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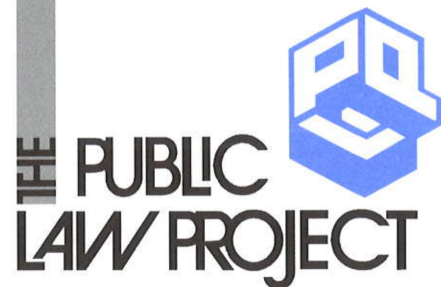

Michael Odulaja
Post Point 4.34
Ministry of Justice
102 Petty France
London
SW1H 9AJ

Your ref:

Our ref:

Date:

Wednesday 23 January 2013

Dear Mr Odulaja,

Public Law Project response to the Judicial Review consultation

The Public Law Project

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

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

3. PLP produces independent evidence-based research in the area of public law. Since its establishment in 1990, PLP has published the following academic reports:
    - *The effect and value of judicial review in England and Wales* (forthcoming: summer 2013) by Varda Bondy and Maurice Sunkin.

[1] PLP Five Year Report 2006-2011, available at: www.publiclawproject.org.uk/documents/PLPReview_06-11web.pdf

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- *Designing redress: a study about grievances against public bodies* (2012) by Varda Bondy and Andrew Le Sueur, the Public Law Project and Queen Mary University of London.[2]
- *Mediation and Judicial Review: A Practical Handbook for Lawyers* (2011) by Varda Bondy and Margaret Doyle, the Public Law Project.[3]
- *Mediation and Judicial Review: An empirical research study* (2009) by Varda Bondy and Linda Mulcahy with Margaret Doyle and Val Reid, the Public Law Project.[4]
- *Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (2009) by Varda Bondy and Maurice Sunkin, the Public Law Project and the University of Essex.[5]
- *Mediation pilot study* (2005) by Varda Bondy.[6]
- *The impact of the Human Rights Act 1998 on judicial review* (2003) by Varda Bondy.[7]
- *Third party interventions in judicial review* (2001) by Deana Smith, Karen Ashton and Professor Lee Bridges.[8]
- *Cause for complaint? An evaluation of the effectiveness of the NHS complaints procedure* (1999).[9]
- *Judicial review in perspective, investigation of the trends in the use and operation of the judicial review procedure in England and Wales* (1995) by Bridges, Meszaros and Sunkin, 2nd ed. Cavendish.

Introduction

4. This consultation document was produced over the Christmas period, leaving only 24 working days for responses. PLP is concerned that a number of individuals and organisations will be unable to provide a considered response in this short time. PLP's concern echoes that of the House of Lords' Secondary Legislation Committee report on the Government's new arrangements for consultation. Page 11 of the report specifically criticises the time allowed for this consultation.[10]

5. PLP's concerns about the restricted time-frame are made all the more profound by the fact that these proposals are largely un-evidenced and un-particularised. The evidence that is provided is predominantly "anecdotal" or impressionistic:
   - 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

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[2] Available at: www.publiclawproject.org.uk/documents/DRM%20Final%20with%20logo%20and%20colour.pdf
[3] Available at: www.publiclawproject.org.uk/documents/MJRhandbookFINAL.pdf
[4] Available at: www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf
[5] Available at: www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf
[6] See: www.publiclawproject.org.uk/MediationPilot.html
[7] Available at: www.publiclawproject.org.uk/downloads/HumRghts_JRRep03.pdf
[8] Available at: www.publiclawproject.org.uk/downloads/ThirdPartyInt.pdf
[9] See: www.publiclawproject.org.uk/CauseFrComplaint.html
[10] www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/100/100.pdf

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 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."

6. The Impact Assessment further demonstrates the absence of evidence:
   - Page 2 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."
   - Page 3 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."

7. As with any consultation exercise, the proposals in the consultation paper clearly fall to be considered by consultees by reference to the evidence on which they are based. In this case, however, objective evidence justifying the proposals is conspicuous by its absence (whether because it does not exist or because the Government has chosen not to publish it). It is submitted that the lack of an objective evidence base for the proposals renders the consultation exercise flawed, and that in order to afford consultees a proper opportunity to submit an informed response, it will be necessary for the Government to publish the evidence-base for the proposals, and then allow a further period of engagement with consultees. These representations are made without prejudice to that contention.

