

<b>Title:</b> Reforms to Judicial Review  <b>IA No:</b> MoJ 212  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b> None	<b>Impact Assessment (IA)</b>	
	<b>Date:</b> 06/09/2013	
	<b>Stage:</b> Consultation	
	<b>Source of intervention:</b> Domestic	
	<b>Type of measure:</b> Primary legislation	
<b>Contact for enquiries:</b> Michelle English Admin.justice@justice.gsi.gov.uk		
<b>Summary: Intervention and Options</b>		<b>RPC Opinion:</b> Not applicable

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	No   N/A
			No   N/A

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

The number of judicial review (JR) applications has more than doubled in the past 10 years. The Government is concerned that a large number of these claims are unmeritorious and that many cases, including those with national economic significance, could be resolved more quickly. Unsuccessful JRs may disproportionately frustrate and delay the implementation of government policy including infrastructure projects that may contribute towards economic growth. Successful JR challenges can also take too long to be resolved.

**What are the policy objectives and the intended effects?**

The policy objective is to ensure that JR cases, including those with potentially large impacts on economic development and growth, are resolved as quickly and efficiently as possible and that there is less scope for abuse of the system, such as bringing judicial review applications with an intention to delay lawful Government action or as part of a campaigning approach. The Government is also of the view that, as a matter of principle, it is not a good use of public resources to fund one part of the state to challenge another and wishes to limit the circumstances under which this may take place.


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

The following policy options have been considered in this Impact Assessment. At this stage the Government favours implementing Options 1-3 and is seeking further views on Option 4.

- Option 1: Transfer planning cases to the specialist Upper Tribunal
- Option 2: Deal with cases grounded on minor procedural defects more effectively by bringing forward (option 2a) and changing (option 2b) the “no difference” test (where a rectification of a claimed flaw would be likely to have made ‘no difference’ to the original outcome).
- Option 3: Expand the circumstances under which appeals may “leapfrog” to the Supreme Court. This includes expanding the legal circumstances (option 3a), changing rules around consent (option 3b) and allowing leapfrog appeals to be brought from more courts (option 3c).
- Option 4: Consider restricting standing (who may bring a JR) for local authorities in major infrastructure cases.

<b>Will the policy be reviewed?</b> It will/will not be reviewed. <b>If applicable, set review date:</b> 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.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b> NA	<b>Non-traded:</b> 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: Transfer planning cases to the specialist Upper Tribunal

## 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	£100,000	NQ	NQ

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

One off transition costs for HMCTS (e.g. IT systems) are initially estimated at around £100,000.

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

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed.  
There may be some costs to legal services providers from reduced levels of business (secondary impact) because cases are determined more quickly.

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.

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

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs. Some claimants and third parties may also benefit from quicker resolution if this is in their interests.  
Claimants would benefit from reduced legal costs.  
HMCTS would benefit from reduced costs if cases are resolved more quickly.  
Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

### Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that there would be no change in case volumes or in case outcomes and that cases would simply be dealt with more quickly in the specialist chamber due to a realignment of judicial resource.  
It is assumed that less legal resource would be required to settle cases in the specialist chamber.  
It is assumed that there would be no impact on other cases brought before the Upper Tribunal.

## BUSINESS ASSESSMENT (Option 1)

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

# Summary: Analysis & Evidence

# Policy Option 2

Description: Dealing with cases grounded on minor procedural defects more effectively by bringing forward (option 2a) and changing (option 2b) the “no difference” test.

## 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.

### Other key non-monetised costs by ‘main affected groups’

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed. Some claimants may no longer receive a Court remedy to their case. HMCTS may receive less fee income if cases are resolved earlier in the JR process. However, as they would also require less resource to process cases the overall impact on HMCTS is assumed to be neutral. There may be some costs to legal services providers from reduced levels of business (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 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.

### Other key non-monetised benefits by ‘main affected groups’

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs if cases are resolved earlier in the JR process. Some claimants and third parties may also benefit from quicker resolution if this is in their interests.

Claimants would benefit from reduced legal costs.

