

## Annex A: Summary of consultation responses

88. This Annex and Annex B provide a summary of the responses received to the questions posed in the consultation. All the responses were considered carefully in deciding how to proceed. Each section sets out the main arguments and views expressed by respondents. Inevitably these include opinions with which the Government does not necessarily agree or accept as fact.

### Chapter 3 – Planning

89. The Government consulted on a number of proposals to speed up the time taken to consider judicial reviews and statutory appeals relating to planning and major infrastructure projects. These included establishing a new Planning Chamber in the Upper Tribunal, introducing a permission filter for statutory appeals and amending the procedural rules to include time limits for completing these cases.
90. There were a total of 325 responses to the consultation overall, but of these 235 refrained from commenting on the planning proposals, citing a lack of expertise in this area or referring to responses from specialist planning experts.

### Specialised Planning Chamber

#### *Questions*

**Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?**

**Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?**

#### *Summary*

91. Of the 90 respondents who responded to the planning questions, 43 were in favour of creating a specialist Chamber in the Upper Tier of the unified tribunal system while 47 were against the proposal. The remaining four respondents felt there were advantages and disadvantages to both options.
92. Those against creating a Planning Chamber (mainly judicial and legal representatives) felt the Government should first assess the impacts of the recent changes to judicial review (namely reduction of timescales to lodge a planning judicial review; introduction of fees and the totally without merit test; the transfer of immigration and asylum judicial reviews to the Upper Tribunal) and the impacts of the Planning Fast Track (PFT) before introducing more changes. The senior judiciary supported building on the PFT by establishing a separate Planning Court within the Administrative Court and formalising the administrative timescales, with a longer term aim of streamlining how planning and environmental cases are dealt with overall.
93. However developers, business and infrastructure organisations were more likely to express support for the Planning Chamber and welcomed steps to speed up hearing of planning and major infrastructure cases through use of specialist judges, new procedural rules and statutory timescales.

### *Planning Chamber*

94. The main arguments and views expressed by respondents were:

- Scepticism that the Lands Chamber would deliver any appreciable advantage over the PFT, given it will deploy the same judges to hear cases previously heard in the High Court and there are already backlogs in the Lands Chamber
- Planning law under the Town and Country Planning Act is a devolved matter and the Welsh Assembly Government is about to introduce new planning legislation; it is important that the Welsh judiciary and legal representatives are involved in planning cases in Wales. There were concerns that a Planning Chamber would be more likely to hear cases in London as opposed to the District Registries of the Administrative Court.
- In the absence of legal aid provision for parties in tribunals, concerns that the proposal would disadvantage Gypsy and Traveller groups in statutory planning appeals.
- A key element in reducing delay is ensuring initial permission hearings are made by authoritative specialist judges to prevent further appeals.
- Planning judicial reviews include important public law issues which should remain in the High Court rather than be dealt with exclusively on planning grounds in the Upper Tribunal.
- It was questioned whether the Lands Chamber, as an expert forum looking at merits-based arguments, is best placed to consider judicial reviews which examine deficiencies of process.

### *Additional Procedural Requirements*

- Pre-action protocols should be updated to reflect shorter time limits for lodging planning judicial reviews.
- Both the claim form and the acknowledgment of service should allow parties to indicate if the matter should be referred to the specialist chamber.
- Given the specialist nature of the judiciary it may be proportionate to amend the right to an oral renewal or have the case reconsidered on the papers by another specialist.
- Given the specialist nature of planning judicial reviews and statutory appeals it is appropriate to make more use of written evidence and time limits for oral evidence presentation.
- There should be a high threshold of 'arguability' to remove weak cases earlier.
- The Government should reduce the period required by the Civil Procedure Rules for production of detailed grounds of resistance from 35 days to 21 or 28 days and codify timescales to provide skeleton arguments (21 days for claimants/14 days for defendants).
- Guidance is required for staff asked to allocate cases which also have significant other non-planning issues.
- The period for issuing a pre-action letter challenging a planning decision should be six weeks from when the Local Planning Authority makes their decision and not when they publish the decision notice.

- Targets in either the PFT or a new Chamber should be published alongside regular performance statistics.
- If taken forward it would be proportionate to remove an automatic right to oral renewal in planning judicial reviews or to only reconsider an application for renewal on the papers by another specialist judge.
- Appropriate to make more use of written evidence and set time limits for oral evidence presentation.
- Some support for maintaining the current CPR rules.

#### *Scope of Chamber*

Respondents made a number of suggestions as to what should be in scope for a new Planning Chamber to consider. These included:

- Planning decisions including Nationally Significant Infrastructure Projects;
- Statutory appeals (288) under the Town and Country Planning Act 1990;
- All environmental consents and permits;
- All related development consents for Nationally Significant Infrastructure Projects;
- Transport and Works Act;
- Environmental and Habitat Regulations;
- Village Greens and rights of way;
- Local Plans and other LA planning documents; and
- Environmental matters which do not involve planning.

