Ministry of JUSTICE

Judicial Review: proposals for reform

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Judicial Review: proposals for reform

Presented to Parliament
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by Command of Her Majesty

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Contents

Foreword

Recently, the Prime Minister set out the Government's plans to tackle red tape, promote growth and stimulate economic recovery, highlighting reform of Judicial Review as a key element of this plan.

This paper sets out our proposals for reform, and seeks views on three areas: the time limit for bringing proceedings; applying for permission to bring a claim; and fees for Judicial Review proceedings.

Judicial Review can be used to challenge a wide range of decisions. It may involve an individual challenging a decision to remove him or her from the country; a challenge to planning decisions, from the very largest infrastructure to much smaller developments; and a range of other challenges, for example, to an award of criminal injuries compensation, a Local Authority's provision of housing, an assessment of a child's educational needs, or the payment of an agricultural subsidy.

The issues in question may be diverse, but the intention of these reforms applies to them all: to make sure that weak or hopeless cases are filtered out at an early stage so that genuine claims can proceed quickly and efficiently to a conclusion. In this way we will ensure that the right balance is struck between maintaining access to justice and the rule of law on the one hand, while reducing burdens on public services and removing any unnecessary obstacles to economic recovery on the other.

The measures in this paper are simple and proportionate procedural reforms that can, I believe, be introduced quickly. We are considering whether these need to be supported by a programme of more wide ranging reforms.

Chris Grayling, Lord Chancellor and Secretary of State for Justice

1. Introduction

1. This paper sets out the Government's proposals for the reform of Judicial Review.

2. Judicial Review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions of public bodies to ensure that they are lawful. The Government is concerned that the Judicial Review process may in some cases be subject to abuses, for example, used as a delaying tactic, given the significant growth in its use but the small proportion of cases that stand any reasonable prospect of success.

3. These proceedings create delays and add to the costs of public services, in some cases stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery.

4. In this paper, we set out the reforms we propose to make in three key areas of the Judicial Review process:

   - the time limits within which Judicial Review proceedings must be brought;
   - the procedure for applying for permission to bring Judicial Review proceedings; and
   - the fees charged in Judicial Review proceedings.

5. In developing these proposals for reform, the Government has been mindful of its international obligations, including those contained in the European Convention on Human Rights and under European Union law. We have sought to develop an equitable response to the pressures that Judicial Reviews place on the courts and other public authorities.

6. The intention of these reforms is not to deny, or restrict, access to justice, but to provide for a more balanced and proportionate approach. We want to ensure that weak or frivolous cases which stand little prospect of success are identified and dealt with promptly at an early stage in proceedings, and that legitimate claims are brought quickly and efficiently to a resolution. In this way, we can ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.

7. There is, in the Government's view, a pressing need to address these issues. The measures set out in this paper are, we believe, sensible, targeted, and proportionate steps designed to reduce the burden of Judicial Review, by making its procedures quicker and more effective at filtering out, and reducing the impact of, weak claims. In this way, we

believe they can help to put in place the right conditions to promote growth and stimulate economic recovery.

8. The main chapters of this paper contain a series of questions which seek views on our proposals for reform. Alongside this paper we have published an Impact Assessment, which sets out the estimated impact these proposals would have if they were implemented. In chapter 7, we also invite respondents to provide evidence that could help us consider the potential impact on individuals with protected characteristics, in line with our responsibilities under the Equality Act 2010.

9. Details of how to respond are set out in chapter 9. The deadline for responses is Thursday 24 January. The Government will consider the responses to this engagement exercise and we intend to publish our response in the New Year.

10. This engagement exercise relates to and proposes changes to Judicial Review proceedings in England and Wales only.

2. Background

Judicial Review

11. Judicial Review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions[1] of the Executive, including those of Ministers, local authorities, other public bodies and those exercising public functions. It is a largely judge-developed procedure and can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the Executive to account. It is, however, intended to operate quickly and proportionately. Certain protections are in principle provided against spurious claims: only those with sufficient interest are able to bring a case and they must first obtain permission for their case to be heard.[2]

12. There are three main grounds on which a decision or action may be challenged:[3]

    - **illegality**: for example, it was not taken in accordance with the law that regulates it or goes beyond the powers of the body;
    - **irrationality**: for example, that it was not taken reasonably, or that no reasonable person could have taken it;
    - **procedural irregularity**: for example, a failure to consult properly or to act in accordance with natural justice or with the underpinning procedural rules.

13. There is a degree of overlap between the various grounds for review and they have continued to develop to take into account the changing legal landscape. The expansion of statutory duties on Government and other public bodies has also led to an increase in Judicial Reviews based on failure to comply with these duties (for example, duties under the Equality Act 2010).

14. Judicial Review is often described as a remedy of last resort: the courts will normally expect parties to use other avenues, including a right of appeal, where they are available. Parties contemplating the bringing of Judicial Review proceedings are required to adhere to the Pre-Action Protocol,[4] which encourages parties to seek to settle their differences

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1 This may include both action and inaction.

2 Section 31(3) Senior Courts Act 1981 (c. 54).

3 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (Lord Diplock paragraph 410).

4 See: http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv (the pre-action protocol does not apply to immigration or asylum judicial reviews).

without reference to the court. However, in urgent matters, the parties can dispense with the Protocol.