8. The contrast with previous reforms of judicial review reinforces PLP's concern that the present proposals are premature and ill thought out. Previous changes to the Civil Procedure Rules in the judicial review context have been made following expert and lengthy consideration. The current procedure is based on reforms originally made

following recommendations of the Law Commission in 1976. The fundamental purpose of these was to ensure flexible access to public law and its remedies. The procedure was further considered by the Law Commission in its 1994 report, *Administrative Law: Judicial Review and Statutory Appeal,* which made a series of recommendations for reform. This report coincided with Lord Woolf's *Access to Justice* reports. This work was built on in 1999 by Sir Jeffrey Bowman, Chairman of the Review of the Crown Office, who conducted a year-long inquiry into judicial review, culminating in the introduction of the current Part 54 CPR. The Bowman inquiry was supported by a Secretariat and included meetings and consultation with 36 senior judges, court staff, legal practitioners, including the Administrative Law Bar Association, the Immigration Law Practitioners' Association, the Central London Law Society and the Local Government, Planning and Environment Bar Association, the Crown Office Users' Committee and twelve government departments.[11] By stark contrast, these proposals have been devised in haste, subjected to a shortened consultation period over the Christmas period and designed to be introduced "quickly" (see foreword to consultation). Far from being the red-tape cutting exercise that the Government suggests, these proposals go to the heart of state accountability and access to justice. As such, the absence of evidence and expertise is of profound concern.

9. Nothing in the consultation document demonstrates that these proposals will make the civil justice system more efficient, more accessible or fairer. In PLP's view these proposals would have the opposite effect.

10. PLP is concerned about the constitutional propriety of the Lord Chancellor making detailed proposals about changes to the Civil Procedure Rules. The power to make rules for the procedure in the courts vests in the Lord Chief Justice (section 12 and schedule 1 Constitutional Reform Act 2005). The Lord Chancellor has the power to direct the Lord Chief Justice to make rules to achieve a specified purpose. PLP is of the view that these proposals may go beyond identifying 'a specified purpose', and trespass into the rule making power that belongs with the expert Civil Procedure Rule Committee. In this respect PLP endorses the comments made by Lord Woolf, the former Lord Chief Justice, that "[i]n our system, without its written constitution embedded in our law so it can't be changed, judicial review is critical...This marks a departure. If we want to change procedures, normally we do that through our very experienced Civil Procedure Rules Committee backed up by the Civil Justice Council which are both bodies who have got expertise in these matters which the Ministry of Justice have not got. [The Ministry of Justice] would be very well not to get involved in this area [and] leave it to the specialist committees."[12]

Time limits for bringing a claim

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

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[11] *Review of the Crown Office List: A Report to the Lord Chancellor,* March 2000, Annex D. Hereafter "the Bowman Report".

[12] Reported in *The Independent,* 15 December 2012. Available at: www.independent.co.uk/news/uk/politics/woolf-warns-government-over-judicial-review-8420033.html

11. PLP does not agree with the proposals for shortening the time limit for planning and procurement judicial reviews. These proposals appear to stem from three concerns. First, that judicial review is on the rise; second, that planning and procurement judicial reviews are an impediment to economic growth; and third, that the possibility of judicial review causes public bodies to act overly cautiously when making decisions. PLP does not agree with these assertions, none of which is supported by the evidence: see paragraphs 16-28 below.

12. The time limit that currently applies was the subject of a considered recommendation by the Law Commission in 1994, endorsed by the House of Lords in *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330. As is well known, a claim for judicial review must be brought "promptly, and in any event within three months" of the decision challenged. This test is one which the courts are used to applying to do justice according to the different facts of every case. It is very surprising, and a matter of considerable concern, that this simple test is misstated in five places in the impact assessment at page 1, section 3; page 11, point 2.7; page 11, point 2.11; page 9, footnote 5; and page 13, point 2.31. It is not known whether the authors of the impact assessment were not themselves aware of the correct test applied by the courts, but it is clear that it gives consultees an inaccurate and materially misleading depiction of judicial review time limits.