### **Section 288 permission filter**

#### *Question*

#### **Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and Country Planning Act?**

#### *Summary*

95. 41 respondents supported the introduction of a permission filter for appeals made under section 288 of the Town and Country Planning Act 1990, while 30 were against the proposal.
96. The main arguments and views expressed by respondents were:
- This additional stage may potentially add delay.
  - Some proposed further changes to the statutory appeal process under the Act, including a requirement to file an acknowledgment of service with summary grounds of defence. This would give the claimants and courts an earlier view of the strength of the case, encourage early settlement and deter late withdrawals.

## Evidence of impact of judicial review

### Question

**Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?**

97. 23 respondents provided examples or evidence in response to this question, a number of which showed delays to infrastructure projects, including:
- ASDA – delay from competitors launching judicial reviews;
  - Airport Operators Association – 9 months delay to Bristol Airport Expansion and Stansted Generation 1 development; 15 months delay to Southend Airport Runway Extension;
  - Tendring District Council – already a two year delay caused by an ongoing judicial review of the construction of a new Container Terminal Port;
  - British Property Federation – Shopping Centre London – 15 months delay and additional costs.

## Additional suggestions for improving the speed of judicial reviews

### Question

**Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?**

98. 33 respondents provided suggestions in response to this question, including:
- Increase resources, in particular the number of specialist judges.
  - Introduce a permission stage for section 288 claims.
  - Greater enforcement of existing rules and time limits for filing evidence to prevent delays.
  - Consider restricting Protective Costs Orders so parties are not protected when challenging competitors' developments.
  - Greater enforcement of the requirement for pre-action protocol to stop a judicial review been filed on last possible day without any cost penalty due to Protective Costs Order protection.
  - More use of regional courts.

## Local Authorities Challenging Infrastructure Projects

### Questions

**Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?**

**Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?**

### *Summary*

99. This proposal concerned restricting the ability of local authorities to judicially review Nationally Significant Infrastructure Projects ('NSIPs') which are given permission to bring a judicial review under a streamlined process in the Planning Act 2008. Of the 325 total responses to the consultation 84 respondents answered this question. Of those respondents 6 supported the proposal, 77 did not and 1 had mixed views.
100. The main arguments and views expressed by respondents were:
- There has not been a challenge to an NSIP by a local authority and so these proposals do not target a real problem.
  - This is an arbitrary restriction of local authorities' powers and would negatively impact upon the rule of law.
  - This change would be ineffective; for example a local authority could fund a community group to bring a challenge. Alternatively, it was argued that unless a local authority was able to bring a challenge then an unlawful project might not be challenged.
  - It would be undemocratic and run counter to the wider localism agenda.
  - It is important for local authorities to represent the interests of local inhabitants.
  - It is for the taxpayers and voters of an area to form a judgement on any decision to litigate.
  - This change would be a denial of access to justice if a local authority would otherwise meet the standing test, particularly as they may bring a claim they consider in the interests of the local community.
  - Local authorities tend to behave responsibly and not risk taxpayers' funds on unmeritorious judicial reviews.
  - The Local Government Act 1972 empowers local authorities to prosecute or defend legal proceedings only where it is expedient for the well-being of the inhabitants of their area and local authorities in general only bring well-considered claims.
  - The nature of NSIP projects is that there will almost invariably be a possible claimant who could bring the challenge instead and so the reduction in risk of challenge would be limited.
  - This change might increase the risk of delay as challenges are brought by individuals in a piecemeal fashion rather than a single challenge by a local authority.

### **Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990**

#### *Question*

**Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to**

**fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?**

*Summary*

101. The consultation said the Government was considering whether it is appropriate for these cases to continue to attract legal aid. We asked for views on whether legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Act where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application. This would not affect the availability of legal aid where the failure to fund the challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights.
102. Many respondents did not provide a view. Of the 325 total responses to the consultation 88 respondents answered this question. Of those respondents, 65 supported retaining legal aid for these cases, 11 supported removing legal aid, and 12 provided no clear view.
103. The main arguments and views expressed by respondents were:
- Concerns that removing legal aid would reduce the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which has already restricted legal aid in these types of appeals to cases where the individual is at immediate risk of loss of home) and would be unjust given the importance of that issue to the legally aided individual.
  - Any further restriction of legal aid availability in this area, would be contrary to the rationale expressed during the passage of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and on which the current scope of legal aid, as a whole, is therefore based.
  - This issue was not connected to the growth-related aims of the other planning proposals in the consultation, and was in fact intended to target gypsies and travellers. Respondents highlighted the lack of data provided to evidence the case for exploring any further restrictions of legal aid in this area.
  - Introduction of a permission filter for section 288 cases should be considered as an alternative. A filter already exists in section 289 cases.