15. Judicial Review proceedings are governed by section 31 of the Senior Courts Act 1981 and the procedure is set down in the Civil Procedure Rules (CPR), and in particular Part 54 (and the accompanying Practice Directions).[5] They are generally heard in the Administrative Court, which forms part of the Queen's Bench Division of the High Court.[6] Usually, they are heard by a High Court Judge, but on occasion may be heard by the Divisional Court (comprising two Judges).

16. Judicial Review is concerned with the lawfulness of the decisions taken. It is not the Court's role to substitute its own judgment for that of the decision maker. Where the Court concludes that a decision was not taken lawfully it may make one of the following orders:[7]

    - a **quashing order**, setting aside the original decision;
    - a **mandatory order**, requiring the public body to do something or take a particular course of action;
    - a **prohibiting order**, preventing a public body form doing something or taking a particular course of action;
    - a **declaration**, for example, that a decision is incompatible with the European Convention on Human Rights; and
    - an **injunction**, for example, to stop a public body acting in an unlawful way.

17. Judicial Review cannot create any new rights to damages nor can they be claimed in Judicial Review proceedings without other remedy, but the Court has discretion to award damages where they would have been available under an ordinary action, for instance in tort or under the Human Rights Act 1998.[8]

The Judicial Review process

18. Judicial Review proceedings must be commenced by filing at court a claim form, setting out the matter the claimant wants the Court to decide and the remedy sought. The claim must be submitted promptly and in any event within three months of the grounds giving rise to the claim. The claim form must be served on the defendant, and any other interested party (unless the Court directs otherwise) within seven days of issue. If the other parties wish to take part in the proceedings, they are required to file an Acknowledgement of Service within 21 days of the service on them of the claim form.

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5 See: http://www.justice.gov.uk/courts/procedure-rules/civil/rules.

6 Some Immigration and Asylum Judicial Reviews are heard in the Upper Tribunal.

7 Section 31(1) and (2), Senior Courts Act 1981.

8 Section 31(4) Senior Courts Act 1981 and CPR 54.3.

19. The Court's permission is required for a claim for Judicial Review to proceed. Decisions on permission are normally considered on a review of the papers filed. Permission may be granted in full, or limited to certain grounds set out in the claim.

20. In cases where the Court refuses permission (either in full or in part), it will set out the reasons and serve them on the claimant and the other parties to proceedings. The claimant may request that the decision be reconsidered at a hearing (referred to in this paper as an "oral renewal"). A request for an oral renewal must be filed within seven days of service of the reasons for refusing permission.

21. The renewal is a full reconsideration of the matter, supported by oral submissions. Where permission is granted, the claim will continue as normal. Where it is refused, the claimant may consider whether he or she wishes to appeal to the Court of Appeal.

22. Where permission is granted the Court may make directions for the conduct and management of the case, setting out time limits for example, for the filing and serving of the particulars of the claim, the defence to the claim and any evidence on which the parties wish to rely.

23. Matters may be expedited with the Court's permission: for example, the permission and the full hearing may be "rolled up" so that both are considered at the same hearing. The Court also has a general power to extend any time limit set out in the rules where it is in the interests of justice to do so.

Judicial Review in immigration and asylum matters

24. The main area of growth in Judicial Review has been immigration and asylum matters. Since October 2011 the courts have had powers to transfer a limited category of these cases, those which challenge a decision not to treat further representations in an asylum or human rights claim as a fresh claim, to be heard in the Upper Tribunal. This, alongside the establishment of Administrative Court centres in Birmingham, Manchester, Cardiff, and Leeds, has helped to reduce the pressures that have built up in the Administrative Court, particularly in London. However, we believe that these arrangements have also brought wider benefits through the swift and efficient conduct of proceedings by Judges who are specialists in this area of the law.

25. Measures in the Crime and Courts Bill, currently before Parliament, will, if enacted, allow for all immigration, asylum or nationality Judicial Reviews to be heard in the Upper Tribunal, and will also allow the Lord Chief Justice to deploy Judges more flexibly across the courts and tribunals to respond more quickly to changes in demand.

3. The case for change

26. The history and development of judicial oversight of executive and administrative action can be traced back over many years. But in more recent decades, and particularly over the last ten years, we have seen significant changes in the way that Judicial Review has been used to challenge the decisions and actions of public authorities. This has led to concerns that it has developed far beyond the original intentions of this remedy.

27. There is only limited information available on how Judicial Review cases progress through the courts. Nevertheless, the data which are collected centrally are useful in providing a general overview of performance and highlighting some of the concerns.

Growth in Judicial Review

28. There has been a significant growth in the use of Judicial Review to challenge decisions of public authorities, in particular over the last decade. In 1974, there were 160[9] applications for Judicial Review, but by 2000 this had risen to nearly 4,250,[10] and by 2011 had reached over 11,000.[11]

29. The increase has mainly been the result of the growth in the number of challenges made in immigration and asylum matters. In 2011, these represented over three quarters of all applications for permission to apply for Judicial Review.[12]

