

Title: Reforms to Judicial Review IA No: MoJ 210 Lead department or agency: Ministry of Justice Other departments or agencies: None	Impact Assessment (IA)		
	Date: 06/09/2013		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: Thomas Murphy 020 3334 4386			

Summary: Intervention and Options	RPC Opinion: GREEN
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
£m	£m	£m	Yes IN - zero net cost

What is the problem under consideration? Why is government intervention necessary?

The number of judicial review applications has more than doubled in the past 10 years. The Government is concerned that a large number of these claims are weak or frivolous and that there is scope for JRs to be brought by those without a direct interest in the matter at hand. The Government is also concerned that financial incentives currently do not discourage claimants from bringing weak cases. Unsuccessful JRs may disproportionately frustrate and delay the implementation of government policy including infrastructure projects that may contribute towards economic growth.

What are the policy objectives and the intended effects?

The policy objective is to reduce the incidence of weak JRs brought by those with only a tangential or representative interest, particularly where those claims are brought as part of a campaigning or delaying approach, and by providing better balanced financial incentives to discourage weak or frivolous cases. The government is also requesting views on whether standing should be amended to require a direct interest in the matter to which the application relates. In this way, this should ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The options considered in this Impact Assessment are outlined below.

Option 1: The Government is seeking views on limiting standing (who may bring a claim) in 2 ways: 1a) to those with a direct interest in the matter at hand, unless the claim is an “environmental JRs” 1b) in ‘environmental JRs’ to NGOs who promote the protection of the environment or to individuals who are able to demonstrate a genuine interest and sufficient knowledge in the environmental matter (save for those with a direct or familial) .

Option 2: Rebalance financial incentives for claimants considering whether to bring a JR. This option has four components: 2a) Claimants pay defendants’ costs when claimants lose oral renewal hearings, 2b) Increased use of cost orders against legal representatives for misconduct, 2c) Rebalanced use of Protective Costs Orders in non environmental cases, 2d) Cost provisions in relation to third parties and non parties.

The Government wishes to receive views on amending standing. In terms of financial incentives, the Government’s favoured option is to implement all proposals to meet the policy objectives.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded: NA	Non-traded: NA

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____  _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Limiting Standing (who may bring a claim)

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: NQ

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this reform at this time. Further information will be sought through the consultation process to support quantification at the final stage.

Other key non-monetised costs by 'main affected groups'

Claimants and third parties that stand to benefit from delay, uncertainty or changes to government decisions would lose out if there were fewer JRs following this change.

Legal services providers may face costs if fewer JRs are lodged following this change although this is a secondary impact.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to fully monetise all impacts of this reform at this time. Further information will be sought through the consultation process to support more quantification at the final stage. Currently it is estimated that defendants may save a maximum of £10m and claimants may save a maximum of £8m from 400 JRs no longer being pursued (both figures assume no cost recovery from the losing party).

Other key non-monetised benefits by 'main affected groups'

Claimants, defendants and third parties that stand to benefit from reduced delay and uncertainty to government decisions would benefit if there were fewer JRs following this change.

Defendants and claimants would benefit from reduced costs of bringing and defending JRs following this change, assuming there is a reduction in the number of JRs. Legal services providers would be able to divert any resources freed up to other profitable activities. There may be wider economic benefits if major infrastructure projects are able to progress more quickly as a result of fewer JR challenges.

Key assumptions/sensitivities/risks

Discount rate (%)

The maximum illustrative quantified benefits of £10m plus £8m mentioned above assume the maximum possible baseline number of JRs affected are no longer lodged, and assume the maximum possible legal costs are saved. Actual savings could be lower.

There is a risk that some excluded groups may devote more resources to demonstrate they have standing or to support third parties that have standing in bringing JRs. This may be more costly for them.

It is assumed that the financial impact on HMTCS will be neutral as HMCTS operates on a cost recovery basis over the longer term.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes	Zero net cost

Summary: Analysis & Evidence

Policy Option 2

Description: Improving financial incentives for claimants

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to fully monetise the impacts of this reform at this time. Further information will be sought through the consultation process to enable further quantification at the final stage. Currently it is estimated that claimants may pay up to around £1.8m to defendants who recover their oral renewal legal costs from claimants (of which £50,000 might be business and third sector claimants), and defendants may pay up to around £0.9m to claimants who recover their oral renewal legal costs from defendants. For legally aided claimants some of these £1.8m costs would be met by the Legal Aid Agency. Legal services providers may face costs of up to £40,000 through greater application of cost orders made against legal representatives for misconduct.

Other key non-monetised costs by 'main affected groups'

Claimants/third parties that benefit from delay/uncertainty/changes to government decisions would lose out if there were fewer JRs or if they were withdrawn earlier. Claimants may lose out through more restrictive Protective Cost Protection. Third parties may lose out from being unable to recover costs and having costs awards made against them. Legal services providers may experience reduced levels of JR business if fewer JRs are lodged/withdrawn earlier.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to fully monetise the impacts of this reform at this time. Further information will be sought through the consultation process to enable further quantification at the final stage. Currently it is estimated that defendants may save up to around £1.8m from recovering their oral renewal legal costs from claimants, and claimants may gain up to around £0.9m from recovering their oral renewal legal costs from defendants. Defendants or claimants would gain up to £40,000 from an increase in wasted costs orders.

Other key non-monetised benefits by 'main affected groups'

Defendants would gain from a reduction in JR volumes and uncertainties and/or earlier withdrawals in the defendant's favour. Claimants would also save costs from bringing fewer weak JRs and/or from withdrawing sooner. Defendants may gain from no or more restrictive Protective Cost Orders for claimants and from costs awards against interveners and non-parties. Third parties including businesses would gain from reduced delays and less uncertainty relating to the implementation of public decisions. There may be wider economic benefits if major infrastructure projects are able to progress more quickly as a result of fewer JR challenges. Legal services providers may devote freed up resources from fewer JRs to other profitable activity.

Key assumptions/sensitivities/risks

It is assumed that some claimants and lawyers with weak cases would be discouraged from lodging JRs following these changes or would withdraw them earlier in the process. It is assumed that the financial impact on HMTCS will be neutral as HMCTS operates on a cost recovery basis.

Discount rate (%)

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes	Zero net cost

Evidence Base (for summary sheets)

Introduction

Background

- 1.1 Judicial Review (JR) is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions of the executive, including those of Ministers, local authorities, other public bodies and those exercising public functions. It is largely a 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.
- 1.2 There are three main grounds on which a decision or action may be challenged:
 - Illegality: For example, the decision was not taken in accordance with the law that regulates it or goes beyond the powers of the body.
 - Irrationality: For example that the decision 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.
- 1.3 JR proceedings must be commenced by filing at Court a claim form, which sets out the matter the claimant wants the Court to decide and the remedy sought. The Court's permission is required for a claim for JR 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. Where permission is granted, the Court may make directions for the conduct and management of the case.
- 1.4 In cases where the Court refuses permission (either in full or in part), the Court 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 Impact Assessment as an "oral renewal"). The oral renewal is a full reconsideration of whether permission should be granted, supported by oral submissions. Where permission is granted at an oral renewal, 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 (CoA).
- 1.5 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. 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.
- 1.6 JR 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 a number of orders, such as a quashing order setting aside the original decision.