## **Chapter 4 – Standing**

*Questions*

**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?**

**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?**

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

### Summary

104. In this chapter the Government sought views on whether the test for standing – which governs who may bring a judicial review – should be amended to require a ‘direct’ interest and if so what a new test might look like. Of the 325 responses to the consultation, 241 respondents answered this question. Of those 241, 16 were in favour of a revised test, 213 did not agree with changing the test and 12 gave a mixed response.
105. The majority of respondents did not support a tighter approach to standing. The senior judiciary identified this as an area which caused them “particular” concern in respect of preventing meritorious challenges, and this was a view echoed widely. The Bar Council, individual chambers and barristers, the Law Society, and a range of solicitors’ firms (including large commercial ones) also registered their concern as did NGOs.
106. The main arguments and views expressed by respondents were:
- Requiring a direct interest would deny meritorious claims standing, and would be an example of the Government using a procedural technique to stop important issues being considered.
  - A direct interest test would be a significant denial of access to justice and weakening of the rule of law.
  - Stopping public interest challenges would switch the role of judicial review – which is to challenge public wrongs and unlawfulness – rather than allow persons to protect their own rights.
  - There is little evidence of a problem with the current approach, with few claims brought in the public interest. Claims brought by NGOs tend to be more successful, as the Ministry of Justice’s own figures show. In addition, there is little evidence of use as a campaigning tool – the permission filter already works well.
  - Expert NGOs assist the court and can assist the court to understand the public policy context, in addition to assisting claimants this, it was argued, is beneficial to the Government.
  - Any new test is likely to be ineffective as NGOs should easily be able to find directly affected persons to bring the challenge instead.
  - It might have adverse implications for the cost of living if consumer groups are not able to challenge regulatory decisions.
  - This change would leave some acts by Government without a possible challenger, and so effectively immunises Government from scrutiny by the courts.
  - There is likely to be satellite litigation over the application of any test which would take time and there would be uncertainty in the meantime.
  - A claim might be bought by a person without a direct interest simply so that they could generate publicity for their cause from the courts having not granted permission (because of their lack of standing).
  - In relation to an alternative test, most respondents argued that none of the potential alternatives offered in the consultation paper were satisfactory and that the current approach worked well. Most respondents supported the Government’s view that the general test for standing to challenge EU measures in the European

Court of Justice, which requires a “direct and individual concern”, is too narrow to be considered.

- Many respondents argued that interveners in general assist the court, and the ability to intervene is already subject to a good measure of judicial control.

There was some support for a change to the test for standing, for example:

- People do need to have a direct interest in decisions in order to be able to challenge them otherwise the system will get clogged. There were arguments that the current test, by allowing for those with only a very limited connection to bring a challenge, causes public authorities (particularly local authorities) to have to waste scarce funds on defending judicial reviews. Several supporting respondents warned, however, that the Government should be careful not to restrict direct interest to a point where nobody will get standing.
- Allowing any person whatsoever to challenge a decision which the court feels it wants to examine is to undermine the democratic process as it allows unelected, unrepresentative and unaccountable judiciary to appropriate decision-making powers on the application of equally unelected, equally unrepresentative and equally unaccountable pressure groups.

## Chapter 5: Procedural Defects

### *Questions*

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

**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?**

**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?**

**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?**

**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)?**

### *Summary*

107. In this chapter the Government proposed two changes to the existing approach to challenges brought on the basis of procedural defects which could not have made a difference to the original outcome. The proposals looked at a) allowing such arguments to be tested more thoroughly earlier in the judicial review process – at permission stage – and b) applying a lower test of ‘highly likely’ to replace the current one of ‘inevitable’. Of the 325 responses to the consultation, 170 respondents answered this question. Of those 170, 17 were in favour of a revised test, however, 132 did not agree. A further 21 had mixed views on the merits of the proposal.



108. There was some support from respondents but generally little detail as to why the proposal was supported. Most respondents were opposed to any reform, and many questioned whether there was any basis for reform.
109. Where examples of claims brought solely on 'procedural defects' ground were raised the respondents tended to argue that these claims concerned substantive illegality and that the claims had raised issues of significant importance.
110. The main arguments and views expressed by respondents were:

*Option 1 – Bring forward the Consideration*

- Rejecting a claim on the basis of procedural defects can already be done at permission stage. The judiciary are already making such decisions appropriately.
- The proposal could result in 'dress rehearsals' of the substantive claim at the permission stage, slowing the judicial review process and adding to costs. This risk could not be mitigated effectively.
- The permission stage is not appropriate for considering whether there could have been a difference, not least as the defendant will not have fully disclosed their papers to the claimant.
- A link to the paying for permission work in judicial review cases was also identified by some respondents. By 'front-loading' the process, legally aided solicitors would have to do more work at risk, and so may be less likely to take on claims.
- Where respondents supported this change, they agreed that it could help reduce the number of weak claims brought and ensure those with merit would be resolved more quickly. It could serve as a disincentive to claimants who bring judicial reviews in order to delay decisions.
- Some respondents noted that planning judicial reviews are relatively often brought on technical points which a court might conclude would not have made a difference to the outcome of the overall decision making process. There was some support for the view that, in those cases, the court should be able to form a view on whether there would have been a difference at permission.