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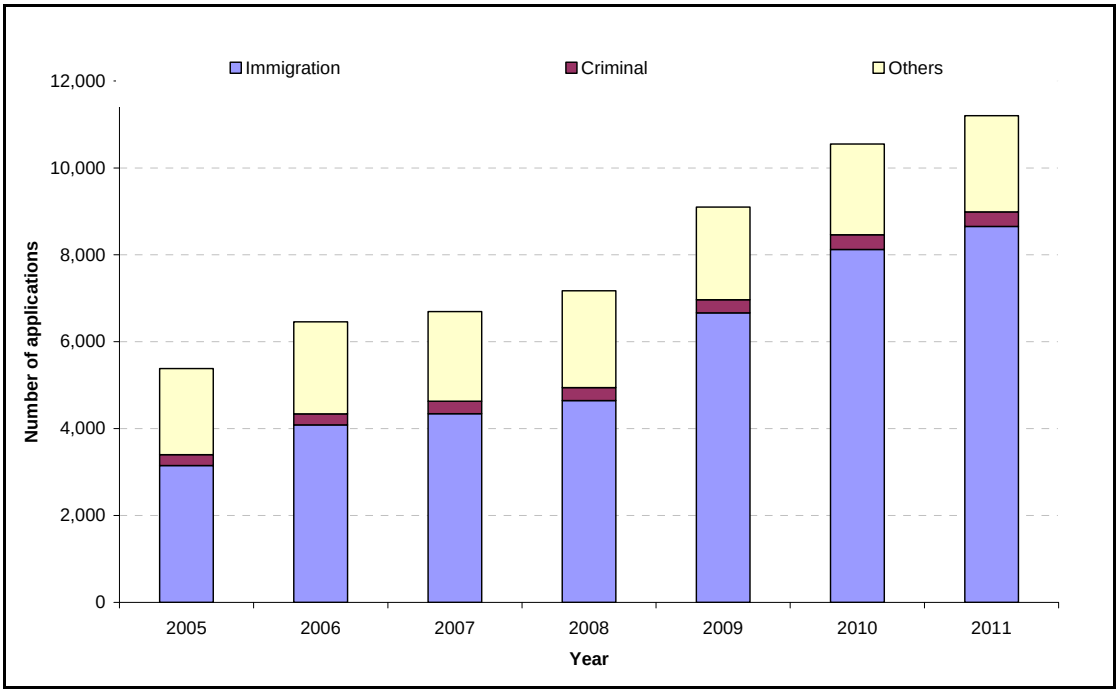
[9] See: http://www.parliament.uk/documents/commons/lib/research/rp2006/rp06-044.pdf.

[10] *Judicial Statistics 2000 England and Wales*, Cm 5223, Lord Chancellor's Department, July 2001, Table 1.13.

[11] *Judicial and Court Statistics 2011*, Ministry of Justice, June 2012, Table 7.12.

[12] Ibid.

Figure 1: Number of applications for permission to apply for Judicial Review – 2005 to 2011



30. The data suggest that only a small number of applications per year proceed to a final hearing in that year: in 2011, there were just under 400 Judicial Review disposals following a substantive hearing. In some cases, this is because the parties have reached a settlement, and the claim has been withdrawn. In others, the case is in progress and it is, for example, awaiting a decision on permission, or is being prepared for a final hearing. We do not currently collect data centrally on these matters.

Permission to bring Judicial Review proceedings

31. In the majority of applications considered by the courts, permission to bring Judicial Review proceedings is refused. Of the 7,600 applications for permission considered by the Court in 2011, only around one in six (or 1,200) was granted.[13] Of the applications which were granted permission, 300 were granted following an oral renewal (out of around 2,000 renewed applications that year).[14]

[13] Ibid.

[14] Management information, Administrative Court Office.

32. By the time the case reaches a substantive hearing, case outcomes are more balanced. In 2011, 396 applications for Judicial Review were disposed of, and the claimant was successful in 174 of them.[15] But even where the claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment.

Timeliness of Judicial Review proceedings

33. As this shows, some Judicial Review proceedings are well founded. But we are concerned at the length of time these proceedings take and the resources they consume. In particular, we are concerned that it takes too long to weed out weak or hopeless cases. For example, in 2011, it took on average 11 weeks for a decision on permission to be taken on the papers, and a further 21 weeks if the matter went to an oral renewal. Overall, it took around 10 months on average for a Judicial Review to reach a conclusion.[16]

34. This comes at a substantial cost to public finances, not just the effort of defending the legal proceedings, but also the additional costs incurred as a result of the delays to the services affected. In certain types of case, 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, potentially putting its financial viability at risk.

35. It is not just the immediate impact of Judicial Review that is a concern. We also believe that the threat of Judicial Review has an unduly negative effect on decision makers. There is some concern that the fear of Judicial Review is leading public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge.

36. 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.

Conclusion

37. The Government believes that there is a pressing need to take action to tackle these problems. In the following chapters we set out a series of proposals for reform, and invite views on how they can be implemented to best effect.

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[15] See footnote 11 above.

[16] See footnote 14 above.

4. Time limits for bringing a claim

Introduction

38. This chapter sets out proposals for reform to the time limits within which a claim for Judicial Review can be brought.

39. The Civil Procedure Rules (CPR) require claims for Judicial Review to be brought "promptly and in any event not later than three months after the grounds to make the claim first arose".[17] This time limit cannot be extended between the parties themselves and other rules may shorten the time limit in certain cases.[18] Where there has been undue delay in making an application for Judicial Review the Court may refuse to grant permission[19] reflecting the intention that Judicial Review should be a swift process.