Problem under consideration

- 1.7 The Government is concerned that there has been significant growth in the use of JR, with suggestions that this is sometimes used as a delaying tactic, and only a small proportion of cases stand a reasonable prospect of success. JR proceedings can create delays and add to the costs of public services, in some cases potentially frustrating reforms, including those aimed at stimulating growth and promoting economic recovery.

Standing

- 1.8 Currently, the law (section 31 of the Senior Courts Act 1981) requires that claimants should not be granted leave for an application for JR unless the court “considers that the applicant has a sufficient interest in the matter to which the application relates”.
- 1.9 The Government is concerned that, over time, an increasingly generous interpretation of the requirement of “sufficient interest” has been given, so that a personal or substantive interest in the matter to which the application relates is no longer required. This has meant that individuals and groups with an interest in the general area, such as representative groups, have been able to challenge specific decisions, acts or omissions which do not affect them directly.
- 1.10 The Government is concerned that this has allowed JRs to be lodged as part of sophisticated campaigning approaches, by Non-Governmental Organisations (NGOs) and pressure groups, which may bring cases to raise public awareness of the issue or of their organisation.

Financial incentives

- 1.11 Currently claimants who lodge unsuccessful cases may not be exposed to all of the costs which they generate as a result – for instance their costs liability in pursuing an oral renewal is limited to the defendant’s costs of preparing an acknowledgment of service and will not include the costs of any preparation and representative advocacy for the hearing. As a result claimants might lodge JR claims, including pursuing permission and oral renewal decisions, which they otherwise might not if they took account of all costs and benefits.
- 1.12 Legal services providers acting on behalf of claimants may also, through their behaviours, generate avoidable costs and delays which are currently met by claimants and defendants. They might not do so if they were more exposed to the costs of their actions, for example if they had to meet the costs generated by their unreasonable behaviour.
- 1.13 Similar considerations apply to claimants who secure Protective Costs Orders (PCO). These limit claimants’ exposure to the costs they generate as a result of their actions and any of the defendant’s costs they would otherwise be liable for. As a result claimants may lodge more JRs, or may pursue them further, than they would otherwise do if they took account of all costs and benefits. Also, while it is already a principle that in considering a PCO the court should have regard to the financial means of the claimant, when applying for a PCO it is currently not mandatory for the claimant to provide details of who is funding the case and reveal any information on the size of third party funding.
- 1.14 Third parties who may be interested in the issue being considered in the judicial review may seek to voluntarily intervene, by filing evidence or making representations at the judicial review hearing. This has the potential to increase costs for the claimant or the defendant. Third parties may be less inclined to intervene voluntarily if they were more exposed to the costs of their actions.
- 1.15 Claimants may also form companies to limit their financial risk (so that only the assets of the organisations are at risk, not those of the individuals). Unless the claimant is in receipt of a prescribed ‘funding agreement’, such as a Conditional Fee Agreement (under which part of a solicitor’s fees will only be payable if the case is successful), there is no provision in the Civil Procedure Rules for

revealing the source of funding for litigation which may mean that costs can not in practice be enforced against those who had actually funded the judicial review.

Policy objectives and options under consideration

- 1.16 The policy objective is to ensure that the volume of JRs brought by those with only a tangential or representative interest in the matter in question is reduced, particularly where used for campaigning or delaying purposes, and that less meritorious cases which stand little prospect of success are discouraged from being lodged through better financial incentives. This should ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.

Option 1 – Limiting standing

- 1.17 The Government wishes to receive views on limiting standing (i.e. who may bring a JR claim) for claimants in two ways: under Option 1a standing would be limited to those with a direct interest in the matter. This would apply to all claims. Under Option 1b, standing in environmental JRs would be limited to NGOs who promote the protection of the environment and to individuals where they are able to demonstrate a genuine interest and sufficient knowledge in the environmental matter (in addition to those with a direct interest).

Option 2 – Financial incentives

- 1.18 Generally in a court case the unsuccessful party pays the costs of the successful party. This may include costs of using legal representatives, court fees, and other costs incurred in the case such as costs of obtaining evidence from experts. The options outlined below look to strengthen this principle for JR cases.

Option 2a – Cost orders for oral renewal hearings

- 1.19 Currently claimants do not pay the costs of defendants (public bodies) at oral renewal hearings when the defendant is successful. This may lead to an excessive number of weak oral renewals which generate delays in resolving a JR claim. Under Option 2a, the costs of an oral permission hearing would be recoverable, i.e. unsuccessful claimants would pay the defendant's costs of defending the unsuccessful oral renewal application. If the claimant is successful at the oral hearing and goes onto a full hearing, the cost of the oral hearing will be determined at the end of the case with the unsuccessful side generally being responsible for costs.

Option 2b – Increased use of cost orders against legal representatives

- 1.20 A Wasted Costs Order (WCO) relating to legal provider misconduct may currently be made when legal services providers are judged to have generated costs on either a claimant or defendant as a result of improper or negligent conduct or omission on the part of a legal or other representative or any employee of such a representative. These orders consider the situation in which a party has unnecessarily incurred costs due to the other side's conduct.
- 1.21 Currently WCOs are used very infrequently.¹ Under the current proposals WCOs against legal representatives might be used more often as they might be applied in a wider range of circumstances. This may have a deterrent effect on particularly weak cases being brought.

Option 2c – Removing or reducing the use of protective costs orders (PCOs)

- 1.22 A PCO is a costs order made at the beginning of the case which limits a party's (usually the claimant's) exposure to the winning party's costs on a pre-emptive basis. Separate provisions already apply to environmental cases (in accordance with the Aarhus Convention) and the current reforms relate to non-environmental cases.

¹ See figures in paragraph 2.28.

- 1.23 The proposals look at whether PCOs should be available at all in non environmental cases; alternatively if PCOs continue to be available, the proposals look at modifying the principles which govern their use and that the claimant should provide greater details of who is funding the case. The proposals also consider greater use of a cost cap to protect the defendant's liability to the claimant's costs. While it is already a principle that in considering a PCO the court should have regard to the financial means of the claimant, when applying for a PCO it is currently not mandatory for the claimant to provide details of who is funding the case and reveal any information on the size of third party funding.
- 1.24 The reform assessed here is that fewer PCOs will be available for claimants in future and/or that PCOs will provide claimants with less protection against meeting the defendant's costs in cases which the defendant wins in non-Aarhus Convention cases. The IA also assesses the impacts of claimant having to provide details of who is funding the case and a statement of assets including any third party funding.

Option 2d – Cost provisions against third parties.

- 1.25 Where a third party (including people and organisations) with an interest in the case – although not directly affected or a party to the litigation – chooses to intervene in the proceedings, the courts can require the unsuccessful party (claimant or defendant) to pay the costs of that third party. This has the potential to significantly increase the legal costs of the case to the claimant or the defendant. The proposals look at third parties assuming responsibility for their own costs and, where the third party raises issues that leads to additional costs for the claimant or the defendant, whether the third party should assume responsibility for those additional costs.
- 1.26 Additionally where claimants form an organisation to bring a judicial review, (to avoid individual responsibility for costs) the court has limited ability to award costs against the individuals. The consultation invites views on whether to amend the requirement to provide information on how litigation is funded and on the power to award costs against non parties (individuals who have formed an organisation to bring a claim or other individuals/bodies that may have provided funding to the claimant).