*Option 2 – A different threshold*

- The senior judiciary pointed out that a lower threshold would mean that some unlawful processes which may have had an impact will not be considered fully by a court or remedied.
- Many respondents also argued that the lower threshold downgraded the importance public authorities need to place on following lawful processes.
- The judiciary are experienced in making such decisions and there is no need to change the test.
- There is a risk that any changes will cause judicial review to focus on substance rather than (as now) process. This might mean that the judge would begin to look at the substance and merits of the decision, being forced to usurp the proper position of the decision-maker.
- Again, some respondents commented that it could result in 'dress rehearsals' of the substantive claim at the permission stage, slowing the judicial review process and adding to costs.

- Many respondents argued that this proposal reflected a Government misunderstanding of the importance of following a lawful process (particularly those set out in statute), which was as important as any type of substantive illegality.

## Chapter 6 – Public Sector Equality Duty

### *Questions*

**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.**

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

### *Summary*

111. The consultation included a question on whether disputes relating to the Public Sector Equality Duty (PSED) could be better resolved by an alternative mechanism to judicial review. This followed a recommendation by the Independent Steering Group, whose report was published on the same day as the consultation was launched.
112. Of the 325 total responses to the consultation, 136 respondents answered some or all of the questions on the PSED. A majority of those 136 responses (107) responded negatively to the question, arguing that judicial review should remain the principle mechanism for resolving disputes related to the PSED. 18 (of the 136) respondents saw some scope for using alternative mechanisms, and made suggestions in this regard. 11 respondents gave a mixed view, being sceptical of alternatives to judicial review but accepting that some may exist.
113. Those opposed to making changes in this area argued that the PSED relies on judicial review to be effective and enforceable and that cases have led to improvements in equalities protection. Many suggested that while the duty remains in its current form, judicial review should be available to enforce it. However, many of the negative responses had interpreted the consultation as proposing to remove judicial review in relation to the PSED, rather than seeking views on alternative mechanisms.
114. Some respondents saw merit in using alternative mechanisms to judicial review. Suggestions included a specialist tribunal, Alternative Dispute Resolution, an independent regulator and stronger enforcement powers for the Equality and Human Rights Commission. Some also suggested that the emphasis should be placed on public bodies fully complying with the PSED (through a statutory code of practice or better guidance). Furthermore, respondents highlighted that any alternative would need to have the same powers as the High Court, or judicial review would still need to be available as a last resort.
115. Respondents were asked whether they had any evidence regarding the volume and nature of PSED-related challenges. A small proportion of respondents were able to provide information in this regard. Many of those that did highlighted cases which they saw as leading to a positive change in terms of equalities protection in the behaviour of the public body or wider policy.

116. The main arguments and views expressed by respondents were:

- Adjudicating breaches of the PSED is an important exercise – even if the same decision will ultimately be taken.
- Successful judicial reviews do not just result in the same decision being re-taken – they can lead to substantive benefits for claimants and others.
- The PSED should not be treated any differently to other public law duties – it should be enforceable in courts.
- If Parliament wants to change or abolish the duty then it should do so.
- There is no evidence of any problem with PSED challenges.
- PSED is usually brought as an additional ground as part of a wider challenge. An alternative mechanism would lead to dual litigation – one for PSED and another for other grounds.
- Various cases were highlighted by respondents where a PSED challenge resulted in substantive benefit to the claimant as well as a wider change in policy.
- Removing the potential to go to judicial review would lead to satellite litigation at the outset.
- PSED has just started to ‘bed down’ and courts have established boundaries effectively – should not be tampered with.
- Alternatives to judicial review should already be explored under the Pre-Action Protocol – judicial review is a measure of last resort.
- Judicial review is resource intensive for both sides – alternative mechanisms could be cheaper and quicker.
- Judicial reviews related to the PSED place an undue burden on public bodies and so alternatives should be found.
- Specialist or expert bodies could be more effective in resolving disputes at an early stage.
- Any alternative would need to have the same powers as the High Court, or judicial review would still need to be available as a last resort.
- Better guidance is needed for public bodies on complying with PSED.
- Equality and Human Rights Commission enforcement powers should be strengthened.
- Public bodies should respond properly to the pre-action procedure.
- Alternative mechanisms include Alternative Dispute Resolution, an independent regulator, or a new specialist tribunal or extension of jurisdiction of an existing tribunal e.g. Employment Tribunals.
- Claimants could be required to identify on claim form whether they intend to raise a PSED argument.

## Chapter 7 – Rebalancing Financial Incentives

117. In this chapter the Government sought views on how the approach to costs for judicial review could be adjusted to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings. Reform was considered in five areas: restricting payment to legal aid providers unless permission is granted, the costs of oral permission hearings, Wasted Costs Orders, Protective Costs Orders and costs relating to interveners and non parties. The proposal on paying for permission work in judicial reviews is dealt with in Annex B.