13. Furthermore, PLP is not aware of any evidence to suggest that the current timing arrangements for judicial review do not fairly and effectively balance all competing interests. Where a party has delayed without "very good reasons" (CPR Practice Direction 54A, para.5.1-5.2), the courts can, and do, refuse to allow a judicial review claim to proceed (see Senior Courts Act 1981 section 31(6) and CPR 54.5). It is routine for applications for permission to claim judicial review to be refused because they have not been brought promptly, even though they have been brought within three months. See, for example:
    i. *R (Crown Prosecution Service) v Newcastle upon Tyne Youth Court* [2010] EWHC 2773 (Admin)
    ii. *R v Secretary of State for Trade and Industry ex parte Greenpeace* [1998] Env LR 415
    iii. *R v Chief Constable of Ministry of Defence Police ex parte Sweeney* [1999] COD 122

14. It is not clear from the consultation paper whether the promptness requirement would remain if these proposals were implemented. PLP is of the view that the promptness requirement is an effective way of dealing with cases that have been subject to delay. By contrast, a fixed shortened time limit would not be effective: it would inhibit access to justice, create premature litigation and undermine the efficacy of the Pre-Action Protocol. Furthermore, PLP endorses the observations made by the Citizens' Advice Bureau (CAB) at the Royal Courts of Justice that the judicial discretion to extend time would not be sufficient to cure the problems created by shorter time limits. The CAB's research shows that judges very rarely extend time and therefore relying on judicial discretion will not be sufficient to ensure proper access to justice. In the CAB's experience of assisting litigants in person they are unable to show a single instance of the deadline for a judicial

review application being extended by a judge.[13] It would appear to be, in real terms, the most strictly enforced of the many civil procedure deadlines. There is no reason to assume that this would change if shorter deadlines were imposed, and the unfairness that would result (see further below at paragraphs 29-32; 37-39) would therefore be unmitigated.

15. More broadly, PLP is concerned that the proposals will create confusion and complexity by applying different time limits to different areas of law within the same jurisdiction.

Judicial review is not on the rise

16. PLP is concerned that the genesis of these proposals lies in the Government's unevidenced (and mistaken) view that judicial review is on the rise, based on a number of statistical assertions that do not appear to stand up to scrutiny. 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."

17. These figures are problematic for a number of reasons. Firstly, comparisons with the use of judicial review that go back as far as 1974 are 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. The relief available under the old prerogative orders was very tightly circumscribed, and even when the new judicial review regime was introduced in 1977 plaintiffs continued, until *O'Reilly v Mackman* was decided, to seek declarations and injunctions in ordinary civil proceedings, particularly because there was a more liberal regime there for limitation and discovery of documents. The number of challenges to the legality of government decisions brought by way of ordinary civil proceedings was (and remains) unknown. We do not know how often government was challenged in the courts prior to the early 1980s and there is no data on this. This absence of data was recognised in the Bowman report, where he stated that the information required in order to make proposals with a proper factual basis, was "not readily available and was going to be difficult to obtain."[14]

18. 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. Once asylum and immigration cases are placed to one side, there is no evidence of any significant change in the volume of judicial claims over the last ten years: indeed, it is widely recognised that there has been none. The graph provided in the consultation document[15] supports 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. As Harlow and Rawlings remind us, these numbers are "infinitesimal" compared with the

[13] Moorhead and Sefton, *Value for Money* study (November 2012). Judicial review comprises 9.4% of the CAB's civil cases.
[14] The Bowman Report, *supra*, p.10 para.8.
[15] At page 10, figure 1.

scale of government decision making.[16] It is 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.

19. 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 2009[17] and in 2011 the number decreased by 14 per cent on 2010.[18] 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).

Judicial review is not an impediment to economic growth

- Paragraph 3 of the consultation paper makes the 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."
- Paragraph 7 asserts that "reducing the burden of Judicial Review" will "put in place the right conditions to promote growth and stimulate economic recovery".
- Paragraph 34 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" and paragraph 36 states: "The volume of Judicial Reviews and the delays they cause is not only an issue for the authority making the decision. Delay can affect infrastructure and other projects crucial to economic growth, as well as other private and voluntary sector organisations".