Economic rationale for intervention

- 1.27 The economic rationale for the policy proposals considered in this Impact Assessment is primarily based on improving economic efficiency. Under the base case, claimants and lawyers may generate external costs on the Government and on third parties which they may not be exposed to and which they may not factor into their decision making and their behaviour. This may result in a larger number of weak cases being brought than would otherwise be the case. The proposals in this Impact Assessment aim to address this.

Main affected groups

- 1.28 The proposals are likely to affect the following groups:
 - a. Claimants at the High Court in England and Wales – individuals, businesses and third sector organisations.
 - b. Defendants at the High Court in England and Wales – public sector organisations/bodies.
 - c. Her Majesty's Courts and Tribunals Service (HMCTS) – administers the Administrative Court (which forms part of the High Court of Justice) in England and Wales.
 - d. Legal Aid Agency (LAA). The LAA is responsible for managing the legal aid fund. Claimants who are eligible for legal aid have their fees paid for them by their legal representatives, who can reclaim the money from the LAA.
 - e. Legal services providers.
 - f. Third parties – business and individuals

2. Costs and Benefits

- 2.1 At this stage many of the costs and benefits identified in the following sections remain un-quantified due to a lack of information available on current practices and on the extent of behavioural changes anticipated following these reforms. Information will be sought over the consultation phase to support the quantification of impacts.
- 2.2 In order to fully quantify the impacts of these proposals further information would be needed on the costs claimants face at different stages (for example legal costs) and the benefits they secure through bringing a JR. Information would be needed on the costs and benefits faced by third parties (those that are affected by JRs but are not the claimant or defendant). Some of this information would be held by businesses and third sector organisations and may be commercially sensitive.

Option 0: Base case (do nothing)

Description

- 2.3 Under the “do nothing” base case, costs orders and standing considerations would remain unchanged. The do nothing option is compared to itself and therefore the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
- 2.4 Separate reforms to JR were the subject of an earlier consultation and response² and have been implemented from July 2012. The impact of these reforms is included in the base case for the purposes of this Impact Assessment.

Option 1: Restricting standing

Description

- 2.5 Under Option 1a standing (who may bring a claim) would be limited to those with a direct interest in the matter. This would apply to all claims. Under Option 1b, standing in environmental JRs would be limited to NGOs who promote the protection of the environment and individuals where they are able to demonstrate a genuine interest and sufficient knowledge in the environmental matter (in addition to those with a direct interest).
- 2.6 It is anticipated that Options 1a and 1b are likely to impact mainly on non-immigration and asylum cases brought by organisations rather than by individuals. From internal Administrative Court management information, it has been possible to identify that around 400 JR applications seem to have been lodged in 2011 by organisations (rather than individuals) and, of these, around 60 seem to have been brought by NGOs, charities and pressure groups. Around 15 of the cases could possibly have been brought in relation to environmental cases.³
- 2.7 These figures are based on a high level review of claimant details in Administrative Court data and are therefore largely illustrative. It is also not possible to estimate sufficiently accurately from the data or from the case files how many of these cases would be affected by a new standing requirement. It is possible that in some of these cases the claimant would still have a sufficiently direct interest to meet the new standing requirement. The consultation exercise may shed more light on the possible volume of cases affected. At this stage we assume that a maximum of 400 cases per year might be affected although in practice the impact could be much smaller.

² <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>

³ The figures on claimants are based on a high level internal review of the Administrative Court management information – any findings should be treated as largely indicative.

Benefits of Option 1

Benefits to claimants (including NGOs, charities, pressure groups)

- 2.8 Claimants who would previously have brought a JR may save resources if they no longer do so following this reform. The costs of bringing a JR vary depending on the specifics of the case but figures from the Public Law Project suggest that it may cost between £10,000 and £20,000⁴ to bring a relatively straightforward case. Under Options 1a and 1b, a maximum saving of £20,000 applied to a maximum volume of 400 cases would equate to £8m.

Benefits to defendants (public bodies)

- 2.9 Public bodies would benefit if they have to defend fewer JR applications. Public bodies often incur significant legal costs in the defence of non-immigration and asylum JR applications. Treasury Solicitors initial illustrative assumption is that legal costs for a public sector defendant can be between £8,000 and £25,000 per case if the case reaches a final hearing. Under Options 1a and 1b, a maximum saving of £25,000 applied to a maximum volume of 400 cases would equate to £10m. This figure would be lower for immigration and asylum cases, where Treasury Solicitors initial illustrative assumption suggests legal costs per case might range between £1,500 and £10,000. The consultation exercise may obtain more evidence on how many cases might be affected, on what types of case might be affected, and on the costs per case.
- 2.10 In addition, public bodies may benefit from having to devote fewer staff to defending JR challenges. There could also be benefits to defendants from reduced delays and uncertainties relating to the implementation of decisions.

Benefits to HMCTS

- 2.11 A reduction in the volume of cases would benefit HMCTS as fewer resources would be required to deal with JR applications. In the short and medium terms the resources freed up may be used to address backlogs elsewhere in the court system rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis over the longer term and any reduction in volumes would also be associated with a reduction in fee income (and this is highlighted in the costs section). For the purposes of this Impact Assessment at this stage it is assumed that the overall financial impact on HMCTS would be neutral.

Benefits to third parties (including businesses)

- 2.12 Some businesses and individuals who are third parties to a JR would gain directly from the quicker implementation of public decisions, or from less uncertainty about their implementation, and hence would benefit if fewer JRs were brought following the proposed reform. In addition there is potential for all JR cases to be resolved more quickly, not just projects which are no longer subject to JR, as fewer overall JR applications may free up court resources to process other JR cases more quickly.
- 2.13 Information provided by public bodies party to JRs indicates that the benefits to business from reduced JR-related delays in implementing public decisions may be significant. Delays in proceeding with projects may generate cash flow and other finance costs. Delays may generate resource costs from temporarily redeploying resources to other projects. Legal costs might be incurred by businesses which are third parties to a case. There may also be costs in bearing and managing the uncertainties and risks associated with possible JR-related delays. These costs would all be avoided if the JRs affected by these reforms were no longer pursued. These benefits have not been monetised as they vary from project to project, but they could be particularly significant for larger infrastructure, regeneration or other construction projects.

Wider Economic Benefits

- 2.14 There could be wider economic gains if infrastructure and other projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

⁴ <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>

Costs of Option 1

Transitional costs

2.15 There may be one-off familiarisation and adjustment costs to claimants, defendants and HMCTS. These are expected to be negligible. There might also be some initial satellite litigation to determine how the new standing tests work.

Costs to claimants (including NGOs, charities, pressure groups)

2.16 Some claimants that are excluded from bringing cases under the new standing tests under Options 1a and 1b may no longer be able to challenge public decisions through a JR if they are not directly affected by the matter in question.

2.17 The fact that these claimants are currently willing to pursue JRs in these circumstances, and in so doing to incur costs, implies that there is a benefit to them from doing so. These benefits may take the form of raising public awareness of the issue, or raising the profile of the organisation bringing the case. If some JRs could not be brought in future then there could possibly be a cost to these organisations from losing these public awareness benefits (although this is an intended effect of the policy). It is assumed that this cost would be greater than the savings from no longer pursuing JRs (otherwise these JRs would not have been pursued in the first instance). It has not been possible to monetise the value to these claimants of bringing JRs, e.g. of raising public awareness. This is being explored further over the consultation period.