### Costs of Oral Permission Hearings

#### *Question*

**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?**

#### *Summary*

118. This proposed introducing a principle that the costs of an oral permission hearing should usually be recoverable as a matter of course, rather than exceptionally. Of the 325 total responses to the consultation, 148 respondents answered this question. Of those responses 23 were in favour of the proposal, however, 121 did not agree. 4 respondents provided a comment but had mixed views on support or opposition for the proposals.
119. The majority of respondents were generally not in favour of the proposal, citing access to justice issues arising from more financial barriers to bringing a judicial review which, it was argued, would price claimants out. A common theme amongst respondents was that the hearing is intended to be for the claimant to prove his case and a defendant is not required to attend but if he (the defendant) chooses to do so then he should bear his costs. Respondents stated that it would be premature to take this forward without looking at the impact of previous reforms (namely removal of the right to an oral hearing in cases deemed totally without merit and the new fee for an oral hearing).
120. There was some support for the introduction of such a principle in commercial cases, recognising that such hearings do take longer and involve more costs.
121. The main arguments and views expressed by respondents were:
- Different costs rules should apply to judicial review; the permission filter is a special case and serves to protect defendants from unmeritorious cases which would suggest a defendant should cover his own costs of it.
  - The oral hearing is not for the defendant to defend but for the claimant to prove his case and court to decide if it is arguable. A defendant's attendance is therefore voluntary (unless required by the court) and if he chooses to attend he should bear costs. Arguably the defendant does not add anything to the hearing that could not be dealt with by paper representations.
  - This could turn permission hearings into dress rehearsals of the full hearing. It could also result in satellite litigation over costs.

- The court already has powers to award costs in exceptional circumstances and this is the correct balance. To change it would unbalance the process to the claimant's detriment. In any case it is already open for a defendant to apply for costs of oral permission against an unsuccessful claimant.
- These reforms are designed to price claimants out, particularly alongside previous reforms and legal aid proposals. There are access to justice and rule of law issues.
- It is premature to do this without waiting to see the impact of earlier reforms such as the removal of the right to an oral permission hearing for cases determined by a Judge on the papers as Totally Without Merit, and the introduction of a fee for an oral permission hearing.
- There would need to be a strong case for departing from the current principles but there is no evidence to justify change or whether the presence of a defendant is generally of assistance to the court.
- The number of cases that succeed at oral renewal hearing is low but applications are high, which suggests claimants apply even where there is a low chance of success. Although a defendant is not obliged to attend they do need to protect interests and may incur costs through doing so.
- This will deter weak claims that are unlikely to get permission and will help reduce court time and the burden on defendants.
- Currently it seems permission is renewed orally regardless of merits without any fear of costs so this may go some way to help that situation.
- In practice courts refuse to make cost orders at oral permission hearings which ignores the fact that public bodies have to spend public money in defending what can be an unmeritorious claim.

## Wasted Costs Orders

### *Questions*

**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?**

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

**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?**

**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.**

### *Summary*

122. The Government sought views on whether the current approach to Wasted Costs Orders (WCOs) should be modified to capture a wider range of behaviours, and/or whether the WCO process could be streamlined. The consultation also tested whether a fee should be charged to cover the costs of any oral hearing of a WCO.

123. 145 of the 325 total responses to the consultation answered questions on WCOs.

7 responded positively, and 6 respondents offered mixed comments both in support and opposition. However, 132 respondents opposed the proposals.

124. Many respondents felt that the current test was appropriate and that the Government had failed to present a compelling case for change. Some respondents were concerned that the suggestion of a broader test for WCOs failed to recognise that it is ultimately the client's decision whether or not to proceed to bring the claim. Whilst there was some support for the proposal, several respondents noted that the effect of fee changes introduced earlier this year should be assessed before any further fee reforms are pursued.

125. The main arguments and views expressed by respondents were:

- There is an insufficient case for change to the existing approach for issuing WCOs.
- Broadening the test risked deterring legal representatives from taking on difficult but important cases.
- It is the lawyer's role to advise the client of the merits of the case, but the client's decision whether or not to proceed to bring the claim.
- The court would often have to consider advice given to the client covered by legal professional privilege. This could only be disclosed if the client waived that privilege, and it would rarely be in their interest to do so.
- Legal representatives should not be financially penalised to defend themselves against a WCO at an oral hearing.
- The effect of earlier fees reform should be assessed before further action is considered.