20. These assertions are all wholly unsubstantiated. No evidence is provided either in the consultation document or the impact assessment. Furthermore, the Government admits that "[t]here is only limited information available on how Judicial Review cases progress through the courts" (paragraph 27) and that "we do not currently collect data centrally on these matters" (paragraph 30), while relying heavily on unspecified "anecdotal evidence" (at paragraphs 64 and 79). More specifically, the absence of centrally held statistics on environmental cases has been noted by members of the Coalition for Access to Justice for the Environment (CAJE).[19]

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[16] Harlow and Rawlings, *Law and Administration,* p.712.
[17] *Judicial and Court Statistics 2010*, Ministry of Justice (2011), p.145. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf
[18] *Judicial and Court Statistics 2011*, Ministry of Justice (2012), p.65. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf
[19] See: (1) Civil Law Aspects of Environmental Justice (Environmental Law Foundation) available via the Defra website at: www.dwfra.gov.uk/environment/enforcement/justice.htm; (2) Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal (Macrory and Woods) available online at ucl.ac.uk/laws/env/tribunals/docs; and (3) Ensuring access to environmental justice in England and Wales – Report of the Working Group on Access to Environmental Justice. Available online at: http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf

21. There is no evidence that judicial review is an impediment to economic growth or that it frustrates government policy. On the contrary, Virgin's recent challenge demonstrates that judicial review may be used by business to challenge unlawful regulatory restrictions.

22. The consultation document highlights the use of judicial review in the planning field. In fact, there are few planning judicial reviews. 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 during 2011 there were 30 planning judicial reviews, of which only six were brought against central government.[20]

23. 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.[21] Moreover, over half of the challenges to local authorities' decisions concerned housing-related issues, including homelessness.

24. 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.

25. 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. In the absence of any evidence supporting the existence of such an impediment, let alone quantifying it, there can be no justification for restricting the time limit in planning and procurement judicial reviews. Such a change could not be shown to make the civil justice system more efficient or fairer and would be a disproportionate interference with the right of access to justice.

Judicial review does not make public bodies act cautiously

26. At paragraph 35 of the consultation document the Government asserts that the possibility of judicial review "has an unduly 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".

27. There are several important points to make about this assertion:
    i. No evidence is provided to support it.
    ii. It expresses a view that is contrary to the view expressed in other official statements. The importance of judicial review in the promotion of good

[20] *The effect and value of judicial review in England and Wales*, V. Bondy and M. Sunkin, to be published Summer 2013.
[21] Maurice Sunkin et al, *Public Law* (2007) 545, 550.

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."[22]

iii. It is highly ambiguous: cautious public decision making does not necessarily mean bad decision making.

iv. Research suggests that 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."[23] 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 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."[24]

28. An obvious recent example of this (and one relied on by the Prime Minister in his speech to the CBI as a positive example of judicial review) 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.

Short time limits will disproportionately affect disadvantaged groups and individuals

29. PLP is concerned that shortened time limits will disproportionately affect the ability of people with protected characteristics to access justice. This concern is all the more profound given the Government's acknowledgement 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 110 of the consultation document) and that "there is little collated information about the resolution of those Judicial Reviews brought on grounds to ensure that public bodies

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[22] Available at: www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf
[23] *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
[24] *Ibid.*, summary. See also the case study at p.16-17.

carry out their Public Sector Equality Duties under the Equality Act 2010" (paragraph 111 of the consultation document).

30. PLP is particularly concerned that shortened time limits will have a disproportionate impact on:
    i. People with mental health problems, communication difficulties and learning disabilities, who may find it difficult to understand public authority decisions and may take longer to seek legal advice and prepare a claim;
    ii. People who are detained (for example, in prison or in a psychiatric facility) who may find it difficult to access legal advice and prepare a claim in a shortened time frame;
    iii. Members of black and minority ethnic communities for whom English is not their first language.

Specific concerns about bringing the time limit for planning cases in line with statutory appeals