The LAA may benefit if some legally aided cases are resolved more quickly and require less legal resource. HMCTS would benefit from reduced costs if cases are resolved earlier in the JR process. As above the overall financial impact on HMCTS is neutral.

Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

### Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that some cases would be resolved more quickly following this change, that more cases will be judged to have failed the “no difference” test under this change, and that public bodies will be able to correctly identify cases that meet the new “no difference” test and would fail the permission stage as a result. If they are unable to do so there may be some costs associated with greater case preparation for hearings at the early stage of the process.

There is a risk that claimants will devote more resources to their cases to demonstrate that the procedural defects in question would have made a difference to the public body’s decision.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 3

**Description:** Expanding the circumstances under which cases may “leapfrog” to the Supreme Court. Including; expanding the legal circumstances (option 3a), changing rules around consent (option 3b) and allowing leapfrog appeals to be brought from more courts (option 3c).

## 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.

### Other key non-monetised costs by ‘main affected groups’

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed.  
 HMCTS may receive less fee income if cases are resolved with fewer steps. However, as they would also require less resource to process cases the overall impact on HMCTS is assumed to be neutral.  
 There may be some costs to legal services providers from reduced levels of business (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 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.

### Other key non-monetised benefits by ‘main affected groups’

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs if cases are resolved with fewer steps. Some claimants and third parties may also benefit from quicker resolution if this is in their interests.  
 Claimants would benefit from reduced legal costs.  
 The LAA may benefit if some legally aided cases are resolved with fewer steps and require less funding from the legal aid budget.  
 HMCTS would benefit from reduced costs if cases are resolved with fewer steps. As above the overall financial impact on HMCTS is neutral.  
 Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

### Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that more cases would be leapfrogged under this change and that parties will be able to correctly judge which cases would ultimately appeal to the Supreme Court. If this is not the case there is a risk that cases will be more costly as they would be heard in the Supreme Court rather than the Court of Appeal.

## BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 4

Description: Consider restricting standing (who may bring a JR) for local authorities in major infrastructure cases

## 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.

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

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed.  
There may be some costs to legal services providers from reduced levels of business (secondary impact). HMCTS may receive less fee income if fewer cases are brought following this change. However, as they would also require less resource to process cases the overall impact on HMCTS is assumed to be neutral.

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.

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

Defendants would benefit from quicker case resolution. The same would apply to some claimants and third parties if quicker resolution was in their interests.  
Claimants and defendants would benefit from lower costs of alternative resolution services compared to the costs of JR.  
Alternative dispute resolution services may gain from increased levels of business (secondary impact).  
There may be wider economic benefits in some cases if projects are able to progress more quickly.  
HMCTS would benefit from reduced costs if fewer JRs are brought. As above the overall financial impact on HMCTS is neutral.

### Key assumptions/sensitivities/risks

Discount rate (%)

This analysis assumes Option 4 will be pursued. The consultation is seeking further open views on this. It is assumed that there would be the same volume of challenges but these would be pursued via alternative dispute resolution services rather than via JR. It is assumed that the costs of these services would be lower for both defendants and claimants, case outcomes would be broadly comparable but in some ways may be less favourable for claimants and more favourable for defendants, and that cases would be resolved more quickly.

## BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	No	Zero net cost

# Evidence Base

## 1. 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 properly consult or to act in accordance with natural justice or 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 rapid growth in the use of JR, with suggestions that it is sometimes used as a delaying tactic, and only a small proportion of cases stand a reasonable chance of success. JR proceedings can create delays and add to the cost of public services, in some cases potentially frustrating reforms, including those that may contribute to economic growth and recovery. Further information on the latest trends and progression of JRs is provided in Annex A and some of the specific problems that the reforms in this Impact Assessment seek to address are outlined below:

## Planning

1. 8 The Government is of the view that there may be scope for planning challenges to be determined more quickly. For planning cases lodged in 2011, it took on average around 100 days for a planning case to reach the permission stage from the day it was lodged (for cases which reached the permission stage). For planning cases, it took around 370 days from lodgement to a final hearing (for cases which reached a final hearing).<sup>1</sup> These delays can increase investor uncertainty and may generate adverse implications for cash flow and finance costs. Longer court processes may generate other costs from construction resources being left unused for periods of time or being redeployed elsewhere to other active projects (with temporary inefficiencies). They can lead to some developments being deferred indefinitely or abandoned. Delays from whatever source in implementing planning decisions can act as a brake on infrastructure and other projects and may potentially hinder economic growth and recovery.

