Consultation Response by the Police Action Lawyers Group

Introduction to the Police Action Lawyers Group (PALG)

PALG is a national organisation comprised of solicitors, barristers and legal executives who represent complainants against the police throughout England and Wales.

PALG members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, judicial review and compensation claims. In many circumstances, litigation through the civil courts can be the only means by which complainants are able to enjoy any access to justice and thereby to defend their civil liberties in the face of malpractice on the part of officers of the state. PALG members hope that by upholding our clients' rights and highlighting poor practice, improvements will be made to police services and other state authorities against whom our clients bring claims.

PALG members have been involved with numerous notable police complaint cases, civil claims and inquiries. These cases typically involve allegations of false imprisonment, assault and malicious prosecution (often aggravated by discrimination), but are not limited to such work. Some of the most distressing cases we deal with are on behalf of families whose relatives have died in police custody. Many of our members are also active within the INQUEST Lawyers Group.

We were established in 1991 and meet every three months. Our meetings take place in London, are open only to members, and video links for members in other regions are set up at their request.

PALG grew out of a desire to share information & expertise, and to ensure that complainant lawyers did not feel they were working in isolation. This was achieved by establishing regular meetings to discuss complainants' concerns and developments in police law & practice.

Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of complainants against virtually every force in England and Wales. Membership is contingent on lawyers only acting for complainants, to ensure that we provide a wholly independent space to discuss complainants' concerns.

All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome for our clients, many of whom have suffered the most serious abuse at the hands of the police.

As a group we have also been in a position to liaise with other organisations representing complainant interests, including INQUEST, Liberty, Justice and MIND. We have also developed a lobbying role, particularly in relation to the police complaints system. To that end our members have attended before Select Committees, met with Ministers, and prepared regular briefings.

More information can be found on our website[1].

Judicial Review and actions against the police

Our fundamental position is that the government's proposals, if implemented, would have a hugely detrimental impact upon access to justice and the rule of law. The government has simply failed to make the case for change. The numerous criticisms of claimant lawyers and the current system made within the proposals are, as highlighted below, either

[1] http://www.palg.org.uk/

ill-founded assumptions or demonstrably incorrect- in many cases even on the statistics set out within the proposals.

Further, we consider that the proposals are plainly premature with a number of changes having recently been implemented and with their effects not yet being fully felt: see the reduction of funding for such cases introduced by the Legal Aid, Sentencing and Punishment and Offenders Act 2012 (LASPO); the introduction of the "without merit" test and fees for an oral renewal hearing arising from the last consultation; and, hugely significantly, the transfer of immigration and asylum judicial review cases to the Upper Tribunal which does not take place until the deadline for providing responses to this consultation has passed.

In the circumstances we urge the government not to proceed with these proposals.

We now address the questions set out within the consultation paper.

Planning

Questions 1-8 do not apply to our clients.

Standing

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

No.

The government makes a number of assertions in the foreword to the Proposals, including that *"the use of judicial review has expanded massively in recent years and it is open to abuse."* It cites concerns *"about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made"*, and that this is *"unsustainable, particularly when the judicial reviews are brought by groups who seek nothing more than cheap headlines"*, although no examples of such cases are provided.

PALG shares the widely-expressed concerns over the adequacy of data relied upon by the government in support of its proposed reforms, not least because the figures cited are over-inflated by the inclusion of immigration/asylum judicial review claims which, as they are now to be dealt with by the Upper Tribunal, are irrelevant to this consultation.

Bondy and Sunkin[2] note that the figures relied on in this consultation in fact show that there has been no significant increase in the number of non-immigration/ asylum judicial review claims since 2007. Their analysis of

[2] V. Bondy and M. Sunkin, 'How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform', UK Const. L. Blog (26th October 2013) (available at http://ukconstitutionallaw.org)

empirical research undertaken by the Public Law Project and the University of Essex suggests that the purported concerns about the volume and associated costs of non-immigration/asylum claims are exaggerated and simply not borne out by the data.

Similarly, the government's focus on prohibiting judicial review claims brought by claimants *"without a direct or tangible interest"* appears to be misplaced. It is suggested in this consultation that there are around 50 such claims lodged each year; however it is conceded at footnote 38 that the figures relied on are "*[b]ased on a manual analysis of case level information" and that "[d]ue to uncertainties in recording and interpretation this analysis is largely illustrative*."