31. PLP does not consider that it has been demonstrated that the time limits in planning judicial reviews should be brought into line with the time limits for statutory appeals, for the following reasons:
    i. In a statutory appeal, the developer, local planning authority and any aggrieved persons will be personally notified about the decision and their opportunities for appeal. By contrast, individuals and civil society groups with no statutory right of appeal may not be made aware of a decision they may subsequently wish to challenge by way of judicial review.
    ii. It is normal practice that a person bringing a statutory appeal will only need to include a short witness statement exhibiting the decision under challenge (such as the Inspector's Appeal Decision) and the material before the decision-maker relevant to the grounds of challenge. It is rare that additional (or new) evidence is necessary or admissible in statutory appeals. By contrast, judicial reviews frequently require significant evidence and detailed legal argument.
    iii. Statutory appeals do not involve a pre-action process and they proceed on the basis of significantly simpler Civil Procedure Rules than judicial review (Part 8 CPR).
    iv. Judicial review claimants rarely have the resources of the developers and corporations in whom the statutory appeal rights vest. They do not generally have lawyers instructed at the time of the impugned decisions. It is fair and just to provide judicial review claimants with more time to find suitable lawyers, agree funding arrangements, raise sufficient funds and prepare the grounds of their case.
    v. Judicial review claimants bringing public interest challenges to planning decisions would be significantly disadvantaged by shortened time limits because of the funding arrangements that are in place. In cases brought by community or civil society groups, a community contribution is frequently required even where a claimant is legally aided. This means that groups must spend time fundraising before they can issue their claim. This would make it extremely difficult for public interest claimants to comply with shortened time frames.
    vi. The panel of the Legal Services Commission that decides whether or not to fund a public interest case (the Special Controls Review Panel) only meets monthly.

Delay while public interest funding is granted could be fatal to viable claims, since the courts have held that delays caused by public funding difficulties, even where they are not the fault of the claimant, may not amount to a reason for granting an extension of time (see for example, *R v Metropolitan Borough of Sandwell ex parte Cashmore* [1993] 25 HLR 544; *R v Leeds City Council ex parte N* [1999] ELR 324).

Question 2: Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

32. PLP does not think that parties would have sufficient time to fulfil the requirements of the Pre-Action Protocol if shortened time limits applied and considers that the Administrative Court will have to deal with an increased number of cases that could, with more time, have been resolved outside of the courtroom. In PLP's experience, it is sometimes difficult to comply with the Pre-Action Protocol under the current timing arrangements because defendants frequently take considerable time to respond to Pre-Action correspondence. If a short time limit applied, claimants who had only been made aware of the decision under challenge sometime after the decision had been taken would be advised to issue their claim urgently, so as not to be out of time, thereby dispensing with the Pre-Action Protocol.

33. This view finds support from public law academics such as Craig (as well as PLP and the University of Essex's own research[25]), who states:

    "The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit."[26]

34. PLP is concerned that the proposals, if implemented, will mean that many claimants will not have sufficient time to comply with the Pre-Action Protocol and that therefore:
    i. Claimants will issue their judicial review claims before attempting to reach an out-of-court settlement. This will dramatically increase the numbers of applications for permission to bring judicial review in the Administrative Court. This is inimical to the post-Woolf litigation reforms, the objectives of the Civil Procedure Rules and the Pre-Action Protocol.
    ii. Applications for permission to claim judicial review may be more unfocussed, as they will not have been clarified and narrowed-down by the Pre-Action process.
    iii. Preparing cases at short notice will result in an increased cost for both claimants and defendants.

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

[26] P.Craig, *Administrative Law*, 4th edn, p.794.

35. PLP has seen no evidence to change its view that the current rules on timing are adequate and appropriate: they enable parties to comply with the Pre-Action Protocol and do not allow for unjustified delay. By contrast, in PLP's experience, the vast majority of delays occur after proceedings are issued. This could be addressed not by reducing the timescales for lodging an application, but by directing more resources to the Administrative Court to address the backlog.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

36. No. PLP reiterates that no problems with the current timing arrangements for judicial review have been demonstrated. Introducing a shorter time period with a provision for extension:
    i. Would add to the complexity of the procedure (for example by introducing the scope for disputes about the category of each claim, and therefore about what time limit would be applicable); and
    ii. Very importantly, would set a disturbing precedent for the future (restricting access to the court without justifying that restriction by any evidence as to the costs and risks of the proposal and its impact on the public interest (including the interest of disadvantaged sections of the community) in the maintenance of Rule of Law.

37. Furthermore, PLP is concerned that relying on judicial discretion will not be sufficient to mitigate the unfairness that these proposals will create. The research of the Royal Courts of Justice Citizens' Advice Bureau supports this, see paragraph 14 above.

Question 4: Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details.

38. No. PLP reiterates that no problems with the current timing arrangements for judicial review have been demonstrated (see paragraphs 11-15 above). The requirement for judicial review claims to be brought promptly ensures that the parties are not disadvantaged by delay or periods of uncertainty. Shortening the time limits for judicial review, in the absence of any objective evidence, would be a disproportionate interference with the right of access to justice that would affect individuals and groups with protected characteristics in particular (see further paragraphs 29-30 above).