40. A claim will not necessarily be made "promptly" if it is brought towards the end of the three month period when it could, or ought to, have been brought earlier. However, jurisprudence importing European Union law standards has in a wide range of areas disapplied the requirement for a claim to be brought "promptly" as being insufficiently certain, on the basis that the time limit should be with reference solely to a specific period of time after the claimant knew or ought to have known of the grounds giving rise to the claim.[20]

41. The current rules provide that the time limit starts to run when the grounds first arose. Case law on the application of the time limits suggests that where there are a number of decisions involved in a process, the time limit will run from the substantive decision and not from an ancillary or consequential decision.[21] But the question of when the applicant became aware of the grounds of review will be relevant to whether the Court will grant an extension of time (under CPR rule 3.1(2)(a)).[22] The Court will require a good reason for any extension of time.

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[17] CPR 54.5.

[18] CPR 54.5(3) see, for example, section 38 Inquiries Act 2005 c 12.

[19] Section 31(6) Senior Courts Act 1981.

[20] *Uniplex (UK) Ltd NHS Business Service Authority* [2010] 2 CMLR 47.

[21] *R (Louden) v Bury School Organisation Committee* [2002] EWHC 2749 (Admin).

[22] *R v Secretary of State for Transport Ex p Presvac Engineering Ltd* (1991) 4 Admin L Rep 121 at 133.

The rationale for reform

42. Under the current arrangements, the same three month time limit applies to all applications for Judicial Review, regardless of the nature of the claim (unless an alternative statutory time limit is applied). The Government recognises that parties need a reasonable amount of time to consider their position, and to take legal advice on the strength of any objections, and the merits of the case. The Government also wants to ensure that they have the opportunity to reach a negotiated settlement without the need to issue formal legal proceedings.

43. The Pre-Action Protocol for Judicial Review has been designed to encourage parties to negotiate before the formal issue of proceedings to avoid litigation if possible. Under the Protocol, they must consider whether the claim is one which might be suitable for an alternative approach, such as mediation or arbitration. The Protocol also prescribes a procedure for exchanging *Letters Before Claim* which seeks to encourage the parties to reach a settlement, and to limit the issues in proceedings to those which are genuinely in dispute.

44. However, the Government is also keen to ensure that Judicial Review is a process which requires claims to be brought and resolved swiftly, reducing the uncertainty for public authorities which can have an impact on the delivery and cost of public services. There is some flexibility in the time limit and in some cases the Government believes that this does not facilitate good administration or provide certainty for claimants.

45. The Government recognises that a general reduction in the time limit for bringing proceedings may constrain the time available to seek a negotiated settlement, and that this may potentially be counter-productive. We acknowledge that it carries a risk that parties might be encouraged to circumvent the Pre-Action Protocol and move immediately to litigation potentially leading to further growth in the use of Judicial Review.

46. For this reason, we are not presently proposing a general reduction in the time limit for bringing Judicial Review proceedings across the board. Nevertheless, we believe that there are some classes of case in which it might be appropriate for shorter time limits to apply. Where shorter time limits for appeals apply there is generally an underpinning policy that the cases should be brought swiftly. We believe that it is reasonable to consider whether the same time limit should apply to Judicial Reviews on the same issues. The disjuncture between these time limits can operate to extend periods of uncertainty for both public authorities and others affected by the matter challenged.

47. We explore later in this chapter whether greater certainty can be provided in cases where the grounds for review subsist over a continuing period of time or relate to multiple decisions by tightening up the general rules.

48. We have identified two categories of case to which the shorter time limit might be appropriate: procurement cases, and planning decisions.

Procurement

49. One type of case where it might be appropriate to set a shorter time limit is procurement cases. There is a concern that challenges to procurement decisions, in particular decisions to exclude contractors from the list of those invited to tender and contract award decisions, seem to be on the increase. Most challenges to procurement decisions should be brought under the Public Contracts Regulations 2006 (the "Regulations") which apply a 30 day time limit from the claimant's knowledge of the decision.[23]

50. It is, however, possible for a Judicial Review to be brought in respect of the same decision up to three months after that decision.[24] A Judicial Review of a procurement decision can be brought by interested parties who are not "economic operators" and so would not be able to bring challenges under the Regulations.[25] Additionally some procurement processes are excluded from the Regulations and so challenges are only brought under Judicial Review.[26] Generally these cases are rare but will have a significant impact on the procurement process. They are often complaints about a procedural irregularity brought by a party who has been unsuccessful in a tender for a public contract or other third parties who are affected by the decision. The contracts often involve large sums of money and the delivery of important public services. Any delays in awarding these contracts can have a significant impact on users of those services, and implications for the costs of their delivery.

51. The Government's proposal is that any Judicial Review proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations 2006 should also be subject to a 30 day time limit (regardless of whether the claimant is an economic operator or the public contract is excluded from the Regulations).

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[23] Regulation 47D, Public Contract Regulations 2006 (SI 2006/5). The 30 day time limit was introduced in 2011 following the *Uniplex* case which called for certainty in time limits. If the 30 days ends on day that is not a working day the period is to end at the end of the next working day (working day excludes Saturday, Sunday, Christmas day and bank holidays).

[24] *R. (on the application of Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011.

[25] Regulation 47 defines economic operator for the scope of Part 9 the Regulations.

[26] *R (Menai Collect) v Department for Constitutional Affairs* [2006] EWHC 727 (Admin) (a public concession contract under section 2(4) of the Courts Act 2003.