2.18 Claimants may also lose out in other ways from not bringing JRs. For example if claimants place a positive value in delaying the implementation of a public decision by making a JR, they would lose this benefit if they were unable to bring JRs.

2.19 There may also be some costs to claimants from having to demonstrate a genuine interest and sufficient knowledge in environmental cases, rather than just a direct interest under the current test.

Costs to HMCTS

2.20 HMCTS would receive less fee income if there were fewer JR applications. As stated previously, the overall financial impact on HMCTS is expected to be neutral because they operate on a full cost recovery basis and would also require fewer resources to deal with applications if volumes decreased.

Costs to third parties (including businesses)

2.21 There is the potential for all cases to be resolved more quickly, not just those cases where claimants no longer have standing, as fewer JR applications may free up court resources to process remaining JR cases more efficiently. This may impose costs on all those individuals and businesses that would lose out from quicker implementation of public decisions. Information provided by public bodies party to JRs suggests that businesses are more likely to gain from reduced JR-related delays than they are to lose out from this. Nevertheless it is possible in some cases that a business might incur direct costs from a JR-related delay being reduced.

Risks and assumptions for Option 1

2.22 The main assumption is that fewer JR cases would be brought. It is possible that NGOs, charities and pressure groups may in future find someone directly affected by the public decision in question to 'front' their JR. If this occurs then the overall decrease in JR applications would be smaller. The costs to NGOs, charities and pressure groups of bringing a JR might be higher if they had to use someone to front their JR compared to if they brought it directly. Any such increase in costs, however, might still lead to a reduced volume of JRs as cases which generate less public awareness might not be pursued in future. Any such increase in costs might be associated with an increase in business for legal services providers.

- 2.23 Under both options, there is a risk that fewer opportunities for claimants to bring a JR application may encourage claimants to devote more resources to the early stages of their application to demonstrate that they have standing under the new tests. There is a potential risk that this might in turn lead to defendants devoting more resource to the initial stages of the JR process. If this risk materialised then legal services providers might gain from increased business levels.
- 2.24 It has been assumed that there would be no increase in appeals to the Court of Appeal (CoA).

One-in-two-out (OITO) assessment for Option 1

- 2.25 The new standing tests under Options 1a and 1b may result in some third sector organisations (NGOs, charities and pressure groups) being excluded from bringing JR challenges in some cases, if they do not have a direct interest in the matter. This would count as an IN, as the benefits to them of currently bringing such JRs (e.g. public awareness) are assumed to outweigh the costs to them of doing so. The extent of this IN has not been monetised at this stage as it depends upon the value of benefits foregone, such as public awareness. This will be explored further over the consultation period.
- 2.26 However, businesses in particular would benefit directly from reduced delays in implementing public decisions, and from less uncertainty and risk of possible delay. These benefits are potentially significant, especially for larger infrastructure, regeneration and construction projects. Whilst some business might potentially lose out from reduced delays, information obtained from public bodies party to JRs suggests that this is likely to arise less often and to a lesser degree. Overall the impact of reduced JR-related delays to the implementation of public decisions is considered to be an OUT. The extent of this would depend upon the particular projects affected, and this may vary significantly year by year. Monetising this OUT will be explored further over the consultation period.
- 2.27 Overall, at this stage it is considered that the net gains to business are likely to exceed the net costs to third sector organisations. This assessment is based on information provided by public bodies party to JRs and will be explored further over the consultation period. The reforms have been assessed as an IN with zero net cost.

Option 2: Improving financial incentives

Description

2.28 As explained above there are four elements to Option 2:

- Option 2a: Claimants pay defendants' costs when claimants lose oral renewal hearings. If the claimant is successful at the oral renewal hearing and goes onto a full hearing, the cost of the oral hearing will be determined at the end of the case with the unsuccessful side generally being responsible for costs. In 2012 claimants lost around 1,200 oral renewals and won around 300 oral renewals.
- Option 2b: Increased and more effective use of costs orders against legal representatives for misconduct. Between March 2011 and June 2013, Treasury Solicitors management information suggests that around 50 wasted cost orders were obtained, relating solely to immigration and asylum JRs. In those cases where information is available, these cost orders ranged from around £140 to around £3,000, with an average of around £400 per case. Around 95% of these orders were made at the permission stage, in relation to weak JR claims which did not secure permission.
- Option 2c: Availability of PCOs and where they are used, greater use of a cost cap. The reform assessed here is that fewer PCOs will be available for claimants in future and/or that PCOs will provide claimants with less protection against meeting the defendant's costs in cases which the defendant wins. The IA also assesses the impacts of claimants having to provide details of who is funding the case and a statement of assets including any third party funding.
- Option 2d: Cost provision in relation to third parties and non-parties who may intervene on either side of a JR case. The proposals would see a lower level of costs being recoverable by third parties who intervene in judicial review claims. They would also potentially see a higher level of costs being awarded against third parties interveners and non-parties who fund judicial reviews. It is not currently known in how many cases third party individuals or organisations intervene or non-parties fund cases although this is understood to be in a small proportion of all cases. Further information will be sought through the consultation to fill this evidence gap.

Benefits of Option 2

Benefits to claimants

2.29 Under Options 2a, 2b, 2c and 2d some JR claims may no longer be lodged in future or may be withdrawn earlier in future (e.g. without making an oral renewal). It is unclear to what extent the volume of JRs might fall. Claimants who are discouraged from bringing a JR by these reforms would save resources if they no longer bring a JR in the future. The savings to claimants would depend upon how far the JRs which are no longer brought would have proceeded. As explained in relation to Option 1, the costs of bringing a JR vary depending on the specifics of the case but figures from the Public Law Project suggest that it may cost between £10,000 and £20,000⁵ to bring a relatively straightforward case.

2.30 Under Option 2a claimants may benefit if defendants are required to pay claimant's oral renewal legal costs in cases where the claimant is successful at the oral hearing and at the full hearing. For cases lodged in 2012 around 300 claimants were successful at the oral renewal stage. Anecdotal information suggests that claimant legal costs from commercial providers may be considerably more than defendant legal costs. For illustrative purposes, if average claimant legal costs at the oral renewal stage were around £3,000 per case (compared to the £1,000 to £1,500 assumed for defendants) this would imply a maximum benefit to claimants of around £900,000.

⁵ <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>

- 2.31 Under Option 2b, as explained above it is possible that the proceeds of additional costs orders may go to claimants rather than to defendants. This aspect of policy design is being considered further over the consultation period. If claimants receive these proceeds then claimants would benefit in the same way as identified above for defendants.
- 2.32 Under Option 2d, claimants would gain as they would no longer be exposed to third party costs in cases that claimants lose. In cases in which claimants are successful they may also be able to gain by recovering more costs if the court makes more costs awards against third parties.