## Procedural Defects

1. 9 The Government is concerned that challenges which relate to minor procedural flaws in decision making processes that did not affect the outcome of the original decision could be determined more quickly and with less resource. In some cases, whilst technically successful, some of these challenges may result in no substantive change to the original decision. Consequently, the Government wishes to strengthen the Court's powers where the rectification of a claimed flaw in a decision making process would be likely to have made "no difference" to the original outcome.
1. 10 Procedural irregularity or impropriety is currently a ground for JR and the Court has already established a "no difference" principle. Where the Court is satisfied that the outcome would "inevitably" have been the same even if the alleged defect in a decision making process had not occurred, it can refuse the remedy sought. It is open to the defendant to argue that a purported flaw made "no difference" at any stage in the process, including in the Acknowledgement of Service (which includes a summary of the grounds for contesting the claim).
1. 11 However, under current arrangements at the permission stage the Court is unlikely in many cases to be able to properly consider "no difference" arguments because insufficient information is often provided to determine whether the flaw made any difference.. This means that some cases that ultimately end up being adjudicated as having made "no difference" can proceed through the permission stage to a final hearing, and therefore take a considerable amount of time to resolve. For all cases lodged in 2011, it took on average around 80 days for a case to reach a permission decision from the day it was lodged (for cases which reached permission stage), and it took around 310 days from lodgement to a final hearing (for cases which reached a final hearing). Extended case duration can generate additional costs and delays which may also have adverse impacts on third parties<sup>2</sup>.

## Leapfrogging

1. 12 In a small number of highly significant cases of JRs and other types of cases it becomes apparent at a relatively early stage that leave to appeal to the Supreme Court may ultimately be sought. These cases are complex, and necessarily require full consideration over a period of time. The Government, however, wishes to receive views on options to on occasion reduce the time taken. The time taken to resolve these cases may harm public confidence in the judicial system. A party may have a narrower self interest in their case not being resolved for some time when this might not be in the wider public interest. The Government considers that there may be advantages in providing for a wider range of cases (including non-JR cases) to move to the Supreme Court more quickly with fewer with fewer intermediate steps. For JR cases between 2008 and 2013, Court of Appeal internal management information indicates that it took on average around 140 days to make a decision on whether to grant permission to appeal to the Court of Appeal the outcome of a JR (from the day this permission application was lodged with the Court of Appeal, not from the day of the JR final hearing). Of these, this internal management information indicates that those

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<sup>1</sup> Data on Judicial Reviews is available here: <https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013>. All Administrative Court data is from this source unless separately referenced.

<sup>2</sup> These figures are a further breakdown of the official Court of Appeal statistics published online. The published statistics are available here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207807/court-stats-q1-adt-ables.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-adt-ables.xls)

granted permission to become appeals (again on average between 2008 and 2013) took a further 160 days to be heard by the Court of Appeal. In addition, in the same period, this internal management information indicates that it took around 240 days for the remaining, substantive appeals to be heard by the Court of Appeal. (i.e. those appeals that did not need a permission to appeal stage in the Court of Appeal ).

1. 13 It is currently possible for cases to “leapfrog” the Court of Appeal (moving direct from the court of first instance to the Supreme Court) where there is a point of law of general public importance and the Court is bound by precedent. The relevant point must have been considered fully by the Court at first instance. In addition, a leapfrog appeal currently requires consent of both the claimant and defendant, which may reduce the volume of such appeals (if the claimant is motivated largely by delay). The current circumstances and conditions are considered to be too narrow and to prevent some cases from “leapfrogging” the Court of Appeal and being adjudicated in the Supreme Court. This may result in additional delays and costs to claimants, defendants and third parties that could be avoided if cases were resolved more quickly with less resource.