Planning

52. Applications for planning permission are in the main dealt with by the local planning authority. There are a minority of planning applications which are called in by the Secretary of State for his consideration. In addition the Secretary of State deals with appeals by developers if a planning application is refused or not determined within the statutory time.

53. Where there has been a decision of the Secretary of State following a planning appeal or "call in" of an application there is a right to challenge that decision in the High Court on a point of law under section 288 of the Town and Country Planning Act 1990. These challenges must be brought within six weeks of the decision. They can only be brought by the developer, the local planning authority or an interested party who has played an active role in the planning process (for example, someone who has objected and appeared at the inquiry).

54. Outside the appeal process any challenge to planning decisions made by local planning authorities (the bulk of all planning decisions), can only be made by Judicial Review. If objectors to a decision wish to lodge a challenge they can judicially review that decision. In addition the Secretary of State's decision to call in (or not call in) an application for his determination can be challenged by Judicial Review. The bulk of Judicial Reviews in planning cases are defended by local planning authorities.

Proposals for reform

55. The Government believes that there are advantages to applying a shorter time limit for bringing Judicial Review proceedings in these categories of case.

56. In both cases, there is a route of appeal which must be made within a shorter timescale: within 30 days or six weeks of the decision respectively reflecting the statutory provisions for appeal. The Courts would expect those challenging a decision in these types of case to pursue the route of appeal, and would only entertain an application for Judicial Review if it raised different grounds (for example, that there was a procedural irregularity in reaching the decision or that it was legally flawed, rather than a reconsideration of the merits).

57. For these reasons we propose to reduce the time limit in these specific categories of case so that they are consistent with the time limits available for an appeal.

58. We recognise that in some cases the parties may need more time to take legal advice and consider their position. The Courts have powers to allow matters to be brought out of time where it is just and equitable to do so. In determining whether it is in the interests of justice for permission to be granted, the Court will take into account a number of factors, including the length of, and reasons for, delay and the impact of the delay on good administration.

59. The Government believes that the combination of a shorter time limit with the Court's existing powers to grant an extension provides the right balance between reducing the burdens on public services and protecting access to justice.

60. Subject to the outcome of this engagement exercise, the Government proposes to invite the Civil Procedure Rules Committee to amend the Civil Procedure Rules so that they provide that:

- claims for Judicial Review in procurement cases should be brought within 30 days of when the claimant knew or ought to have known of the grounds for the claim. "Procurement cases" are proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations (whether or not the claimant is an economic operator or the public contract is excluded from the regulations); and
- claims for Judicial Review of planning decisions of the local authority should be brought within six weeks of when the claimant knew or ought to have known of the grounds for the claim.

Questions

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?

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?

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?

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

Tackling delays in bringing late claims

61. In many cases, the decision or action which gives rise to the grounds for the claim will be clear. In these cases, there is no dispute about the point at which the time limit commences.

62. However, in some cases, the grounds may arise from an ongoing state of affairs or from a number of related decisions. This may be because the claim relates to a ground or grounds which are ongoing, for example**,** a delay or failure to take a decision or implement a policy properly. This may mean that it is possible to bring a claim for Judicial Review after more than three months by arguing that a continuing failure means that the starting point for the time limit is continually moving.

63. In others, it may be because the decision complained of has led to some further activity, for example, correspondence between the claimant and the decision making body seeking clarification on the decision, or the reason for reaching it, or asking for the decision to be reconsidered in the light of further submissions. In these cases it is the later decision which is relied on as the starting point from which the three month period starts to run.

64. We believe that the current law ought to function so that the time within which proceedings must be brought starts at the point where the grounds giving rise to the claim first arose. Nevertheless, anecdotal evidence suggests that, at least in some cases, the claimant has been able to argue successfully that the time limit should start at a later point, either by challenging the latest point of continuing breach or the latest decision in a series of related decisions, essentially frustrating the application of the three month time limit.

65. Subject to the response to this engagement exercise, we propose to invite the Civil Procedure Rules Committee to review the current wording of the Civil Procedures Rules, and in particular Part 54.5, to make clear that any challenge to a continuing breach or cases involving 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. The review should ensure that the wording of this rule reflects the current legal position that the time limit to be applied in Judicial Review proceedings starts to run from the point at which the grounds for the claim first arose, taking into account when the claimant first knew or ought to have known of the grounds arising.

Questions

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?

5. Applying for permission

Introduction

66. No Judicial Review can proceed to a substantive hearing without the permission of the High Court.[27] This chapter sets out proposals for tightening the procedural rules for granting permission to bring Judicial Review proceedings.

Current procedure

67. An application for Judicial Review will in the first instance normally be dealt with on the papers only: the claim form must set out the grounds for the claim and any remedy sought (CPR 8.2 and 54.6). Where permission is refused on the papers the Judge will give reasons for the refusal (CPR 54.12). If permission is refused the claimant has the unqualified right to request (within 7 days) that the application for permission be determined at an oral hearing (CPR 54.12(3)). The hearing is not an appeal but a renewed application for permission (an "oral renewal") in which the permission decision is taken again with the parties able to attend and make representations.