Benefits to defendants (public bodies)

- 2.33 Under Options 2a, 2b, 2c and 2d some JR claims may no longer be lodged in future, or may be withdrawn earlier in future (e.g. without making an oral renewal) in the defendant's favour. It is unclear to what extent the volume of JRs might fall. Defendants would save resources if they no longer need to defend a JR in the future. The savings to defendants would depend upon how far the JRs which are no longer brought would have proceeded. Treasury Solicitors initial illustrative assumptions suggest that legal costs for defendants in JR cases range from £8,000 to £25,000 for non immigration and asylum cases and range from £1,500 to £10,000 in immigration and asylum cases. There could also be benefits to defendants from reduced delays and uncertainties relating to the implementation of their decisions, including if these delays and uncertainties generate wider costs for public bodies.
- 2.34 Under Option 2a defendants (public bodies) would be able to recover their legal costs when they are successful at oral renewal stage. In 2012 defendants were successful in around 1,200 oral renewals. Treasury Solicitors initial illustrative assumptions suggest that it costs a defendant on average around £1,000 to £1,500 to prepare for and attend an oral hearing relating to immigration and asylum (which account for over 70% of renewals requested). If applied to all JRs these figures imply that the maximum benefit to defendants would be around £1.8 million. This might be lower if, as suggested above, the total volume of JR claims falls as a result of the proposals, and/or if JR claims are withdrawn at an earlier stage in future such as before an oral renewal is made.
- 2.35 Under Option 2b, defendants would gain if they receive the proceeds of additional costs orders. (The precise mechanism applying to this reform is subject to further development). It is anticipated that few costs orders would continue to be made in future, and that the impact of the reform may be to discourage particularly weak claims from being lodged. For purely illustrative purposes, if a maximum of 100 additional cost orders were made in future, with the current average of around £400, the total benefit to defendants would be £40,000.
- 2.36 Under Option 2c, if fewer PCOs are awarded and/or if less costs protection is provided in PCOs then defendants would gain in cases in which they are successful, from being able to recover more of their costs from losing claimants. The extent of these impacts is being explored further over the consultation period. The defendant may also benefit from more information on the claimant and third parties that are funding the claim.
- 2.37 Under Option 2d, defendants would gain as they would no longer be exposed to third party costs in cases that defendants lose. In cases in which defendants are successful they may also be able to gain by recovering more costs if the court makes more costs awards against third parties.

Benefits to HMCTS

- 2.38 A reduction in the volume of cases would benefit HMCTS as fewer resources would be required to deal with JR applications. In the short and medium terms the resources freed up may be used to address backlogs elsewhere in the court system rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis over the longer term and any reduction in volumes would also be associated with a reduction in fee income (and this is highlighted in the costs section). For the purposes of this Impact Assessment at this stage it is assumed that the overall financial impact on HMCTS would be neutral.

Benefits to Legal Aid Agency

2.39 Some claimants may be funded by the legal aid budget. If some of the claimants affected by the proposals are legally aided then the Legal Aid Agency may in theory benefit in the same way as self-funded claimants might benefit, i.e. savings might arise if some JRs were no longer brought in future. In practice this impact may not materialise as legal aid claimants in effect already benefit from complete costs protection and they would not be exposed to the defendant's costs if the defendant wins, i.e. Options 2a and 2c would not affect their wish to bring a JR. Furthermore it is assumed that legal services providers funded by the legal aid budget would not engage in the behaviours which lead to a costs order being made, i.e. Option 2b might not apply in practice. Under option 2d there may be a benefit for the Legal Aid Agency from less liability for intervener or third party costs or from having to meet additional costs caused by the intervention.

Benefits to third parties (including businesses)

2.40 Some businesses and individuals who are third parties to the JR stand to gain directly from the quicker implementation of public decisions, or less uncertainty about their implementation, and would benefit if fewer JRs were brought following this change. There is the potential for all JR cases to be resolved more quickly, not just projects which are no longer subject to JR, as fewer overall JR applications may free up court resources to process other JR cases more quickly.

2.41 Information provided by public bodies party to JRs indicates that the benefits to business from reduced JR-related delays in implementing government decisions may be significant. Delays in proceeding with projects may generate cash flow and other finance costs. Delays may generate resource costs from temporarily redeploying resources to other projects. Legal costs might be incurred by businesses which are third parties to a case. There may also be costs in bearing and managing the uncertainties and risks associated with possible JR-related delays. These costs would be avoided if the volume of JRs fell as a result of these reforms. The associated benefits have not been monetised as they vary from project to project, but they could be particularly significant for larger infrastructure, regeneration or other construction projects.

Wider Economic Benefits

2.42 There could be wider economic gains if infrastructure and other projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

Costs of Option 2

Transitional costs

2.43 There may be one-off familiarisation and adjustment costs to claimants, defendants and HMCTS. These are expected to be negligible. There might also be some initial satellite litigation to determine how the new provisions will work.

Costs to claimants

2.44 Under Options 2a, 2b and 2c if claimants stand to gain from delay or uncertainty in the implementation of public decisions they may lose this benefit if they no longer lodge a JR in future or if they withdraw at an earlier stage (e.g. prior to making an oral renewal) in favour of the defendant.

2.45 Under Option 2a claimants would pay defendants' legal costs when claimants are successful at oral renewal stage. In 2012 defendants were successful in around 1,200 oral renewals. Treasury Solicitors initial illustrative assumptions suggest that it costs a defendant on average around £1,000 to £1,500 to prepare for and attend an oral hearing relating to immigration and asylum (which account for over 70% of renewals requested). If applied to all JRs these figures imply that the

maximum cost to claimants would be around £1.8 million. Of this total figure, it is estimated that around £50,000 might be incurred by businesses and third sector organisations.⁶

- 2.46 These figures might be lower if, as suggested above, the total volume of JR claims falls as a result of the proposals, and/or if JR claims are withdrawn at an earlier stage in future such as before an oral renewal is made. In addition where claimants are legally aided their costs would be met by the legal aid fund. This is more likely to apply in relation to immigration and asylum cases.
- 2.47 Under Option 2b there would be no direct costs to claimants as the claimant's legal provider would be liable to cover any costs order.
- 2.48 Under Option 2c, with less costs protection in non-environmental cases, some claimants would be liable to pay all or a greater proportion of the defendant's costs if the defendant is successful. There may also be additional costs to the claimant if the third party no longer contributes towards the claimant's case. If the third party continues funding the claimant, there may be costs to claimants in disclosing information on third party involvement. The extent of these impacts is being explored further over the consultation period.
- 2.49 Under option 2d there may be additional costs to the claimant if a third party is no longer willing to contribute towards the claimant's case as a result of greater exposure to costs. If the intervener continues funding the claimant, there may be costs to claimants in disclosing information on intervener involvement, likewise if the claim has been brought by a company formed by the individual claimants there may be additional costs in disclosing this information.
- 2.50 Under option 2d there may also be additional costs to individuals or organisations that have formed a separate organisation or company to bring a claim if the courts are able to award costs against the individuals or organisations rather than the claimant company.