Whilst this figure itself is not particularly high in any event, Bondy and Sunkin found that the actual number is likely to be much lower. After excluding environmental challenges and the EHRC from their data, they were able to identify just four final hearings between July 2010 and February 2012 in which the claimant had no direct and tangible interest.

In addition to this, the government acknowledges that these types of claims are more likely than others to be successful at each stage of proceedings, including at final hearing. This will often be because the claimants bring with them the necessary knowledge and expertise to assist the court in its decision. Attempts by the government to prohibit claims that are proportionately more likely to demonstrate illegality by the State will of course bring in to question the motives for such proposals.

NGOs, charities and public interest groups play a vital role in holding the state to account on behalf of the vulnerable and disenfranchised who, for various reasons, may not be able to effectively pursue judicial review claims themselves (see, for example, the following cases: *Children's Rights*

Alliance for England v SSJ [2012][3]; *Child Poverty Action Group v SSDWP* [2013][4]; and *Medical Justice v SSHD* [2010][5]*).* In the first of these, Foskett J pertinently noted on the issue of standing that:

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

Furthermore, in circumstances where the government has already imposed a direct interest requirement on publicly funded claimants, the role of groups and public interest litigants will necessarily take on even greater significance. If such claims are prohibited, the court can expect an increase in the number of litigants in person and a consequent an increase in delays and costs.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

For the reasons set out above, it is our opinion that the existing 'sufficient interest' test is appropriate, and that an amended test for standing based on any of the existing alternatives would be unreasonable, unjustifiable and unconstitutional.

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

We do not believe that there is in fact a problem of judicial review being used as a campaigning tool and the government has not adduced any or sufficient evidence in support of this assertion.

3 EWHC 8 (Admin)
4 EWHC 2616 (Admin)
5 EWHC 1925 (Admin)

Procedural Defects

Option 1 - Bring forward the Consideration

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

[Re: Questions 12-16]

No.

We see no reason for legislative interference in the existing system and have seen insufficient evidence in support of proposed change. The court has devised and implemented an effective 'no difference' test, which it is open to a defendant to rely upon in its Acknowledgment of Service at the permission stage. The current threshold of inevitability is appropriate, enabling the court to refuse permission where it is clear that the procedural defect would have made no difference to the outcome. In respect of claims where the impact of the procedural defect is less clear, full consideration of the issue ought to be undertaken at a final hearing once all the relevant evidence has been obtained and made available to the court.

The government accepts that front-loading these claims by requiring what is effectively a substantive oral hearing at the permission stage *"may add to the length and complexity of [that stage] and consequently the whole proceedings if permission is granted."* First, this is inconsistent with the government's purported concerns about the spiralling volume and costs of judicial review claims. Secondly, if this reform were to be implemented, it would be incumbent upon the government to revisit its earlier proposal that legal aid providers only be guaranteed payment for their work where permission is granted by the court.

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress

rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

See above- addressed at Question 12

Option 2 – Apply a lower test

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

See above- addressed at Question 12

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

See above- addressed at Question 12

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

See above- addressed at Question 12

The Public Sector Equality Duty and Judicial Review

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

The proposals contain no evidence to support an "alternative mechanism" for resolving PSED disputes.

We note the observations of the independent Steering Group[6] that claims for judicial review relating to the PSED have been brought alongside a number of additional heads of claim, and as such those claims would likely have been brought in any event and irrespective of the duty. It would thus appear artificial and illogical to prevent PSED being relied upon as a head of claim.

We are concerned at the Steering Group's findings that inadequate Guidance has been provided to relevant bodies to effectively and appropriately direct their application of the PSED. We believe that this needs to be swiftly addressed, and that disputes relating to the PSED ought to be much less likely to arise in circumstances in which there is full and clear understanding of its operation and requirements.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

We do not have comprehensive evidence of the volume and nature of PSED-related challenges. We have seen no evidence of any problems with such challenges.

Rebalancing Financial Incentives

Paying for permission work in judicial review cases

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

No.

We strongly oppose the proposals in relation to payment of costs following permission, putting providers 'at risk' on this work.

[6] https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response

The proposals fail to properly address the statistical evidence or consider the effect the changes will have on meritorious cases and on the ability of lawyers to continue working in this area of law.

The timing of the consultation is also of concern, coming so swiftly after the implementation of LASPO. In fact the Government initially made these proposals before the effects of LASPO had even taken effect. For example, exercise of devolved powers is now no longer permitted for judicial review claims. The government has not allowed any time to assess the impact of this change prior to consulting on further drastic limits to the funding of JR cases.