39. By this question, and by the assertion that some judicial review victories are Pyrrhic (paragraph 32 of the consultation document), PLP is concerned that the Government has failed to recognise the constitutional importance of judicial review in holding the state to account and promoting good governance. The suggestion that judicial review victories may be Pyrrhic is of concern in two respects:
    i. 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.

ii. One of the crucial functions of judicial review is to ensure fair process and transparent and accountable decision-making. 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. The academic 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."[27] We do not contend that the Rule of Law would necessarily justify "pyrrhic victories" if that were indeed the norm (in PLP's experience, it is not), but in any proper consultation exercise of the sort now being undertaken, the Rule of Law, and any proposal that impacts on it, must be treated as matters of constitutional importance: any evidence as to the need for change (to date unparticularised) must be weighed against the benefits flowing from judicial review cases (so far unquantified) before any consultation exercise can be said to do the subject matter justice.

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

40. PLP does not understand the meaning of the proposal in question 5. The consultation paper does not identify the problem that this proposal is designed to address, nor does it engage with the extensive case law in this area and the reasons the courts have given for allowing judicial reviews of on-going and/or multiple decisions to proceed. PLP is unaware of any problems in this area and is concerned that the proposals seek to overrule case law (some of which comes from the House of Lords, as it then was) by way of a rule change. PLP notes that this proposal is based solely on the unspecified "anecdotal evidence" referred to in paragraph 64 of the consultation document. Furthermore, PLP is of the view that the requirement to bring judicial review cases promptly ensures that cases are not allowed to proceed where there has been unjustifiable delay (see paragraphs 11-15 above).

41. PLP has a number of concerns about this proposal:

i. On one interpretation of this proposal, it will lead to public authorities benefitting from the gravity of their errors. PLP is seriously concerned that this proposal would mean that public authorities would escape judicial scrutiny if their unlawful acts or

[27] http://ukconstitutionallaw.org/blog/

omissions lasted for more than three months. For example, if a person is unlawfully detained for 24 months, would their judicial review of the on-going decision to detain them be out of time? If a person was denied the community care provision that they were entitled to for a year, would the judicial review of the on-going refusal to provide the care be out of time? Would the claim be more and more out of time the longer the unlawful detention lasted or the community care was withheld? These examples demonstrate the absurdity that this proposal would lead to, which would be bound to result in increased litigation. Furthermore, this approach would be contrary to the principles of good administration and the Rule of Law.

ii. It is not clear what impact this proposal would have on challenges to government policy and secondary legislation. On one interpretation, an unlawful government policy or piece of secondary legislation will not be amenable to challenge by judicial review if it has been in existence for more than three months. If a person has been affected by the unlawful policy for more than three months, they may be out of time to challenge it. This would effectively oust judicial review from challenging unlawful policies and legislation, which is contrary to good administration. In this regard, paragraph 51 of Lord Hope's judgment in the recent case of *AXA General Insurance Limited* [2011] UKSC 46, is pertinent: "It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."

iii. It is not clear how a claimant should or could determine the date when an omission arises. This will lead to confusion and increased litigation.

iv. Claimants subject to an on-going unlawful act, or to an unlawful omission, will be at a disadvantage compared with claimants challenging a one-off unlawful act. This will introduce significant and unjustifiable unfairness to the civil justice system.

v. As is anticipated by question 6, many claims will be issued protectively so as to ensure that the time limit is not breached. This is inimical to the post-Woolf litigation reforms, the objectives of the Civil Procedure Rules and the Pre-Action Protocol. It will unnecessarily burden the courts and render the system more inefficient.

vi. This proposal would have the effect of encouraging judicial review litigation at an early stage. This is contrary to the principle that judicial review is a remedy of last resort, as is recognised in the consultation document itself (paragraphs 14 and 28).

vii. This proposal is at odds with the position under discrimination law and human rights law. In discrimination law, a victim of discrimination may bring a claim within three months of the last act of discrimination complained of. In human rights law, the European Court of Human Rights has held that a victim of a human rights abuse will be within the six month time limit if the breach is on-going. No justification for applying a separate rule in the context of judicial review proceedings has been provided and in PLP's view no such justification exists.

viii. The uncertain meaning of this proposal offends the principle of legal certainty enshrined in EU and human rights law.