### **Standing for Local Authorities challenging Infrastructure Projects**

1. 14 The Government is concerned about public money being used to fund challenges by one part of the state against decisions made by another. This option is subject to further consideration over the consultation process, and further evidence and views have been invited. It may relate to challenges to consents under the Planning Act 2008. The 2008 Act created a new streamlined development consent regime for nationally significant infrastructure projects. Under the 2008 Act regime, decisions on many of the consents necessary for projects are taken by the relevant Secretary of State, based on the relevant National Policy Statement and following a report by the Planning Inspectorate. Challenges to decisions under the regime are brought by JR, with possible implications for public resources and for delays in implementing decisions. Challenges may concern infrastructure projects which might support economic growth and recovery, or projects which might otherwise support economic development in a particular area.

### **Policy objectives and options under consideration**

1. 15 The policy objective is to ensure that JR cases, including those with the potential impacts on economic growth and recovery, are resolved more quickly and efficiently. The options under consideration are:

#### **Option 1: Planning**

1. 16 Planning JRs are considered in the Administrative Court, which is part of the Queen’s Bench Division. In July 2013, the President of the Queen’s Bench Division nominated a specialist Planning Liaison Judge to review planning cases and to ensure that all major infrastructure cases are heard by a specialist High Court Judge, sitting in London, the Regions and Wales. Also in July, the President introduced new procedures within the Administrative Court to identify planning cases as early as possible and to prioritise their management and progress in line with new targets and shorter deadlines.
1. 17 The Government anticipates reductions in the time taken to consider and determine planning challenges resulting from those changes. It is also consulting on a further proposal, which would transfer planning challenges from the Administrative Court to the Upper Tribunal. To determine the exact nature of this option, the Government will look carefully at the results of recently introduced changes to listing and judicial deployment in the Administrative Court and then assess whether a specialist tribunal is still required.
1. 18 There are currently several routes to challenge planning decisions depending on who originally determined the planning application. Most applications are dealt with at a local level by the Local Planning Authority (LPA). Nationally significant infrastructure projects are determined by the Secretary of State in accordance with the Planning Act 2008 and may also be challenged by judicial review under Section 118 of that act. LPAs also make decisions to commence enforcement action for breach of planning control. Appeals against either determination or enforcement of these decisions by a LPA lie to the Secretary of State, with most appeals dealt with on his behalf by the Planning Inspectorate (PINS) unless he decides to recover the appeal for his own determination. Any person “aggrieved” by the decision made by the Secretary of State (including by PINS on his behalf) is entitled to further appeal that decision to the High Court on a point of law only, by way of



a statutory appeal under section 288 (permission) or section 289 (enforcement) of the Town and Country Planning Act 1990. The Secretary of States decision whether or not to call in a decision can also be judicially reviewed.

1. 19 Under Option 1, both planning JRs and statutory challenges relating to planning would be transferred to the Lands Chamber of the Upper Tribunal. Specialist planning judges could be deployed to the Lands Chamber, which is a court of superior record and already has powers in the Tribunals, Court and Enforcement 2007 to hear JRs. Its current judges include experts in land, valuation and planning law.
1. 20 Transferring cases to the Lands Chamber would ensure not only that planning cases could be prioritised but would allow specialist judges already appointed to the Lands Chamber to maximise their specialist skills and knowledge to ensure that cases proceed quickly to a determination.<sup>3</sup> It is proposed that if this option were to be pursued the Lands Chamber would be renamed to reflect its wider jurisdictional remit - the Land and Planning Chamber, for example.