These proposals target the only group of litigants in judicial review proceedings who are subject to any real scrutiny before being allowed to proceed with a claim. A claimant in receipt of legal aid to pursue a judicial review has had their claim considered by an expert lawyer (working at a firm which has been deemed suitable to be allowed a contract to carry out the area of work in question) who has certified its merits, by way of completing and signing the appropriate application form. The application is then considered by a caseworker and/or lawyer at the Legal Aid Agency (LAA), who in the case of actions against the police work, is part of a dedicated team who have expertise in this area of law. The targeting of these claimants alone is clearly unfair and irrational.

At paragraph 123 of the consultation it is submitted that "*the provider is well placed to make an informed judgment as to whether the permission test is met*". That statement does however betray a lack of understanding of the position of claimant lawyers. Public law legal aid providers are well able to assess the merits of a given case and whether it has prospects of meeting the permission test, and/ or is of great public interest and wider importance. The decision as to whether the test *is* met and permission

should therefore be granted is for the court. As Sir Stephen Sedley pointed out[7]:

> *"The superficially attractive reason [for the proposal] is that it will inhibit the making of long-shot or speculative claims at public expense, but it is supported by no evidence, and the argument advanced in support of it – that the claimant's lawyer 'is in the best position to know the strength of their client's case' – displays a depressing degree of ignorance about how judicial review works."*

Due to the tight time limits for bringing a claim it is not uncommon for a defendant to respond only at the last minute, or not at all, and then may fail to (or be unable to) provide the documents necessary for a claimant to make a full and proper assessment. Judicial review is always an action of last resort and in such circumstances, if a claim is not issued within 3 months (the CPR specifically precludes the parties from extending the time limit[8]), any possible remedy for the claimant will in the vast majority of cases be permanently lost, regardless of the ultimate merit of the claim.

For example, when the Independent Police Complaints Commission (IPCC) publishes its findings (either the conclusions of its own investigation or findings on appeal), the complainant is entitled to the documents and statements relied upon in reaching those conclusions. These documents are often in the control of the police, who are usually given the opportunity to review these documents in order to assess whether any information must be redacted on the grounds of public interest immunity. Such a process, even in a relatively small investigation, will often take months. Where the information is disclosed before the time limit, it may be so heavily redacted that it is impossible even then to properly assess the claim.

[7] Beware Kite-Flyers, Stephen Sedley, London Review of Books, Vol. 35 No. 17 · 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers
[8] Rule 54.5(2)

Whilst the pre-action protocol procedures go some way to assist the claimant in assessing the prospects of the claim, the reality is that the claimants are inevitably in a position of some uncertainty when bringing a claim.

The legal aid system is in place in order to ensure those with the least means are able to access legal representation. The state acknowledges the importance of certain areas of law and certain fundamental rights of all individuals. The government's own lawyers point out that the rigour to which legally-aided claimants are already subjected is not reflected in the limits imposed on defendants. In an open letter to the Attorney-General on 4 June 2013, the government's own lawyers, based on the statistical evidence and on their own experience defending such claims, disputed that legal aid was being granted in a significant number of unmeritorious cases. [9]

All litigation carries risk; no claim is certain. This is even more the case in the field of judicial review, where the individual bringing the claim is inevitably at a disadvantage. However, where the claimant is a legally-aided person (and in contrast to privately-funded claimants or litigants-in-person) they are required to make out their case to a lawyer and then to the LAA.

The LAA statistics that the government seeks to rely upon show that (in 2011-12) of the 4,704 cases funded by legal aid, only in 515 was the claim not settled, permission refused, and a record made of "no substantive benefit to the client". This is an effective success rate of 87%.

Such figures would in fact strongly suggest that the provisions already in place, including the merits test by the LAA and the assessment by the claimant lawyer, are in fact exceptionally effective.

[9] http://legalaidchanges.wordpress.com/2013/06/06/46/

The fact that judicial review is also of profound importance to the effectiveness of our democracy and the upholding of the rule of law would mean that, even on the Government's own statistics, such a high success rate shows that the measures currently in place work are working effectively and strike the right balance between effective use of court time and protecting the rights of individuals to hold the state to account.