## **Protective Costs Orders (PCOs)**

### *Questions*

**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?**

**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?**

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

**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?**

**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?**

### Summary

126. The proposals looked at abolishing PCOs in any case where there is an individual or private interest regardless of whether there is a wider public interest or modification of the principles governing the awarding of a PCO; greater clarity on funding and the presumption of a cross cap for a defendant's liability, with fixed cap amounts.
127. Of the 325 total responses to the consultation 186 respondents answered this question. Of those responses 14 were generally in favour of the proposals, however, 162 generally opposed the proposals. 10 respondents provided comments but had mixed views on support or opposition for the proposals.
128. Generally, respondents were not in favour of abolishing PCOs where there was a private interest; respondents commented that judicial review was about public wrongs not private rights and to remove in cases where there was a public interest was an attack on access to justice. With the standing proposals this was a double barrelled attack and would leave NGOs/charities unable to challenge public interest cases. There was more support for greater transparency in funding but respondents urged caution that it didn't make for lengthier applications. There was some support for a cross cap.
129. The main arguments and views expressed by respondents were:

#### *On abolishing or modifying PCOs*

- The central consideration for awarding a PCO is whether there is a public interest, other factors such as private interest should then be considered. A private interest is not determinative and courts are experienced in making such judgements.
- This is another barrier to deter meritorious claims and designed to price out a claimant, particularly given earlier reforms (such as court fees) and legal aid proposals. Opposition on access to justice grounds. PCOs will become more important with legal aid changes.
- When read alongside the standing proposals this is a double barrelled attack on NGOs and charities and will leave them in a Catch 22 situation, It places a claimant – particularly NGO and charities – in a position where if they have a sufficient (direct) interest for standing then they could not get a PCO, and vice versa.
- Removal or modification would mean executive can act unlawfully with impunity. Wrong in principle for executive to intervene with costs/abolish completely, this is a matter for judicial discretion.
- It is in the interests of the taxpayer that public bodies are held to account. No conflict between access to courts and interests of taxpayers.
- The consultation talks of 'rebalancing' but things are moving too far in favour of the defendant. There is an imbalance between parties and this inequality of arms led to PCOs being developed in the first place.
- When PCOs are awarded they don't always mean that a claimant doesn't have to pay costs – there will usually be some costs liability and that can be financially difficult.
- Abolition of PCOs may mean more costs in long run if cases aren't brought. For example, (even if the claimant loses) the case could be used to the benefit of the wider public interest – to clarify the law, prevent future unlawful decisions. There

is also a risk of multiple challenges as individual claimants would all bring their own challenge.

- May be appropriate to modify the private interest test to rule out a PCO where there is a financial or commercial interest.

*On financial transparency*

- Responses were mixed, with respondents considering that transparency is important but that the courts consider such matters already and have sufficient powers.
- It is important to make sure that looking into the finances does not overly prolong applications.
- Finances should go to the amount of the cap rather than whether a cap should be made in the first place.

*On Cross Caps (limiting the defendant's liability for the claimant's costs)*

- Some respondents thought the courts do already consider such things and do not need new powers.
- Cross caps have a different purpose: to protect the defendant from the claimant raising unreasonable costs. A cross cap would significantly change the function of the PCO.
- Some respondents queried whether it is right for a public body defendant who has been found to have acted unlawfully to have costs protection.
- A cross cap could affect the claimant's ability to find a legal representative. Defendants have greater funds so can use lawyers of their choice as they are able to cover costs above the PCO limit but claimants can't. Cross caps shouldn't be at a level that makes Conditional Fee Agreements unviable.
- A presumption of a cross cap for local authorities would be helpful. Courts forget there is more pressure on local authority finances with reduced budgets. Not only does this mean less to use for litigation, but it is likely to cause more judicial reviews as services will need to be withdrawn to fund the costs, and that will be challenged.
- There was little support for fixed limits as the claimant's circumstances and the amount of the cap will vary from case to case. If fixed limits were introduced the claimant should have a lower amount for his liability. Setting individual amounts may be too restrictive and will alter over time in any event.

## **Interveners**

*Questions*

**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?**

**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?**



### *Summary*

130. The Government proposed that third parties who choose to intervene in judicial review should be responsible for their own costs and any costs they cause the existing parties. Of the 325 total responses to the consultation 169 respondents answered this question. Of those respondents 23 were in favour of the proposal and 122 were not. 24 respondents provided comments but had mixed views on support or opposition for the proposals.

131. The majority of the respondents said that interveners already pay their own costs. There was little support for interveners paying additional costs, with respondents arguing that it was a matter for judicial discretion – courts already manage the process well and can benefit from the expertise brought by interveners.

132. The main arguments and views expressed by respondents were:

- Interveners already pay their own costs. Intervention happens rarely but happens in the public interest so cost orders should not be used to deter interventions.
- The court and parties will benefit from intervention by expert interveners, improving decision making. This can mean less cost in the long run.
- Courts have to consent to an intervention so can manage the process already and may also make use of their current case management powers. Courts are experienced in judging where an intervention is unnecessary and inappropriate and make costs orders as necessary.
- The government often intervenes.

## **Non-parties**

### *Question*

**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?**

### *Summary*

133. The Government proposed requiring claimants to provide information on how litigation is funded. Of the 325 total responses to the consultation 118 respondents answered this question. Of those respondents 30 were in favour of the proposals and 73 were not. 15 respondents provided comments but had mixed views on support or opposition for the proposals.