## **Option 2: Procedural Defects**

1. 21 There are two options under consideration concerning “no difference” arguments: allowing them to be determined earlier in the process more often and providing for a different threshold. These could be applied to all types of procedural failing.
  - **Option 2a – Bring forward the consideration:** Under this option the Government might make process changes so that “no difference” arguments could be fully made and tested at the permission stage more often, but in many cases there may be a need for the Court to be provided with more factual material. The Government is consequently seeking views on whether the process for JR might allow that, but it is not currently proposing to place a positive duty on the judiciary to consider in every application whether the alleged flaw in a decision making process complained of could have made a difference. This would be a consideration only where the defendant makes the assertion in the Acknowledgement of Service that the flaw could not have made any difference and where there are no other arguable grounds.
  - **Option 2b – A different threshold:** The Government proposes to legislate to replace the need for “inevitability” with a different probability threshold. This would ensure that, where it was reasonably clear that the alleged flaw in a decision making process did not make a difference, but it was not inevitable that it could not have, the Court could refuse permission and also no longer provide a remedy in favour of the claimant. One option would be to amend the test from “inevitable” to “highly likely”. The Court would consider and apply the new test. Under these proposals, where there is still real doubt as to whether the result would have remained the same, the Court would be able to grant permission or to provide a remedy in favour of the claimant.

## **Option 3: Leapfrogging**

1. 22 The Government is considering three changes to the existing rules about when a leapfrog may be made:
  - **Option 3a – Extending the relevant circumstances:** The Government wishes to extend the circumstances to include cases 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). Whilst there would still be the need for the point of law to be one of general importance the case could leapfrog if it had one of the additional implications.
  - **Option 3b – Consent:** This proposal would abolish the need for all parties to consent to a leapfrog taking place. The judiciary would retain their current role in deciding whether to grant requests to leapfrog.

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<sup>3</sup> Moving statutory appeals to the Town and Country Planning Act to the new chamber would require primary legislation. Reallocating judicial review to such a chamber could be implemented by a direction of the Lord Chief Justice but changes to procedural rules would take at least six months to develop and implement.

- **Option 3c – Extending the courts and tribunals in which a leapfrog appeal can be initiated:**  
The Government is seeking views on whether to, in addition to High Court and Divisional Courts of England and Wales extend the range to include the Upper Tribunal, the Employment Appeals Tribunal and the Special Immigration Appeals Commission, appeals from each of which are considered currently by the Court of Appeal.

#### **Option 4: Standing for Local Authorities challenging Infrastructure Projects.**

1. 23 The Government wishes to seek views on whether limiting standing for local authorities to bring JRs against nationally significant infrastructure projects would be the right approach for England and Wales. Under this proposal it may be possible that, unless they were the applicant (for development consent), local authorities might not have standing to challenge consent decisions by JR where the project has been subject to the regime established under the Planning Act 2008. If this was the case then local authorities would still be able to influence and challenge relevant projects through routes other than JR, such as mediation.
1. 24 The Government's preferred approach at this stage would be to implement Options 1-3 and to consider Option 4 further in light of the outcome of the consultation process.

#### **Economic rationale for intervention**

1. 25 The economic rationale for intervention relates to improved efficiency. There would be productive efficiency gains if JR cases, including those that are the most important, are resolved more quickly and with fewer resources whilst achieving the same outcomes.
1. 26 The proposed reforms might also generate wider economic benefits, including those applying to third parties. Reduced delays and uncertainties in the implementation of some government decisions might benefit infrastructure projects and others which might support economic growth and recovery.

#### **Main affected groups**

1. 27 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 as well as other courts and tribunals.
  - 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 existing practices and on the nature and extent of behavioural changes 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) such as property developers. 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 the proposals highlighted in Options 1-4 would not be implemented. The do nothing is compared to itself and therefore the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
- 2.4 A number of existing changes to the JR process have recently been made and are included in the base case for the purposes of this Impact Assessment. These changes include:
  - The Government is already implementing changes to the listing of cases in the Administrative Court to deliver reductions in the time taken for JRs and for statutory challenges in planning and infrastructure cases to be determined. The ongoing changes to listing include firstly identifying planning related challenges and JRs as early as possible and to prioritise their management and progress in line with new targets and shorter deadlines laid down by direction of the President of the Queen's Bench Division. Secondly these ongoing changes to listing include to ensuring that these cases are referred to and managed by specialist planning judges where possible.
  - In July 2013 the Government implemented a package of JR proposals<sup>4</sup> including changes to; time limits in planning cases, oral renewals fees, progression for cases judged as being "totally without merit".