The alternative is to seriously risk a 'chilling effect' on judicial review, potentially leaving (on the 2011-2012 figures) up to 3559 wrong, unlawful or irrational Government decisions unchallenged, the law untested and the Government able to continue to act in a manner entirely incompatible to the rule of law.

To bring in the changes to funding for the permission stage in effect punishes both the lawyers who carry out such fundamental work, and those in society who do not have the means to pay their own lawyers.

As Treasury Counsel state in their open letter:

> *"To require that even cases which meet a merits test will nevertheless be conducted at risk for a significant part of the proceedings is to create a fundamental asymmetry. The same applies to the possibility of funding important, but uncertain, cases."*[10]

The nature of judicial review means that much of the work is front-loaded. That is, that the work done prior to issuing the claim is, for the solicitor especially, a large part of the work that will be done on the case. The process is designed to be quick and for the court to be able to make a decision quickly (relatively speaking, in comparison with standard civil litigation). The claimant is asked to present all documents and evidence they rely upon at the permission stage. It is not a mere administrative

[10] ibid

hurdle regarding the 'merits' of the case; it is a substantive argument on law, the answer to which is decided by the court and not the provider.

The consultation also fails to consider the increased administrative and legal work done by the LAA in dealing with the secondary applications for payment, considering those claims where permission has not been granted but where payment ought to be made, further internal reviews and potential legal challenges to decisions.

As the government's own lawyers state, the proposed changes are essentially a cut in rates of pay.[11] Adding to this burden is the unpaid work undertaken in making a *further* application (on top of the standard application for funding) for payment. Even where a case has to all intents and purposes been won, the provider will be forced to undertake unpaid work in order to justify why they should be paid. This will not be a purely administrative task, but a legal argument about the benefit to the client as well as costs principles. A refusal gives rise to a right of review (and therefore further unpaid work) before costs might be paid.

This inevitably creates further work for the LAA in processing and assessing these applications, undertaking reviews and the possibility of legal challenges to their decisions.

We support the comments made by the President of the Supreme Court, Lord Neubeurger, who addressed the proposals in a recent lecture:

> *"(i) The cause of the delays complained of is largely historic, thanks to the very recent removal of asylum and immigration cases from the Administrative Court to the Upper Tribunal, which the judges proposed in 2009. (ii) Cutting down time limits for JR applications may actually increase the work, due to rushed applications and many more requests for extensions of time. (iii) The cost-cutting proposals risk deterring a*

[11] ibid

significant number of valid applications, and will save a pathetically small sum."[12]

It is far from clear that the proposed changes to payment pre-permission will save costs and yet they do clearly threaten access to justice within a vital part of our constitutional and democratic framework. In fact, there is a strong case for such drastic changes to be assessed by an independent body, so serious are the proposals being changed.

It would only be proper that an independent body be given powers to review these proposals as they are in effect being made by the defendant in order to change the fairness of the system in its own favour. It would plainly offend the principles of justice, equality of arms and the rule of law for such fundamental constitutional changes to be put in place by one of the parties to the claims.

In their response to the previous consultation on changes to judicial jeview, the Bingham Centre warned that *"Countries without the rule of law stack the odds in favour of governmental decisions which are difficult or impossible genuinely to question"*. [13]

By taking away the 'threat' of JR, defendant public bodies will in effect be able to act with immunity, particularly those bodies whose decisions disproportionately affect members of society who are likely to require legal aid funding.

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

[12] Lord Neuberger, "Justice in an age of Austerity", Tom Sargant annual memorial lecture, 15 October 2013, para 52 www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf
[13] http://www.biicl.org/files/6304_moj_jr_consultation_-_bingham_centre_response_23_1_2013_final_final.pdf

We appreciate that the Government has taken into account the responses to the first consultation in providing exceptions to the rule that there will be no payment where permission is refused. We are however entirely opposed to the changes to the funding for the reasons outlined above in response to question 19.

It is also concerning to note that the proposals take no account of the conduct of the defendant in proceedings, for example, the late (or entire absence of) disclosure on the part of the defendant; or, failure to comply with the pre-action protocol.

The list leaves no room for discretion for exceptional cases, nor does it appear to take into account in any way the unique nature of judicial review and the potential for wider benefit of such claims.

We have argued above that the measures are already in place for the LAA to assess the merits of a claim before granting funding and that these measures are proven to be more than satisfactory on the statistics provided within the consultation. The government, in seeking these changes, suggests that the LAA is not equipped to make that judgment, and yet in the second stage of the proposed process, argues that the LAA is in the position of deciding whether permission would have been granted had it reached that stage.