Costs to defendants (public bodies)

- 2.51 Under Option 2a defendants may face additional costs if they are required to pay claimant's costs at oral renewal in cases where the claimant is successful. For cases lodged in 2012 around 300 claimants were successful at the oral renewal stage. Anecdotal information suggests that claimant legal costs from commercial providers may be considerably more than defendant legal costs. For illustrative purposes, if average claimant legal costs at the oral renewal stage were around £3,000 per case (compared to the £1,000 to £1,500 assumed for defendants) this would imply a maximum cost to defendants of around £900,000.
- 2.52 Under Option 2b defendants are assumed not to incur any significant additional costs as a result of more costs orders being made.
- 2.53 Under Option 2c defendants are assumed not to incur any significant additional costs as a result of fewer PCOs being made and/or less costs protection being provided by PCOs.
- 2.54 There are not expected to be any costs to defendants under option 2d as it is highly unlikely that non-parties would fund the public sector's defence costs.

Costs to HMCTS

- 2.55 HMCTS would receive less fee income if there are fewer JR applications. As stated previously, the overall financial impact on HMCTS is expected to be neutral because they operate on a full cost recovery basis and would also require fewer resources to deal with applications if volumes decreased.

⁶ Internal Administrative Court management information suggests around 35 JRs lodged in 2011 seem to have been brought by businesses and third sector organisations were refused permission at an oral renewal. The figures on claimants are based on a high level review of the Administrative Court data – any findings should be treated as largely indicative.

Costs to legal services providers

- 2.56 Under Options 2a, 2b, 2c and 2d, legal services providers may experience reduced levels of business from any reduction in the volume of JRs, or from JRs being withdrawn earlier in the process (such as before an oral renewal is made). This would be a secondary impact of the reforms. As a result resources would be freed up for other profitable activities.
- 2.57 Under Option 2b, legal representatives would be required to pay costs if a costs order was made. As explained above, for purely illustrative purposes we might consider that 100 cost orders might be made per year (compared to around 50 WCOs made between March 2011 and June 2013). Applying the earlier average WCO cost of £400 per order gives a total cost of £40,000 to legal services providers. This might be regarded as a cost which applies to non-compliant businesses.

Costs to Legal Aid Agency

- 2.58 Some claimants may be funded by the legal aid budget. If some of these claimants are affected by the proposals then the Legal Aid Agency may incur costs instead of claimants doing so.
- 2.59 Under Option 2a the legal aid fund would cover the cost of defendants' legal costs at oral renewal stage in cases where the defendant is successful at an oral renewal. As explained above, this would account for a proportion of the (maximum) £1.8m cost to claimants under Option 2a.
- 2.60 Option 2c would not affect the legal aid fund as it has been assumed that PCOs are not sought in cases where claimants are funded by legal aid.
- 2.61 Option 2d would not affect the legal aid fund as third parties would not be likely to be eligible for legal aid.

Costs to third parties (including businesses)

- 2.62 There is the potential for all cases to be resolved more quickly, not just those cases where claimants no longer have standing, as fewer JR applications may free up court resources to process remaining JR cases more efficiently. This may impose costs on all those individuals and businesses that would lose out from quicker implementation of public decisions. Information provided by public bodies party to JRs suggests that businesses are more likely to gain from reduced JR-related delays than they are to lose out from this. Nevertheless it is possible in some cases that a business might incur direct costs from a JR-related delay being reduced.
- 2.63 Under option 2d there is potential for costs for intervening non-parties as they will have increased liability for their own costs as well as liability for costs incurred by the claimant or defendant arising from their voluntary intervention. Non-parties, who provide financial backing for a claim, may also have an increased liability for costs. The courts will retain discretion over when interveners and non-parties are liable for costs.

Risks and assumptions for Option 2

- 2.64 Overall, it has been assumed that the proposals may reduce the volume of JR applications to some extent, and/or may lead to some cases being withdrawn earlier in the process (for example prior to making an oral renewal) and that the number of successful permission applications would remain the same. This would result in the same JR case outcomes.
- 2.65 Under Options 2a there is a potential risk that some meritorious claims might be discouraged due to the possible higher claimant exposure to defendant costs if the defendant is successful at oral renewal. In 2012, around 300 applications were granted permission at the oral renewal stage after being refused permission initially. Only a subset of these might be discouraged. These might be cases where the likelihood of securing permission is lower and less clear. Furthermore only a proportion of cases which secure permission at oral renewal are subsequently resolved in favour of the claimant.
- 2.66 There is a similar possibility under Options 2c and 2d as claimants may be exposed to higher costs or be less likely to receive non-party funding to support their case.

One-in-two-out (OITO) assessment for Option 2

- 2.67 Under Option 2 there may be some costs to organisations involved in JR litigation (including claimants and interveners) whilst other third party businesses, that are dependent on the quicker implementation of government proposals, could benefit.
- 2.68 Under Option 2a businesses and third sector organisations may incur increased costs from paying the defendants' oral renewal costs when the defendant is successful at oral renewal. The maximum costs to business and the third sector is estimated to be around £50,000 per year. This estimate assumes that around 35 oral renewals brought by business/third sector organisations are unsuccessful per year (which seems to be the case in 2011 based on internal Administrative Court management information) and that the defendant's legal costs are between £1,000 and £1,500 per case, as Treasury Solicitors initial illustrative assumptions suggest. These costs would take the form of a transfer payment from business and the third sector to the public sector.
- 2.69 Under Option 2b, if there were 100 additional cost orders made against legal providers for misconduct per year, each with a cost of around £400 then the additional cost to lawyers would be £40,000 per year. This would, however, relate to non-compliant legal services providers and hence would not feature in the One In Two Out assessment.
- 2.70 Under Option 2c, some claimant organisations may be exposed to greater costs if protective costs orders are more limited in the future. Under Option 2d, businesses and third party organisations may incur increased costs if they intervene in cases as they would be liable for their own costs of intervening and potentially also for the additional costs that their intervention has caused the claimant or defendant to incur. Some claimant organisations may also face costs associated with revealing information about interveners.
- 2.71 It is currently not known how many cases would be affected by Options 2c and 2d although it is anticipated to be only a small number. Further information will be sought through the consultation to monetise this impact at the final stage.
- 2.72 Some third party businesses would benefit directly from reduced delays in implementing public decisions, and from less uncertainty and risk of possible delay. These benefits are potentially significant, especially for larger infrastructure, regeneration and construction projects. Whilst some business might potentially lose out from reduced delays, information obtained from public bodies party to JRs suggests that this is likely to arise less often and to a lesser degree.
- 2.73 Overall, at this stage it is considered that the gains to business are likely to exceed the costs to business and to the third sector. As such the reforms have initially been classed as an IN with zero net cost (i.e. overall there are no additional net costs in businesses).

Annex A: Small & Micro Business Test

- A.1 The costs and benefits of these reforms on businesses have been outlined in the main body of this Impact Assessment. The reforms will apply to any claimants and lawyers bringing a JR under certain circumstance and this could include businesses regardless of size. It is unclear precisely to what extent small businesses (up to 49 employees) and micro businesses (up to 10 employees) might be affected differentially by the reforms. Questions relating to this and to mitigating actions will be included in the consultation document, and we welcome further views on this.
- A.2 An internet search of legal companies providing advice on Judicial Review suggests that a range of businesses of various sizes provide legal services in this area. There are around 10,000 legal firms in England and Wales and 85% of these are small firms with 4 or less partners.⁷ However, the Top 200 companies in terms of turnover employ over two-fifths of all solicitors in private practice and generate two-thirds of total fee income suggesting that although there are a large number of small firms, the market is quite concentrated with larger firms accounting for a considerable share of the legal service market.⁸
- A.3 There are two ways that small and micro businesses might be affected. First, if a small or micro business is a legal representative of a claimant. Secondly, if the small or micro businesses are the claimant themselves.