68. If permission is again refused after an oral hearing, the claimant may (within seven days of that hearing) request permission to appeal to the Court of Appeal against the refusal (CPR 52.15).[28] The Court of Appeal may:

    - refuse permission to appeal (which by implication confirms the refusal of permission);
    - grant leave to appeal but ultimately refuse permission; or
    - grant leave to appeal and grant permission and remit the case to the High Court to determine the substantive Judicial Review.[29]

69. The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is an arguable case fit for further consideration.[30]

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[27] Section 31(3) Senior Courts Act 1981.

[28] This does not apply in relation to a Judicial Review in a criminal case.

[29] There is no onward appeal to the Supreme Court (*Re Poh* [1983] 1 WLR 2).

[30] *R v Legal Aid Board Ex P Hughes* (1992) 5 Admin L Rep 623.

70. The test for granting permission is not set out in the rules but arises from case law. In his judgment in the case of *R v Inland Revenue Commissioners*[31] Lord Diplock explained that the purpose of the test was to:

> prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review were pending although misguided.

71. The Government is keen that the procedure for permission continues to fulfil this purpose.

The rationale for reform

72. The Government is concerned that the procedures for considering whether permission should be granted allows claimants too many opportunities to argue their case, particularly where their case is weak. This undermines the benefit of the requirement to obtain permission and creates greater uncertainty for public authorities. It also takes up court resources meaning that well-founded cases may not proceed quickly.

73. The claimant may have up to four opportunities to argue the case for permission. However, as set out in the case for change (see chapter 3) few cases stand any prospect of success.

74. Although a claimant is rarely successful in bringing Judicial Review proceedings, the numerous opportunities to renew applications can lead to substantial delays, and incur significant costs to public authorities which they may have little prospect of recovering from the claimant. For example, in 2011, it took on average 11 weeks to for a decision on whether to grant or refuse permission on the papers, and a further 21 weeks on average if the matter went to an oral reconsideration hearing.

75. Following the decision in the case of *Cart*,[32] the Civil Procedure Rules were amended with effect from 1 October 2012 to introduce new provision (Rule 54.7A and 52.15(4)) which applies a more restrictive test and procedure for considering permission for Judicial Review in certain cases. This test applies in cases where the claimant seeks a Judicial Review of a refusal by the Upper Tribunal to give permission to appeal a decision of the First-tier Tribunal. In these cases the application for permission is determined on the papers only, with no reconsideration at an oral hearing, and if permission is refused, any application for permission to appeal to the Court of Appeal will be determined on the papers only.

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[31] *R v Inland Revenue Commissioners Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642.

[32] *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

76. The Government believes, however, that there is further scope to tighten the procedures for permission to bring Judicial Review in a wider category of cases before the Administrative Court. We have considered two proposals for reform to address the concern that the unfounded or misconceived cases are taking up too much time and causing too much uncertainty:

    - the first would remove the right to an oral renewal in cases where there has already been a prior judicial process involving a hearing considering substantially the same issue as raised in the Judicial Review claim;
    - the second would remove the right to an oral renewal in cases which the Judge, on written submissions, has determined to be "totally without merit".

77. In developing these proposals the Government has given due consideration to the fact that Judicial Review may be the only available route for a claimant to challenge a decision. The procedure must therefore not act as a barrier to access to justice and must, where relevant, satisfy requirements under Article 6 of the European Convention on Human Rights (right to a fair and public hearing). These potential reforms will only act as a procedural barrier where there has been a prior judicial process involving a hearing (satisfying Article 6) or where the claimant has failed to make out a claim to be determined (and so not engaging Article 6 substantively). In these circumstances, we believe that these proposals would operate compatibly.

Removing the right to an oral renewal where there has been a prior judicial process

78. Many Judicial Review proceedings involve matters which have already been the subject of legal proceedings, in some cases over a long period of time. This is not uncommon as Judicial Review is an action of last resort, where other appeal mechanisms have been exhausted.

79. Anecdotal evidence suggests that, in some cases, in the Judicial Review proceedings the claimant is seeking to reargue substantially the same points in a different forum in the hope that a different conclusion will be reached. Only a very small proportion of these cases are granted permission and even fewer are ultimately successful. Whilst Judicial Review plays a vital role in upholding the rule of law and holding the Executive to account, we do not believe it should be allowed to be used as a tactical device simply to delay decisions and the consequences flowing from them.

Proposals for reform

80. The Government recognises that the decisions being challenged often raise matters of great significance to the claimant. In these circumstances it is not surprising that claimants will use every legal avenue available to them. However, the Government is concerned that the current legal procedures allow too many opportunities to put forward points which have already been considered by a Judge.

81. The Government has therefore considered changes to the procedure for permission to restrict the number of opportunities available. Our proposal is that, in cases where the claimant has been refused permission on the papers, and the matter is one which has been the subject of a prior judicial hearing, the claimant's right to ask for an oral renewal of the application for permission should be removed. As with the reforms following *Cart,* any appeal to the Court of Appeal would also be on the papers only.

Prior judicial hearing

82. The Government's intention is that a prior judicial hearing should mean any oral consideration by a court or tribunal or by any body exercising judicial power. We believe that it would be proportionate to restrict an oral renewal in these circumstances as the claim will already have been determined at an oral hearing in a judicial process.