The proposals would add an unnecessary administrative layer to the process. The government has failed to account for how such work would be costed and accounted for within the budget, and the savings they claim will be delivered by these changes.

We do not believe that the government will achieve any real savings, given the proposed criteria and the work required to assess each application. It is our view therefore that the proposals are misguided.

Costs of oral permission hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

There already exists a great number of difficulties and deterrents for the proposed claimant in judicial review. Any further risk of costs at the permission stage will only serve as a further deterrent in an area which is vital in ensuring the proper accountability of public bodies (and in which those bodies already benefit from the permission stage in providing protection from unmeritorious claims).

Wasted Costs Orders

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

It is unnecessary to modify or extend the current approach to wasted costs orders. The current provisions allow such orders to be made following consideration of a three part test: i) had the legal representative acted improperly, unreasonably or negligently? ii) if so, had the applicant incurred unnecessary costs? iii) was it just in all the circumstances to order the legal representative for whole or part of the relevant costs? We submit that this test is sufficiently stringent to enable the courts to compensate for the most serious of conduct failings of a legal representative.

It is difficult to envisage any other type of behaviour that should require a legal representative to compensate a party other than that which can be described as improper, unreasonable or negligent. Indeed, such a test already sanctions a legal representative who assists with proceedings that are an abuse of process. It would be too far reaching and too significantly chilling on the provision of legal advice and assistance to the wider public were the test to encompass a wider range of behaviour than the most

serious, as are currently considered. The fact that they are rarely awarded emphasises that they are reserved for the most serious situations which are, themselves, uncommon. Were wasted costs orders to be introduced as a regular consideration in all cases where a claim fails, leading to a retrospective assessment of the merits, the ability of legal representatives to freely advise and the ability of claimants to challenge decisions would be profoundly curtailed. It is disingenuous of the government to suggest that, simply because a claim fails, the legal adviser may have failed or neglected to properly weigh up the strengths and weaknesses of the challenge. As highlighted in Treasury counsel's letter to HM Attorney-General of 6 June 2013, it can be extremely difficult to achieve certainty on the outcome of any claim.

Furthermore it is clear from Treasury counsel's letter[14] that the government often instructs them to act despite their advice being that the merits are poor: "*most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%.*"

In addition, it is simply unnecessary to extend wasted costs orders to "*rebalance the financial incentives which contribute to claimant's decisions whether or not to bring and pursue applications".* There are, in addition to the current provisions for wasted costs orders against legal representatives, adequate provisions in the CPR[15] for the conduct of the parties to be considered and costs sanctions applied at the court's discretion. CPR 44.3(5) specifically states that the court can consider the reasonableness for a party to pursue an issue and the manner in which it was pursued.

Sufficient safeguards are already in place to ensure that both parties and their legal representatives conduct themselves properly and in a manner that allows them to present their case. Widening the test for wasted costs

[14] Treasury counsel's letter responding to the proposals dated 4 June 2013
[15] Rule 44.3

orders, with, apparently, only claimant representatives in mind, would unequally and unnecessarily burden potential claimants seeking to challenge government decisions.

We therefore submit that the current test for making a wasted costs order against a legal representative is appropriate, should remain the position and should not be extended.

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

While we agree that the procedure for considering an application for a wasted costs order should be proportionate, both in relation to the value of the wasted costs and the substantive proceedings, we would argue that a process of routinely considering the application on the papers would fail to reflect the gravity of the sanction and prevent the serious issues in question from being determined fairly.

The purpose of an application for wasted costs is not to allow the court to investigate, to any great extent, a legal representative's conduct. It is to request a remedy where the conduct is relatively obvious and, consequently, the additional costs incurred are able to be specifically attributed to that conduct (*Tolstoy-Miloslavsky v Adlington* [1996][16]). We agree that the costs of attending an oral hearing should not routinely be disproportionate to the wasted costs or the substantive proceedings but we are of the view that the court already have provisions for enforcing this. Indeed the CPR[17] already allows for the court to give directions about the procedure to be followed in each particular case to ensure fairness and simplicity.

[16] 1 WLR 736
[17] 48.4PD

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

The court gives directions about the procedure to be followed upon an application for wasted costs being made. Should the court determine that a hearing is necessary because a legal representative wishes to give reasons opposing the order we do not agree that the legal representative should pay a fee in order to be heard as a result of that application.