42. PLP repeats its concern about the constitutional propriety, under the Constitutional Reform Act 2005 section 12 and schedule 1, of the Lord Chancellor 'inviting' the Civil Procedure Rules Committee to make such specific changes to the CPR (paragraph 65 of the consultation document), see further paragraph 10 above.

43. PLP reiterates its view that the genesis of this proposal is in the Government's mistaken opinion that judicial review is on the rise: see paragraphs 16-19 above.

Applying for permission

Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

44. PLP does not consider that the need for these proposals has been demonstrated nor does PLP agree with them in principle. PLP does not understand the meaning of "prior judicial hearing" and in the absence of a properly particularised and explained proposal, PLP's ability to provide a detailed response is necessarily limited. It is not clear in what circumstances a "prior judicial hearing" would preclude a renewed oral permission hearing. For example, where a coroner decides, after oral argument, that an inquest is not an Article 2 ECHR inquest, would a party be able to orally renew their application to judicially review that decision? Or would an oral renewal be unavailable because the coroner had considered the issue? If the consequence of this proposal is that an oral renewal would not be available in these, or analogous, circumstances, PLP is concerned that the proposal would represent a serious restriction on the right of access to the court which has not been justified by any evidence, or any consideration of the important competing considerations (see paragraphs 38-39 above). If this is not the consequence of this proposal then PLP does not understand its meaning or application, and seeks further clarification before taking a view.

45. The definitional difficulties with this proposal would, if implemented, almost certainly lead to satellite litigation with associated cost implications and delays. Whatever its meaning, the Government has failed to give any evidence of what mischief this proposal is designed to meet. There is not, for example, any evidence of how many claims would fall into this category. This is admitted by the Government in the impact assessment: 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." In the absence of such evidence, any abrogation of the right of access to the court is disproportionate.

46. The consultation document states that "few cases stand any prospect of success" (paragraph 72), asserting at paragraph 31 that only around one in six applications for permission to claim judicial review were granted permission in 2011. This is given as the rationale for limiting the right to an oral renewal hearing. However, this statistic is misleading and significantly exaggerates the actual failure rate of claims.

47. The official Ministry of Justice statistics cited divide judicial review applications into three categories: Immigration/Asylum, Criminal and Others.[28] 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 (i.e. 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.[29]

48. 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 issued, only 7,611 make it to the permission stage.[30] 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.[31] 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. In light of this, the rationale for limiting the right to an oral renewal hearing falls away.

49. The significance of the right to an oral renewal hearing in the judicial review context was recognised by Sir Jeffrey Bowman in his 1999 report: "The initial refusal of permission on the documents is open to renewal as of right to an oral hearing; because of this, and in

[28] www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011, see chapter 7.
[29] '*The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing,* V. Bondy and M. Sunkin, Public Law Project (2009), *supra,* p.39, para.3.4, fn. 7.
[30] *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
[31] '*The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing,* V. Bondy and M. Sunkin, Public Law Project (2009), *supra,* p.33.

the light of the points raised above, we do not believe that the permission stage constitutes a significant barrier to justice."[32] It follows that removal of the right to an oral renewal will constitute a significant barrier to accessing justice.

50. Furthermore, the proposal fails to recognise the importance of oral hearings in the English and Welsh justice systems and their role as a safeguard to ensure that arguable cases proceed. This was emphasised by Lord Justice Laws in *Sengupta v Holmes* [2002] EWCA Civ 1104, where he stated at paragraph 38:

    "He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."

51. The importance of the oral renewal is demonstrated by the greater success rate that permission applications have when they are heard orally: over twice as many oral claims are granted permission as are paper claims. In PLP and the University of Essex's sample of cases, the success rate of oral only permissions was 62 per cent.[33] The removal of this right for issues which have been subject to a 'prior judicial process', is disproportionate and unfair, particularly in the absence of any evidence as to why this measure would make the justice system fairer or more efficient.

52. PLP is also of the view that the removal of the right to an oral renewal in the Administrative Court will simply result in a greater number of applications being made to the Court of Appeal.

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as totally without merit, there should be no right to ask for an oral renewal?

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

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[32] The Bowman Report, *supra*, p.64 para.13.