Small and micro businesses as legal representatives

- A.4 Small and micro businesses might experience a reduction in JR-related business from a reduction in JRs lodged and/or from JRs being withdrawn earlier in the process. Evidence on the scale of these impacts is not available and might be obtained over the consultation period. There is no evidence that small and micro businesses would be affected differentially compared to other legal services providers from any reduction in JR business. Views on this are being sought over the consultation period.
- A.5 Small and micro businesses might respond to this impact by allocating resources freed from less JR activity to other profitable activities. It is unclear whether small and micro businesses might be better able to adjust in this way compared to other legal services providers. Further views on this are being sought over the consultation period.
- A.6 Mitigating actions might relate to supporting small and micro businesses to adjust to any reallocation of their resources between different areas of business. This might include suitably long transitional periods and the provision of information about the precise nature of the reforms and how they might work in practice.
- A.7 In addition and more specifically, the increased use of Wasted Cost Orders made against legal representatives (Option 2b) will directly affect legal service providers, which could include small and micro businesses. This reform would apply only to non-compliant legal representatives which act in the wrong way. Small and micro businesses could mitigate the impacts of this reform by not acting in the ways which lead to a costs order being imposed. Other mitigating actions include suitably long transitional periods and clear information on exactly how the new cost order reforms will operate.

Small and micro businesses as claimants

- A.8 The proposals on standing (Option 1), recovering the costs of an oral renewal (Option 2a) and protective cost orders (Option 2c) would affect small and micro businesses if they themselves are the claimant. Option 2d would affect small and micro businesses if they choose to intervene in a judicial review.

⁷ UK Legal Services Market Report from IRN Research

⁸ <http://www.lawsociety.org.uk/representation/research-trends/market-assessment-2012/>

- A.9 The proposals on standing, PCOs, and interveners may impose direct and indirect costs on businesses, which may include small businesses and organisations. This may extend to businesses being excluded or put off from bringing cases or intervening and therefore no longer able to challenge public bodies' decisions through a JR. However, information from internal Administrative Court management suggests that the number of potential small businesses affected will be relatively small - of the 11,400 cases lodged in 2011, around 230 applications seem to have been brought by businesses and a further 60 seem to have been brought by charities, pressure groups and professional organisations (such as Trade Unions).⁹ It is not known what proportion of the 290 cases were brought by small businesses/organisations but even if all 290 cases were this remains a very small share of the 4.8 million small businesses in the UK.¹⁰
- A.10 Judges will also be able to assess the impact of a PCO on the small business bringing a JR and allowing third party intervening costs to be paid by the unsuccessful party on a case by case basis thus further mitigating the impact of the reforms.
- A.11 The proposal on oral renewal cost recovery will mean that small businesses may at the margin decide no longer to request a renewal or the small business will be liable for the defendant renewal costs. This will however only affect small businesses at the oral renewal stage of the process, which is a relatively small number of businesses – of the estimated 290 cases that seem to have been brought by businesses/organisations, only 90 requested an oral renewal. Again, it is not known what proportion of the 90 cases were brought by small businesses but they will be able to decide after being refused permission on papers whether to continue their case and hence this will limit their exposure to costs. Finally, small businesses will only be liable for costs if the claimant is unsuccessful - of the 90 renewals requested by small businesses and organisations, only 40 renewal applications were refused permission.
- A.12 Overall we have no reason to believe that small businesses would be disproportionately affected. Guidance and information may be produced to help mitigate any disproportionate impacts on small businesses that are identified through the consultation. Further views are also being sought on this and on other mitigating options in the consultation stage.

Other mitigations

- A.13 Under all the proposals, small businesses/organisations that stand to gain from the quicker implementation of public bodies' decisions, or less uncertainty about their implementation, would benefit if fewer JRs are brought following this change. These benefits to small businesses may relate to quicker resolution of a planning decisions where they are contractors for the project's delivery.

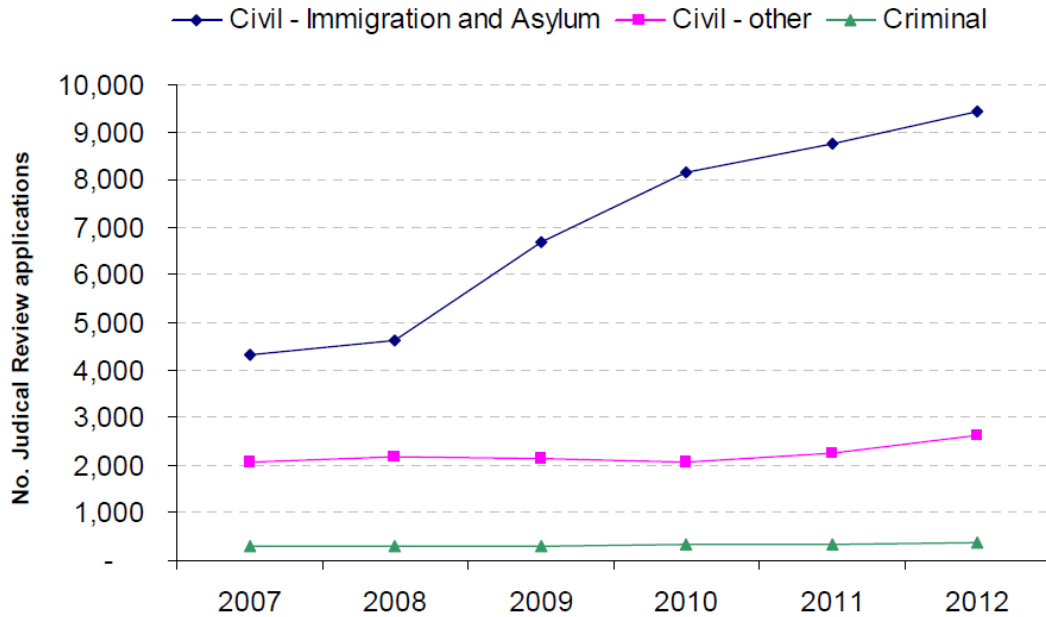
⁹ The figures on claimants are based on a high level review of the Administrative Court data – any findings should be treated as largely indicative.

¹⁰ <http://www.bis.gov.uk/assets/biscore/statistics/docs/b/12-92-bpe-2012-stats-release.pdf>

Annex B: Judicial Review Volumes

- B. 1 The number of judicial review applications has more than doubled in the past 10 years. Administrative Court data shows in 1998 there were over 4,500 applications for JR and by 2012 this had reached 12,400¹¹.
- B. 2 Data from the Administrative Court shows that the main driver of growth in the overall number of JR applications has been an increase in Immigration and Asylum (I&A) applications which have more than doubled between 2007 and 2012. I&A applications made up 76% of the total applications in 2012. The number of criminal and other civil JR applications has remained broadly stable over the period as shown in Chart 1 below.