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

For the reasons given above, we do not think that the wasted costs provisions require any amendments nor should they be extended.

Protective costs orders

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

If PCOs were no longer available in any case where there is an individual or private interest, legitimate and significant issues of wider public interest will be prevented from being considered by the courts. The government proposes to prevent PCOs being available purely because a private interest exists with no attempt to consider the courts' approach of assessing the issues of public and private interest in each case; which are seldom simple to distinguish. The law in this area has been developed by the courts specifically in order to allow claimants with issues of wider public interest to put them before the court, in opposition to well funded government departments.

The grant of PCOs has been vital in cases concerning important public issues including *R (Medical Justice) v SSHD* [2011][18], where the Home Office policy of deporting people with less than 72 hours notice was successfully challenged.

The government has not highlighted one case in support of its assertion that "*this expanding approach has tipped the balance too far and now allows PCOs to be used when the claimant is brining a judicial review for his or her own benefit."*

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

The very purpose of PCOs is that they do ensure a better balance between the parties. A court must satisfy itself that the PCO is required having regard to the financial resources of the parties and the likely costs involved.

Claimant organisations that have been granted PCOs include Medical Justice and Child Poverty Action Group and are typically charity and/or not for profit organisations with limited resources and a real requirement for certainty regarding the cost liability. The government provides no evidence for its assertion that parties granted PCOs are "*unduly insulated from the costs of their litigation."*

It cannot be that the interests of the taxpayer are necessarily aligned with that of the government regarding the funding of legal challenges to government decisions affecting the wider public interest. We doubt whether, when an unlawful government policy is successfully challenged and the issues ventilated in the court, the government would accept any accusation that taxpayers' money had been wasted by defending it.

[18] EWCA Civ 170

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

PCOs are granted when the court is satisfied that the criteria have been met. This should continue to be a matter for the court to determine.

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

Such a cross cap should not be presumed but left to the court to determine, on a case by case basis, as is already the case: *R (MOD) v Wiltshire & Swindon Coroner* [2005].[19]

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

The limit of any costs caps should be determined by the court on a case by case basis.

Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

We support the position of the Public Law Project that the position generally adopted by the Administrative Court is that set out in the Supreme Court Rules; costs will not generally be awarded in favour of or against interveners. Costs incurred by the parties as a result of the intervention can be dealt with as costs in the case.[20] Costs orders are ultimately made at the

[19] 1 WLR 134
[20] Supreme Court Rules 2009 Rule 48(3)
http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf

discretion of the court but the government has provided no evidence for the suggestion that costs are significantly increased by an intervener.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?
If the presumption were in place that interveners should be responsible for any additional costs incurred by their intervention there would be too great a risk that interveners would be discouraged from making important contributions that are useful for the court. Such interventions are an important aspect of judicial review claims, reflecting the role of the procedure for determining issues of public importance and many interveners are charity or not for profit organisations with particular expertise in an area, for example, Inquest and Liberty.

Liberty have been given permission to intervene in a Supreme Court case to be heard in December 2013 dealing with the significant issue of disclosure of cautions in enhanced criminal record checks. It is important to highlight that interveners can only intervene if the court gives them permission, which is granted on the basis that the court will find their input to be of useful assistance to them in determining the issues. Lady Hale recently commented[21] that, from her point of view, when done properly, *"interventions are enormously helpful… it was Liberty who supplied the killer argument in the Belmarsh case[22] and Justice intervened helpfully, for example, in the habeas corpus case of the man detained at Bhagram airport airbase since 2004."[23]* If costs orders against intervenors are more likely then NGOs such as Liberty, Justice and Inquest will be less able to provide the assistance that they currently do to the courts.

[21] 'Who Guards the Guardians', Lady Hale at the Public Law Project Conference 2013
[22] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68
[23] *Rahmatullah v Secretary of State for Defence [2012] UKSC 48, [2013] 1 AC 614*

As mentioned above, we see no justification for changing the current approach of the courts for interveners to bear their own costs and any additional costs to be included as costs in the case, subject to the discretion of the court. Changing this to include a presumption that interveners are responsible for the costs they generate for the other parties reduces the scope for judicial review proceedings to take advantage of interventions.