[33] '*The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, V. Bondy and M. Sunkin, Public Law Project (2009), *supra*.

53. PLP does not agree with these proposals. The consultation paper fails to provide any evidence that there is a problem with the oral renewal procedure and PLP does not think that a problem exists. There is not, for example, any evidence of how many claims would fall into this category. This is admitted by the Government in the impact assessment: 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." In the absence of such evidence, any abrogation of the right of access to the court is disproportionate. Furthermore, the Administrative Court already has powers to deal with vexatious litigants whose claims are an abuse of process (for example, by imposing a civil restraint order under CPR 3.11, or by striking out a case under CPR 3.4). No evidence is provided as to why these powers are insufficient.

54. PLP does not agree that the judicial review process is subject to widespread abuse (paragraph 2 of the consultation document), and nor does the Government provide evidence to demonstrate that it is. When PLP and the University of Essex examined the comments made by judges refusing permission we found that it was relatively unusual for judges to state that claims had been refused because they were hopeless or totally without merit. In our research we found, for instance, that in 104 civil claims (excluding immigration and asylum) where judges gave observations, only 12 cases were said to be hopeless or without merit or perverse. One such case was successfully renewed by a litigant in person and went on to succeed at the final hearing (*Leyton v Wigan County Council* (Co 7428)). A further example is the Friends of the Earth's "solar tariffs case[34]" in which the Administrative Court refused permission on the papers on the basis that the case had was without merit but permission was granted after an oral renewal hearing. Further examples include:
    i. Masuku v SSHD (unlawful detention claim) was certified as totally without merit. The claimant's solicitors renewed the application to an oral renewal. Two days before the oral permission hearing, the Secretary of State conceded permission and released the client from detention
    ii. *Moussaoui v SSHD* (challenge to refusal to grant leave under the Legacy Programme) was certified as totally without merit. Before Court at the renewal hearing, the Secretary of State agreed to reconsider her decision not to grant leave. Although permission was not formally conceded or granted, the Claimant essentially got the relief that he was seeking in the reconsideration of the decision.

55. These examples demonstrates that removing the right to an oral renewal where a judge has deemed a paper application as being totally without merit will result in arguable cases being unable to proceed. This is inimical to good administration, the Rule of Law and access to justice.

56. PLP reiterates that the rationale for this proposal – that only one in six applications for permission succeed - is unsound: see paragraphs 46-48 above.

[34] *R ((i) Friends of the Earth (ii) Solar Century (iii) Homesun) v Secretary of State for Energy and Climate Change* – CO/11091/2011

57. Furthermore, the proposal fails to recognise the importance of oral hearings in the English and Welsh justice systems and their role as a safeguard to ensure that arguable cases proceed: see paragraphs 49-51 above.

58. PLP is also of the view that the removal of the right to an oral renewal in the Administrative Court will simply result in a greater number of applications being made to the Court of Appeal.

Fees

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

PLP does not propose to answer questions 14 and 15.

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

59. The Government admits that it has insufficient information to assess the equality impact of these proposals:
    - Paragraph 110: "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: "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."

60. Without this evidence, PLP does not see how the Government can proceed with these proposals in a way that complies with its equality duties. PLP does not have comprehensive research in this area and it is incumbent on the Government to carry out its own assessment of the equality impact of these proposals.

61. In PLP's view these proposals would have a significant and disproportionate impact on people with protected characteristics (see further paragraphs 29-30 above). First and foremost, the impact on people from black and minority ethnic groups will be high: immigration and asylum applications form over 80% of judicial reviews and most of those will have been brought by individuals from a minority background. But even when this class of case is excluded (and as has been noted above, these reforms are not directed at asylum and immigration judicial reviews), people with protected characteristics are likely to make up a significant proportion of affected claimants. In this regard, PLP endorses the consultation response from Community Law Partnership that the proposals for shortening time limits in planning cases are likely to have a disproportionate adverse

impact on Irish Travellers and Romani Gypsies, who are both recognised as an ethnic group under the Equality Act 2010.

62. These proposals would also have a disproportionate effect on people with disabilities, and people with mental health problems and learning disabilities in particular. These individuals need more time to gather the information necessary to bring a judicial review challenge and would undoubtedly be disadvantaged by shorter time limits.

We urge the Government to take these proposals no further.

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

Yours sincerely,

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