83. The Contempt of Court Act 1981 and the Freedom of Information Act 2000[33] define a court as including any tribunal or body exercising the judicial power of the State. We believe that there is merit in using this same definition to determine whether there has been a prior judicial hearing. Under our proposal, a hearing before a court so defined would constitute a prior judicial hearing. It would therefore include a hearing before the civil and criminal courts (the magistrates' courts, county courts, the Crown Court, the High Court and the Court of Appeal) the tribunal system (including the First-tier Tribunal) and the judicial functions of coroners and inquiries which are set up by statute.[34]

The same matter

84. Often new issues will be raised in Judicial Review proceedings (such as questions of illegality relating to the decision of a lower court). It is not the Government's intention to restrict the consideration of genuinely new legal issues which require consideration. However, where the case is one where substantially the same matter has already been considered, we believe that it would be proportionate that a refusal of permission

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[33] See section 19 of the Contempt of Court Act 1981, and section 32 of the Freedom of Information Act 2000.

[34] The definition does not apply to inquiries which are not set up statute even if headed by a Judge.

(because no arguable case is displayed) should not lead to a right to an oral renewal of the groundless application. This would require the Judge to consider the position in the round and, where he or she decides that permission should be refused, to determine whether the claimant should be entitled to an oral renewal. This is not intended to be a restriction on the availability of Judicial Review: if an arguable case is made out on the papers permission will be granted as it is now.

85. We envisage that the burden of arguing that the case has already had a prior judicial oral hearing of substantially the same matter (and therefore there is no right to renew) would be on the defendant (and the issue raised in the Acknowledgment of Service).

86. A claimant who is unhappy with the determination that there is no right to an oral renewal would be able to request leave to appeal to the Court of Appeal which would in turn be determined on the papers. The Court of Appeal would, as under current arrangements, be able to grant permission to proceed with the Judicial Review, enabling a full hearing of the substantive issues.

Questions

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?

Removing the right to an oral renewal where the case is assessed as totally without merit

87. We have also considered an approach to tackling some of the problems highlighted with the procedures for applying for permission which builds upon the process that has been applied in relation to immigration Judicial Reviews.[35] This could be applied in conjunction with, or as an alternative to, the proposal set out in paragraphs 80 to 86 above.

[35] CPR 52.3(4A).

88. Our proposal is that the Judge reviewing whether to grant permission may, if he or she considers that no arguable case is made out, also decide that it is totally without merit. This concept is one that will be familiar to the judiciary who may currently certify cases to be totally without merit. The impact of that certification (depending upon the circumstances) is that it may have implications for costs, or lead to a civil injunction against further claims. In the context of immigration, where a Judge finds that a case is totally without merit, they may also state that oral renewal is no bar to removal which means that an application for renewal will not of itself be sufficient to defer that removal and the claimant will have to obtain an injunction to prevent it.

89. The Government proposes that, where a case is assessed as totally without merit, there should be no right to an oral renewal. If, when considering the application on the papers, the Judge considers that the case is totally without merit, he or she would be able to assess it as such, with the consequence that the applicant would not be entitled to renew the application at an oral hearing.

90. An appeal to the Court of Appeal could be made, but in line with the *Cart* changes it would be restricted to the papers only.

Questions

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?

Implementing both proposals in combination

91. In this chapter, we have set out two proposals under which the right to an oral renewal would be removed in certain circumstances: either because the substantially the same matter had been the subject of a prior judicial hearing, or because it had been assessed on the papers as totally without merit.

92. We believe that both proposals could be implemented together. If they were both taken forward, an oral renewal would continue to be available in cases where there had been no previous oral consideration by a Judge provided that the claim was not totally without merit. For this reason, and for those set out in paragraph 77 above, we consider that this would be compatible with Article 6 European Convention on Human Rights.

Questions

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?

6. Fees

Introduction

93. This chapter considers the options for reforming fees charged in Judicial Review proceedings.

94. These proposals relate to fees charged for Judicial Review in the Administrative Court, and fees charged in certain immigration and asylum Judicial Review cases dealt with in the Immigration and Asylum Chamber of the Upper Tribunal.[36] However, the Upper Tribunal also has an existing jurisdiction to hear certain other Judicial Review matters (for example, a Judicial Review of a Criminal Injuries Compensation award). Those non-immigration and asylum Judicial Reviews do not currently attract a fee and these arrangements would be unaffected by the proposals in this engagement exercise.

The current arrangements

95. Parties who wish to bring proceedings in the civil and family courts in England and Wales are required to pay a fee. Fees are set at a level designed to recover the costs of providing the service, less the costs of remissions, which are borne by the taxpayer. This is in line with the Government's overall policy on charging fees for public services, which is set out in HM Treasury's publication, *Managing Public Money*.[37]

96. Fees may be waived or remitted (in full or in part) if the applicant meets certain criteria based on an assessment of his or her means. Those on qualifying benefits are automatically entitled to a fee remission. Others may be entitled to a full or partial remission depending on their financial circumstances. The Government is reviewing the remissions criteria and will be inviting views on specific proposals in the New Year.

97. A party who wishes to bring Judicial Review proceedings in the High Court must first seek permission from the Court to do so: the fee for an application for permission in the High Court is currently £60, and where permission is granted a further fee of £215 is payable by the applicant for the matter to proceed to a trial. There is no fee for an oral renewal. The same fees apply to Judicial Reviews in immigration and asylum matters heard in the Upper Tribunal.

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[36] The provisions of the Crime and Courts Bill, currently before Parliament, allow for the transfer of all immigration and asylum Judicial Reviews to the Upper Tribunal.