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

The Senior Courts Act 1981[24] and the CPR[25] already adequately provide for the court to award costs against non-parties, including against a non-party who appears to be funding a party to the proceedings (*Abraham v Thompson* [1997][26] and *Contract Facilities v Rees* [2003][27]). We do know of any case or circumstance advanced by the government as evidence that these provisions are not sufficient.

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

We do not. We would however reiterate that parties may only intervene with the permission of the court. Any party therefore that is granted permission to intervene has been deemed by the court to have something useful to input into those proceedings. The threat of costs orders against such parties will obviously act as a deterrent to their becoming involved, with courts becoming far more likely to receive applications to intervene from parties with the funds to do so, rather than NGOs.

[24] S.51
[25] r. 48.2
[26] 4 All E.R 362 CA
[27] EWCA Civ 1105

Leapfrogging

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

We are of course supportive in principle of genuine improvements that lead to cases being dealt with more efficiently, where the parties are in agreement.

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

We hold no view on this question.

Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

We hold no view on this question.

Question 38: Are there any risks to this approach and how might they be mitigated?

We hold no view on this question.

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

We hold no view on this question.

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

We hold no view on this question.

Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

We hold no view on this question.

Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

No.

We note that the Impact Assessment has only addressed the potential costs and benefits attaching to the proposals regarding the payment of costs incurred between issue and the grant of permission.

In our submission it is reckless for the government to propose significant changes to such an important constitutional mechanism as judicial review without first conducting a thorough and complete Impact Assessment.

Nonetheless we take this opportunity to make the following observations regarding the estimates the government has made:

The Impact Assessment proceeds on the unsubstantiated basis, previously advanced as justification for the last round of legal aid reforms, that the legal aid system does not currently "*command public confidence and credibility*".[28] No evidence has however been given in support of this statement, and as highlighted in various responses to the previous legal aid

[28] Impact assessment page 1.

consultation, in May 2013 ComRes (on behalf of the Bar Council) polled 2,033 members of the British public, 67% of whom said that legal aid is a price worth paying to ensure we have a fair society regardless of its cost, while 68% agreed that at less than 0.5% of annual government spending, legal aid is a worthwhile investment in our basic freedoms.[29] In this light, and given judicial review is the citizen's most effective mechanism for subjecting decisions of the state to rigorous independent oversight, it is unclear why the government considers restricting access to judicial review should increase public confidence.

The intended effect of the proposal regarding pre-permission costs is stated to be "*reduc*[ing] *spending on weak Judicial Review cases that do not have merit*".[30] We note that no consideration has been given to reducing the cost to the public purse occasioned by the government defending claims in which it does not have a viable defence, or settling claims later than the weakness of its position should require. We again recall the letter from Treasury Counsel. In our submission any assessment of the likely impact of the current proposals is deficient unless it also considers how defendants should seek to reduce their own costs, including by conceding challenges which they have no reasonable prospect of successfully defending.

The current proposals are unlikely to result in a reduction in costs associated with "*weak Judicial Review*" cases as is the government's stated intent. They will instead most likely result, for reasons discussed elsewhere in this response, in providers being unwilling to conduct proceedings in cases other than where the prospects of success are virtually assured. Given these are the cases which defendant's should concede pre-issue there will remain a range of cases where the prospects of success are not sufficiently clear for representatives to risk representing legally aided claimants. This is in turn likely to result in a significant increase in litigants in person and therefore increase costs for both defendants and the courts. The cost

[29] May 2013, ComRes, *Headline Findings from the Bar Council Poll*
[30] Impact assessment page 1.

implications of litigants in person will be further exacerbated by the government's proposals to limit standing, thereby denying NGOs the opportunity to advance arguments which will otherwise be left to unrepresented claimants to attempt.

We object to using the costs limit of emergency public funding certificates (£1,350) to calculate the likely costs risked by providers from issue to a decision on permission. In our experience this limitation may not even cover the costs of issuing an application for judicial review. In circumstances where an application is renewed at an oral hearing or pursued to the Court of Appeal the costs at risk are likely to be much higher. The impact assessment appears to have given this no consideration.

No consideration has been given to the costs of 'front loading' arguments regarding the "*no difference*" test which will most likely be caused by the government's proposals. Dealing with these issues at permission stage is likely to require more substantial pleadings and increase the likelihood of oral hearings, thereby driving up costs for all parties.

Question 43: 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 consultation paper?