134. Responses were mixed – some respondents believed the change was unnecessary as courts had sufficient powers and that parties shouldn't have to provide additional information. There was support, including from the senior judiciary, for having greater information on how litigation is funded.

135. The main arguments and views expressed by respondents were:

- The courts already have powers to award costs against non parties and have experience of investigating finances. Further powers are unnecessary.

- The senior judiciary support strengthening transparency over claimants' funding as it will help the court in deciding whether to make a costs order against a non-party. However, courts should retain full discretion in making costs orders.
- There would be practical difficulties in deciding when and how much information should be disclosed to the courts and how this information should be provided.
- The proposal could result in courts having to do a forensic investigation of the truthfulness of the information given. There could be difficulties in collecting costs if an order extends to a large group of ill defined people who contributed to the charity/interest group.

## Evidence and Examples of Costs Orders

### *Question*

**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?**

### *Summary*

136. Few respondents answered this question; of the 325 responses only 26 provided an answer, although some respondents referred to examples of costs orders in their responses to other questions in this chapter. Where an answer was provided, respondents had referred to examples of costs orders or interveners in cases they had been involved in, or referred to leading case law that set out the principles in awarding a particular cost order.

137. In answer to this specific question, and to other questions in the Rebalancing Financial Incentives chapter, some respondents questioned the evidence base for reform, arguing that the Government had put forward no evidence that there was a problem in this area and that change was necessary or desirable.

138. Several respondents referred to research conducted by the Public Law Project and the University of Essex, funded by the Nuffield Foundation. This research found that during the 20 month period between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted, in which only 3 were in non environmental cases. The PCOs included awards to NGOs such as Medical Justice and the Child Poverty Action Group.<sup>13</sup>

## Chapter 8 – Leapfrogging

### *Questions*

#### *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?**

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<sup>13</sup> This research is based on self reported questionnaires from solicitors and may not represent a complete picture.

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

*Option 2 – Consent*

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

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

*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?**

**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?**

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

*Summary*

139. The Government sought views on extending the scope of ‘leapfrog’ appeals (cases which move direct from the court of first instance to the Supreme Court) in order to allow cases which will end up in the Supreme Court to get there more quickly. The consultation suggested three changes to the present approach to leapfrogging: allowing for a case to leapfrog because of its nationally significant implications; removing the need for all parties to consent; and extending leapfrogging to the Upper Tribunal, Employment Appeals Tribunal (EAT) and Special Immigration and Appeals Commission (SIAC).
140. Of the 325 responses to the consultation, 116 respondents answered some or all of the questions on leapfrogging. 51 respondents were in favour of all three leapfrogging proposals, while 20 did not agree with any of them. 45 respondents were either supportive of some, but not all, of the proposals or had no clear opinion.
141. Many respondents agreed with the principle that appropriate cases should be expedited to the Supreme Court. Some highlighted the risk that the Supreme Court could become overloaded with extra cases and would lose the benefit of the Court of Appeal’s consideration.
142. In terms of the specific proposals, many respondents were supportive of the changes proposed in order to ensure appropriate cases reach the Supreme Court quickly. Some saw benefits in the scope for leapfrogging to be extended even more widely than proposed. A minority of respondents were opposed to these changes. Specific concerns raised included that the extended criteria were too vague, that removing the need for consent would undermine appeal rights, and that leapfrogging should not be extended to SIAC.

143. The main arguments and views expressed by respondents were:

*General points*

- It was right that appropriate cases should be expedited to the Supreme Court as this would save costs and time and would be in the interests of justice, though some respondents cautioned that this should not become routine.
- Changes should be applicable to all civil appeals.
- There was a danger of overloading the Supreme Court with cases – it's important that it retains discretion to refuse a leapfrog.
- The Supreme Court benefits from consideration by the Court of Appeal and its role in refining arguments and establishing facts.
- If the Supreme Court refuses permission for a leapfrog appeal the appellant should retain the right to seek permission to appeal to the Court of Appeal.
- Some respondents questioned whether there is evidence of a problem, arguing that considerable efforts are already taken by the courts to expedite cases; cases of national importance are likely to fulfil current criteria anyway.
- It can be difficult to see whether a case will end up in the Supreme Court at first-instance.
- It is not a good use of the Supreme Court's time to wade through evidence from the court of first-instance.
- There should be protection from increased costs for claimants.
- Some respondents offered suggestions for additional procedural changes, including that the Supreme Court should decide an application within seven days and that there should be flexibility to change a leapfrog decision if circumstances change.