Chart 1: Number of Applications for permission for judicial review by case type (2007 to 2012)



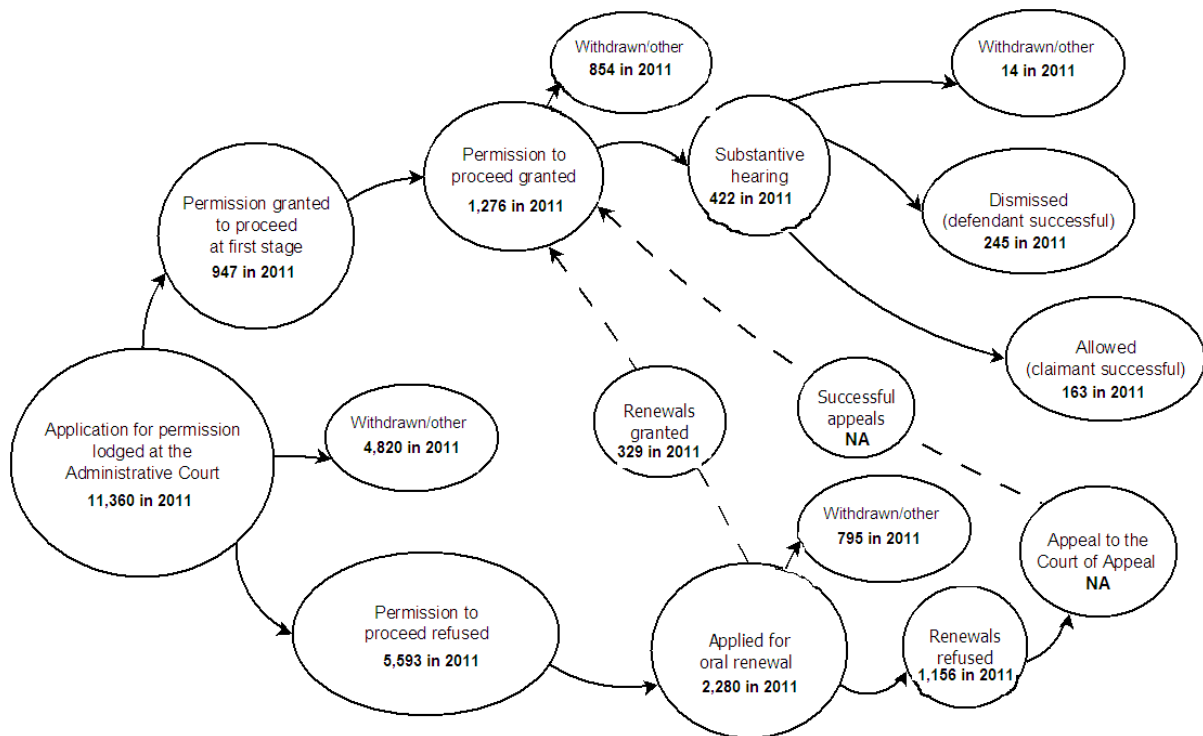
- B. 3 The Administrative Court data suggests that the majority of applications that reach a permission decision are refused. For cases lodged in 2012, only 1 in 6 that reached the permission stage and were considered by the court were granted permission to proceed.
- B. 4 However, the data also shows that a large proportion of JR applications are withdrawn before a permission decision is made. For cases lodged in 2012, over 40% of all applications were withdrawn before permission. Although the reasons for withdrawal are not recorded, there is some evidence that suggests that many of these cases may be settled on terms favourable to the claimant. A 2009 study by Bondy and Sunkin suggested that around 85% of non-I&A cases that are withdrawn at some point in the JR process are settled on terms favourable to the claimant.¹² It is not known whether this finding still pertains and whether similar outcomes occur in I&A JR cases although it is probable that many cases that withdraw settle on terms favourable to the claimant.
- B. 5 For illustrative purposes only, if around 85% (the Bondy and Sunkin figure above) of non-I&A cases withdrawn before permission were settled on terms favourable to the claimant, then of all 3,000 non-I&A applications in 2012, around 44% might initially not be regarded as unmeritorious, in the sense of either being granted permission (either initially or after an oral renewal), or being settled upfront on terms favourable for the claimant.

11 Data on Judicial Reviews is available here: <https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013>

12 Bondy, V., & Sunkin, M. (2009). The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing.

- B. 6 For cases lodged in 2012 around 2,600 oral renewals were requested and permission to proceed was granted in around 300 of these cases. The remaining 2,300 cases were either refused permission or were withdrawn before the oral renewal decision was made.
- B. 7 The diagram below provides a high level overview of case progression for JR applications. This relates to cases lodged in 2011. (Data has not been used for cases lodged in 2012 as many of these might not have reached a final hearing yet. 2011 data therefore provides a more accurate picture of case progression from start to finish).

JR process and volumes for cases lodged in 2011



Note: The large majority of cases in the withdrawn/other categories are withdrawn. Outcomes categorised as “other” includes adjourned, discontinued, no order, referred to CoA and resubmit.

- B. 8 As a result of the large number of withdrawals and the high permission and oral renewal refusal rate, only a small proportion of JR applications reach a final hearing. For cases lodged between 2007 and 2011,¹³ there were around 440 final hearings per year. Outcomes at the final hearing tend to be more balanced than at the permission stage; around 43% of adjudicated decisions at the final hearings were made in favour of the claimant for cases lodged between 2007 and 2011.
- B. 9 As the data illustrates there are a large and growing number of JR applications, many of which are not successful, which provides the backdrop for the proposals considered in this Impact Assessment. In particular the current situation has the following implications.
- B. 10 Firstly, unsuccessful JR applications can cause delays to the implementation of projects. For cases lodged in 2012 it took, on average, around 83 days for a JR application to reach permission stage and a further 95 days for an oral renewal decision to be made. Overall, for applications lodged in 2011 which reached a final hearing, it took on average 313 days for these cases to reach a final hearing from the day they were lodged.

¹³ 2012 figures are not used in this comparison as some cases lodged in 2012 may not yet have progressed to a final hearing and this may therefore understate the total number hearings for this year.

- B. 11 JRs generate costs to the public sector from defending claims. Treasury Solicitors initial illustrative assumption is that legal costs for a public sector defendant might range between £8,000 and £25,000 for a non-I&A case depending on how far the case progresses although they may be higher or lower in individual cases. For I&A cases, public sector legal costs tend to be lower - Treasury Solicitors initial illustrative assumptions suggest they might range from £1,500 to £10,000 depending on case progression. In addition to Treasury Solicitor legal costs, public sector organisations incur additional staff costs associated with defending the case.
- B. 12 Costs to third parties arise from JRs in some cases. In infrastructure cases, for example, delay to implementing planning decisions may extend project delivery times, with implications for cash flow costs and for finance costs. Delay may increase project costs if resources have to be reallocated elsewhere temporarily. These additional costs and uncertainties might be reflected in the final price paid for the project output in question and/or may be reflected in initial project bids.
- B. 13 Wider economic costs might arise from JRs in some cases. For example infrastructure projects and regeneration projects might support market access and economic growth.
- B. 14 When making a decision to bring a JR, applicants might consider only the costs and benefits to themselves, not to other parties affected. This applies especially if claimants are not exposed to the JR costs they might place on the Government, on third parties, and on the economy more widely. This imbalance may be greater in less meritorious cases which the claimant loses. This may lead to an excessively high number of JRs.