In our view the proposals are likely to have a negative and disproportionate impact upon individuals with protected characteristics. The overwhelming impact of the proposals would be to deny those of modest means, who are at the same time among the most likely to share protected characteristics, access to judicial review. At the same time the proposals will have little, if any, comparable impact upon the ability of wealthy individuals and organisations to pursue applications for judicial review. The proposals risk turning public law predominantly into a forum for advancing commercial interests rather than protecting the rights of the disadvantaged and the vulnerable.

We highlight our particular concerns, as follows:

Standing

The concerns we set out earlier in our response in relation to standing would result in non-governmental organisations being precluded from bringing challenges which currently benefit individuals with protected characteristics. Such organisations often provide a voice in the courtroom for individuals whose ability to engage in public law litigation is severely limited due to social exclusion.

In *Children's Rights Alliance for England v SSJ* [2012] EWHC 8 (Admin) the claimant NGO challenged a decision of the SSJ to refuse to disclose the names of children subjected to unlawful restraint techniques at centres run by the interested parties. Had the claimant NGO been denied standing the important issues under consideration would arguably not have been aired in court. This case also provides a good example of the perverse and unfair effects of transposing the victim test set out under section 7(1) of the Human Rights Act 1998 onto applications for judicial review. Whilst the claimant NGO was not considered to be a victim within the terms of section 7(1) Foskett J commented:

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

Further examples of individuals with protected characteristics who would be disadvantaged by the proposals on standing are illustrated by:

- *British Pregnancy Advisory Service v SSH* [2011][31] concerning issues which disproportionately impact upon women.

[31] EWHC 235 (Admin)

- *Child Poverty Action Group v SSDWP* [2011][32] concerning issues which disproportionately impact upon individuals suffering economic disadvantage, a group which tends to correlate closely with individual's possessing protected characteristics.

- *Medical Justice v SSHD* [2010][33] concerning issues relevant to the characteristics of nationality and race.

Protective costs orders

The government's proposals will severely curtail the ability of NGOs to use litigation as an exceptional, but essential, tool for protecting the interests of society's most vulnerable and marginalised members. Given the very small number of such challenges brought at the present,[34] and the public importance of the issues they raise, these proposals risk seriously undermining public confidence in the legal system.

Intervention costs

NGOs representing disadvantaged groups (who are often likely to share protected characteristics) will very often have access to fewer financial resources, and will therefore be less able to bear the risk of not recovering their costs, than organisations benefiting from the financial support of the wealthy. We predict that the disincentive of non-recoverable costs will have a limited impact upon the many interventions made by government and other state agencies. As such the proposals regarding the costs of intervention will disproportionately disadvantage individuals possessing protected characteristics.

[32] EWHC 2616 (Admin)
[33] EWHC 1925 (Admin)
[34] V. Bondy and M. Sunkin, 'How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform'' UK Const. L. Blog (26th October 2013) (available at http://ukconstitutionallaw.org)

Wasted costs orders

By adding in a further risk of a wasted costs order being made against legal representatives the government would only serve to reduce yet further the pool of lawyers willing to undertake publicly funded judicial review work. As individuals with protected characteristics are disproportionately represented amongst publically funded claimants, these proposals will impact negatively upon them and will frustrate the government's duties under the Equality Act 2010.

Changes to funding for judicial review claims

By placing the provider at risk in respect of all stages from issue to grant of permission the government will further limit the range of legal representatives willing to undertake legally aided judicial review work. In turn it will reduce the ability of those with protected characteristics from accessing judicial review. We also take this opportunity to echo the concerns raised by others in their responses to the Legal Aid: Judicial Review consultation as to the impact these current proposals will have upon the junior bar, which will in turn disproportionately affect those with protected characteristics.

Procedural defects

The chilling effect of the proposals regarding funding for pre-permission work on the representatives of legally aided claimant's will be further exacerbated by the proposals to bring forward consideration of the "*no difference*" test to the permission stage and to lower the threshold of that test. These proposals will inevitably result in greater costs being expended at permission stage, costs which providers will face greater risks of being unable to recover. As such instances of procedural defect (and quite possibly of substantive illegality) will be left unchallenged in cases where the decision in question impacts upon the financially disadvantaged, who will very often also be those sharing protected characteristics.

In summary we are strongly of the view that the proposals will severely restrict the ability of individuals with protected characteristics to access judicial review. The proposals risk turning public law predominantly into a forum for advancing commercial interests rather than protecting the rights of the disadvantaged and the vulnerable.

Police Action Lawyers Group
October 2013