granted. This shows a success rate at permission of more than one in four and not one in six as presented in the consultation document. The success rate at oral only permission (ie where the judge considering the paper permission application on the papers adjourns it to an oral hearing) is much higher. In research by PLP and the University of Essex, the overall success rate at permission (for all categories) was 30 per cent, whereas the success rate at oral only considerations of permission was 62 per cent, i.e. more than twice that of paper consideration.⁶

20. The government’s analysis also leaves out of the equation the 3,589 judicial review claims that seem to have disappeared between being issued and the permission stage. The Ministry of Justice statistics show that of the 11,200 judicial review cases that are

¹ *The effect and value of judicial review in England and Wales*, V. Bondy and M. Sunkin, to be published Summer 2013.

² Harlow and Rawlings, *Law and Administration*, p.712.

³ *Judicial and Court Statistics 2010*, Ministry of Justice (2011). Available at:

www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf

⁴ *Judicial and Court Statistics 2011*, Ministry of Justice (2012). Available at:

www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf

⁵ www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011, see chapter 7.

⁶ *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, V. Bondy and M. Sunkin, Public Law Project (2009), p.39, para.3.4, fn. 7. Available at: www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf

issued, only 7,611 make it to the permission stage.⁷ The disappeared cases are significant. They make up 32 per cent of the 11,200 issued claims. This is consistent with research findings showing that 34 per cent of judicial review claims are withdrawn after being issued but prior to being considered by a judge for permission. PLP and the University of Essex's research demonstrates that cases are usually withdrawn following a settlement in favour of the claimant.⁸ The high incidence of pre-permission settlements obviously affects the success rates, as many of the strong claims disappear before they reach that stage, leaving the more complex cases, which often include those that raise issues of a wider public interest, to the judges. Furthermore, this data does not include those cases that settle after the permission stage, which is likely to raise the success rate even more.

Judicial review has a negative effect on decision makers?

21. At paragraph 35 of the consultation document the government asserts that the possibility of judicial review "has an undue negative effect on decision makers", rendering them "overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of legal challenge".
22. There are a number of important points to make about this assertion. First, the importance of judicial review in the promotion of good administration and good practice has long been recognised, for example, in the Cabinet Secretary's foreword to the 2006 edition of *The Judge Over Your Shoulder*. This described judicial review as "a key source of guidance for improving policy development and decision-making in the public service."⁹
23. Second, the research shows that the possibility of judicial review has a positive effect on decision making. In *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales*, Sunkin, Platt and Calvo demonstrate that, "rather than detracting from the quality of local government, an increased level of challenge appears to lead to improvements in levels of performance and is therefore helpful to authorities, rather than a hindrance."¹⁰ The report makes two key findings:
 1. All things being equal better performing authorities (as measured by government indicators) were less likely to be challenged than worse performing authorities. This indicates that there is a connection between official measures of quality and the public perceptions of quality. It also suggests that challenge is linked to quality of services and is not unnecessarily stimulated by lawyers.
 2. We also found evidence that authorities improve (at least in terms of the official measures) when the scale of challenge against them increases. We do not know

⁷ *Judicial and Court Statistics 2011*, Ministry of Justice (2012), table 7.12. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf

⁸ *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, V. Bondy and M. Sunkin, Public Law Project (2009), p.33. Available at: www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf

⁹ Available at: www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf

¹⁰ *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales*, M. Sunkin, C. Platt and K. Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009), summary. Available at: <https://www.iser.essex.ac.uk/publications/working-papers/iser/2009-05.pdf>

why this is the case, but it indicates that authorities learn from challenges particularly when the pattern of litigation increases from levels that they have become accustomed to.”¹¹

24. An obvious recent example of this is the collapse of the Government’s decision to award the West Coast rail franchise to First Group. It is clear that that decision – which had been staunchly defended by Ministers – may well have stood had judicial review not been threatened.

Judicial review an impediment to economic growth?