[37] *Managing Public Money*, HM Treasury, October 2007. See http://www.hm-treasury.gov.uk/psr_mpm_index.htm.

98. In November 2011 the Government published a consultation paper seeking views on proposals to raise fees in the High Court and the Court of Appeal.[38] Under these proposals the fee for an application for permission to bring a Judicial Review and to proceed to trial would both increase to £235.

99. The Government is considering the responses to the consultation and we will be publishing our response shortly.

The rationale for change

100. The Government is concerned that the fees charged in Judicial Review proceedings do not reflect the costs incurred in providing them. In particular, we are concerned that fees do not reflect the full costs of providing the opportunity to have the case for permission considered both on the papers, and if necessary, at an oral renewal.

101. We estimate that the average cost of an oral renewal hearing is £475, but under the current arrangements, the applicant is not required to pay any fee.

102. In chapter 5, we set out our proposals for limiting the opportunities that parties have to renew applications for permission at an oral hearing. If these were implemented they would, we believe, limit the number of applications for an oral renewal in certain categories of case. Nevertheless, under these proposals there would continue to be circumstances in which a claimant would be entitled to renew an application for permission that has been refused on a review of the papers.

Proposals for reform

103. We believe that it is right, and in line with our general policy on fees, that the applicant should pay a fee for an oral renewal of an application for permission. In addition to the financial arguments, we also believe that it is right that the applicant should have a financial interest in the application for permission. This would, we believe, encourage the applicant to weigh up the potential benefits of the application against the costs which would, we believe, help to discourage claimants from bringing weak cases that stand little chance of success.

[38] *Fees in the High Court and Court of Appeal*, CP 15/2011, Ministry of Justice, November 2011.

104. We therefore propose to introduce a new fee, payable when an application is made for an oral renewal. In setting the fee, we propose to adopt the same approach as we have proposed in the consultation on High Court and Court of Appeal fees[39] for introducing a fee for an oral application for leave to appeal. We propose to set the fee for an oral renewal at the same level as for a full hearing of the Judicial Review (currently £215 but under proposals contained in the consultation on fees in the High Court and Court of Appeal it would rise to £235).

105. Where the application for permission is successful, we propose to waive the further fee for a full Judicial Review hearing. This is also consistent with the proposals for the Court of Appeal, under which an appellant who is successful in an oral renewal of an application for leave to appeal is not subsequently required to pay a further fee for the matter to proceed to the full appeal hearing. In this way, an applicant who is successful in securing permission for Judicial Review at an oral reconsideration would not have to pay any more than one who was successful on written submissions. Those entitled to a fee remission would have their fees reduced or waived.

106. The Government accepts that the proposed fee would initially be set below the full estimated costs of the proceedings to which it relates. We will consider the scope for adjusting fees further over time so that they reflect the full costs of providing the service.

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?

[39] Ibid.

7. Impact Assessment and Equality Impacts

Introduction

107. We have published an Impact Assessment to accompany these proposals which sets out the estimated impacts they would have if they were implemented.

108. We will consider responses to the questions set out in this paper, and we intend to publish a Government response in the New Year which will set out those reforms we intend to implement. At that stage we also intend to publish a revised Impact Assessment setting out revised estimates of the impacts to take account of any changes in policy, and better information about the anticipated impacts.

109. Under the Equality Act 2010, public authorities have an ongoing duty to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics. As part of this obligation, we have made an initial assessment of the estimated impact of these proposals on people with protected characteristics.[40]

110. The majority of Judicial Reviews relate to immigration and asylum matters, and it is therefore reasonable to assume that these proposals have the potential to have a differential (adverse) impact on the characteristics of race and religion/belief. We do, however, acknowledge 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.

111. We also acknowledge 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. More information is being sought, through responses to this engagement exercise, to fill this gap and determine whether any of the proposed changes are likely to have a particular impact on Judicial Reviews brought on these grounds.

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[40] The general equality duty covers the following protected characteristics: age (including children and young people), disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status. This means that the first aim of the general equality duty applies to this characteristic but the other two aims do not. This applies only in relation to work, not to any other part of the Equality Act 2010.

112. To help us fulfil our duties under the Equality Act 2010, we would welcome information and views to help us gather a better understanding of the potential equalities impacts that these proposed reforms might have.

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?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

8. Summary of questions

Time Limits

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?

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?

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?

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

Time limits in cases where there are continuing grounds

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?

Applying for Permission

Option 1: restricting the right to an oral renewal where there has been a prior judicial hearing of substantially the same matter

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?

Option 2: restricting the right to an oral renewal where the case is assess as “totally without merit”

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?

Combining options 1 and 2

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?

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?

Equality Impacts

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?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

9. How to respond

113. The engagement exercise will close on 24 January 2013. We intend to publish our response in the New Year setting out those proposals we intend to take forward.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details

Please respond online at: https://consult.justice.gov.uk/digital-communications/judicial-review-reform

Alternatively please send your response to: admin.justice@justice.gsi.gov.uk

or by post to:

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

The deadline for responses is 24 January 2013.

Publication of response

A response to this consultation is due to be published in the New Year and will be available online at www.justice.gov.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact Sheila Morson, Ministry of Justice Consultation Co-ordinator, on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Sheila Morson
Consultation Co-ordinator
Ministry of Justice
6.36, 6th Floor
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the How to respond section of this paper at page 32.

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