*Option 1 – Extending the relevant circumstances*

- The criteria should be extended as proposed so that a case which is inevitably going to reach the Supreme Court can leapfrog.
- They should also be extended to cases where there would be no significant benefit in seeking the views of the Court of Appeal, which affect a large number of people, are of general public importance, raise novel issues of law, where there is evidence of varying practice, where there would be a benefit to the public purse, or where the delay would cause a severe detriment to the parties such as prolonged detention.
- Judges should be given a wide discretion without the legislation being too prescriptive.
- The extended criteria seem to reflect the cases that are important to Government, but not necessarily the public.
- The extended criteria are poorly defined and ambiguous – they could lead to satellite litigation and there will always be cases that fall outside of a given definition.
- The extended criteria may be matters of contention in the relevant proceedings, and as such are not suitable as criteria for leapfrogging.

*Option 2 – Consent*

- It is right that the decision on a leapfrog should be left to the court and not the parties.
- The proposal would not affect appeal rights as cases would end up in Supreme Court anyway.
- Consent should not be removed as it is an important safeguard to ensure appeal rights are not curtailed.
- If the requirement for consent is removed, provision should be made for views of all parties to be taken or there should be a right of appeal against a decision to allow a leapfrog at an oral hearing.

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

- Leapfrogging should be extended to the Upper Tribunal, EAT and SIAC – they should not be treated differently to the High Court.
- They should be subject to the same criteria as for appeals from the High Court.
- Leapfrogging should also be available from the County Court.
- Some respondents had concerns about extending leapfrogging to SIAC as it is a first-instance tribunal and finder of fact – the Supreme Court would benefit from the Court of Appeal's consideration.

## **Equality Impacts**

*Question*

**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?**

*Summary*

144. The consultation asked respondents whether they considered that groups with protected characteristics would be particularly affected, either positively or negatively, from the proposals.
145. Of the 325 responses to the consultation, 211 respondents answered this question specifically although some respondents did include comments on equality impacts within their response to particular proposals. Of those that did provide a response, almost all were of the view that the proposal(s) would have a disproportionately negative impact on groups with protected characteristics and other vulnerable groups. Some respondents were of the view that Government has not produced sufficient evidence that the proposals will not disproportionately affect groups with protected characteristics, and before it took any of these proposals forward it would need to do so. Some argued that the proposals were in themselves discriminatory.
146. A small number of respondents thought that the consultation paper highlighted the potential impacts accurately or considered that while there was a risk of differential impact, this would be mitigated by the court ensuring that arguable cases are heard.

147. The main arguments and views expressed by respondents were:

*General points*

- Respondents were of the view that taken together the proposals would have a disproportionate impact on those with protected characteristics as these groups tend have more interaction with state services and consequently have greater reliance on judicial review. The proposals would threaten their access to justice and ability to challenge unlawful decisions which affect them.
- In particular, respondents highlighted the following groups with protected characteristics as likely to be disproportionately affected by the proposals:
  - Children, including children with learning difficulties and migrant and asylum seeking children. (It was highlighted that MoJ data shows that 23% of JRs are brought by young people aged between 18 and 25 while they make up only 11% of the population of England and Wales).
  - Older people.
  - Vulnerable women.
  - People with a disability, including mental health problems.
  - Lesbian, gay, bisexual and trans (LGB&T) people.
  - People with religious beliefs.
  - Black and minority ethnic communities.
  - Gypsy and Traveller communities.
- Regarding the lack of data on court users with protected characteristics, it was highlighted that some evidence of differential experiences of the civil justice system is available showing that in England and Wales, people aged 18 to 24 and those aged 65 or over; people who are Asian, Black, mixed race or Chinese; and those who are Muslim, Buddhist or Hindu are more likely than those in other groups to give up or do nothing when faced by a civil justice problem or less likely than other groups to obtain advice when faced with a civil justice problem (However note that this research did not include judicial review.)<sup>14</sup>

**Points on specific proposals**

*Planning and section 228 and 229 Town and Country Planning Act 1990 permission filter*

- The planning proposals are likely to affect Gypsies and Travellers disproportionately as they are more often claimants in challenges under sections 228 and 229 of the Town and Country Planning Act 1990.
- Respondents noted the relevance to planning matters of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and highlighted that of two complaints decided in favour of applicants by the UN Disability Committee, one was a planning decision.

*Standing*

- Respondents stressed the negative impact of the standing proposals on groups with protected characteristics by preventing NGOs from bringing claims for groups

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<sup>14</sup> <http://www.equalityhumanrights.com/key-projects/our-measurement-framework/>

they represent e.g. children, people with disabilities, people holding religious beliefs etc.

*Financial incentives*

- Some respondents highlighted that as people with protected characteristics (e.g. disability, gender, ethnicity) are overrepresented in low-income groups, the proposals will act as a barrier to justice for these groups.
- It was argued that the proposals on interveners will impact negatively on vulnerable groups who rely on the intervention of NGOs and charities in proceedings.

*Public Sector Equality Duty (PSED)*

- Respondents were of the view that as PSED disputes invariably concern the impact of a public authority's decision on people who share protected characteristics, the proposals in this area are likely to have a greater effect on these groups.