25. Paragraph 34 of the consultation document states that judicial review “comes at a substantial cost to public finances, not just the effort of defending legal proceedings, but also the additional costs incurred as a result of the delays to the services affected. In certain types of cases, in particular those involving large planning developments or constructions where significant sums may be at stake, any delays can have an impact on the costs of the project.”
26. However, it is important that this claim should be seen in the context of the low number of judicial reviews in the planning field. PLP and the University of Essex’s current study of judicial review cases that were dealt with by the court on substantive hearings (as opposed to claims that were issued and/or considered for permission) shows that in a sample of 500 final hearings over a 20 month period there were 44 planning judicial reviews. During 2011 there were 30 planning judicial reviews, of which only six were brought against central government.¹²
27. Other planning matters will have been litigated by way of the specialised planning appeal system, but these are not judicial review claims and reform of the judicial review process would not directly affect these. Moreover, reforms designed to reduce the number of hopeless claims are unlikely to have much effect on the quantitatively few (but qualitatively important) planning matters that will still end up in the Administrative court.
28. More broadly, the evidence does not support the contention that either central government or public authorities are being overwhelmed by judicial review cases. Very few public authorities are challenged more than a handful of times per year. Research on judicial review litigation against local authorities over six years (2000-2005 inclusive) showed that 85 per cent of local authorities only attracted one or two challenges per annum.¹³ Moreover, over half of the challenges to local authorities’ decisions concerned housing-related issues, including homelessness.

¹¹ *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales*, M. Sunkin, C. Platt and K. Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009), summary. See also the case study at p.16-17. Available at: <https://www.iser.essex.ac.uk/publications/working-papers/iser/2009-05.pdf>

¹² *The effect and value of judicial review in England and Wales*, V. Bondy and M. Sunkin, to be published Summer 2013.

¹³ Maurice Sunkin et al, *Public Law* (2007) 545, 550.

29. Aside from local authorities, the other main targets of judicial review are the Secretary of State for Justice, the Secretary of State for the Home Department, the Parole Board and Prison Governors. None of these departments are involved in planning or procurement decisions. Few other central government departments are challenged more than rarely.
30. These data altogether do not paint a picture of a government being overwhelmed by judicial reviews, nor do they support a credible claim that judicial review presents a significant impediment to economic progress.

Judicial review leads to Pyrrhic victories?

31. The suggestion, at paragraph 32 of the consultation document, that some judicial review victories are Pyrrhic because they result in the impugned decision being remitted to the decision-maker and re-made with the same substantive result. This is puzzling, for two reasons:

- (1) The government has not produced any evidence to support the contention that a decision-maker re-taking a decision lawfully will reach the same outcome as it did when it took the decision unlawfully. The judicial review courts routinely decline to order relief where the judge considers that there is no realistic prospect that a reconsidered decision would be taken differently from the decision under challenge. The consequences of intervention by the court are therefore part of the agenda in every successful claim for judicial review. It would be unreasonable for government to proceed on the assumption that success in judicial review cases makes no practical difference to the outcome without firm evidence. The government have not provided any such evidence.
- (2) One of the crucial functions of judicial review is to ensure fair process and transparent and accountable decision-making (see paragraph 22 above). Lawful decision making is an important aspect of the rule of law, and is an end in itself, regardless of whether the substantive outcome of the decision changes. Mark Elliot states, "In normative terms, [judicial review] discharges a constitutionally imperative function by enabling the Government to be held to rule-of-law based standards of good administration and due process. Viewed in this way, there is no such thing as a pyrrhic judicial review victory: every victory – whatever the eventual outcome for the individual – is a victory for the rule of law."¹⁴ It is far from clear, in the absence of any evidence as to the need for change, how and to what extent the Government has measured the benefits flowing from judicial review cases, and the impact on those benefits of the restrictions that are proposed.

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¹⁴ <http://ukconstitutionallaw.org/blog/>