## Option 1 - Transferring cases to the Lands Chamber of the Upper Tribunal

### Description

- 2.5 Option 1 will transfer planning statutory appeals and JRs from the Administrative Court to the Upper Tribunal.
- 2.6 Data from the Administrative Court on JRs indicates that around 150 to 200 "town and country planning" JRs were lodged per year between 2007 and 2012. On average, for cases lodged in 2012 it took around 14 weeks (100 days) for an initial permission decision to be taken on a planning JR case (not including oral renewals). This is slightly longer than it took other non-immigration and asylum cases to reach a permission decision – non-immigration and asylum applications lodged in 2012 took around on average 11 weeks (80 days) to reach an initial permission decision (not including oral renewals).
- 2.7 For applications lodged in 2011, planning JRs took on average around 53 weeks (370 days) to reach a final hearing from the day they were lodged (for cases reaching a final hearing).<sup>5</sup> This again is slightly longer than other non-immigration and asylum cases (which took on average around 41 weeks (290 days) from the day they were lodged, again for cases reaching a final hearing).
- 2.8 As well as JR challenges, Administrative Court data indicates that there were around 150 additional statutory challenge applications in 2012, of which 12 were allowed and 48 dismissed at a final hearing. Indicative internal management information from the Administrative Court shows that these challenges against s.288 and s289 of the Town and Country Planning Act lodged between June 2012 and May 2013 took on average around 65 weeks and 86 weeks respectively to reach a final hearing from the day they were lodged (for cases reaching a final hearing).<sup>6</sup>
- 2.9 Indicative internal management information from the Administrative Court from June 2012 to May 2013 also suggests that the current flagging system may not particularly expedite identifying JRs or statutory planning cases which are particularly important or require special attention for some other reason (for example, if a case is of significant media interest, or requires an expedited decision or specialist judge). This indicative internal management information suggests that such flagged JR and statutory planning cases still take around 50 weeks to reach a final hearing (around 15 cases

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<sup>4</sup> <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>

<sup>5</sup> For cases lodged in 2012, many cases are yet to reach a final hearing.

<sup>6</sup> These waiting times exclude time stood out (waiting time due to defendant or claimant and not the court) and are calculated as from lodged date to the date of the final hearing decision - they do not include any earlier hearings that were adjourned or where no order was made. These figures are a further breakdown of already published data from the Administrative Court, which is available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207807/court-stats-q1-ad-tables.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls)

per year including major infrastructure projects), compared to around 54 weeks for non-flagged JRs and statutory planning cases (in both cases from the day the case was lodged, for cases reaching a final hearing).<sup>7</sup>

2. 10 The main impact of moving statutory appeals and JRs to the Upper Tribunal is expected to be quicker case outcomes. This is because specialist judges and support staff who are experts in the planning system would be involved and may be able to identify the relevant issues more readily and deal with cases more quickly. Given the often complex and highly technical legal issues of both fact and law, it is widely accepted by the judiciary and by legal representatives that non-specialist judges often take longer to make an equivalent decision on a case.

### **Benefits of Option 1**

#### *Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 11 Some claimants might benefit if a decision on their application is reached more quickly in future. This would apply to cases where claimants win their case or the case is settled outside of court more quickly, and hence where they secure the positive outcome they were seeking at an earlier point in time.
2. 12 Claimants may save costs if less legal resource is needed to resolve claims more quickly in future.

#### *Benefits to defendants (public bodies)*

2. 13 Public bodies seeking to implement planning decisions would benefit from the quicker resolution of planning cases under Option 1. This would allow them to implement their decisions more quickly in cases where they are successful. They may also gain from quicker resolution in cases they lose, as this may enable alternative solutions to planning issues to be pursued more quickly than would otherwise be the case.
2. 14 Public bodies may save costs if less legal resource is needed in dealing with challenges which are resolved more quickly in future.

#### *Benefits to HMCTS*

2. 15 There would be cost savings to HMCTS if the same volume of planning cases was resolved with equivalent outcomes (i.e. same rates of appeal) but with fewer HMCTS resources required per case. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the long run.

#### *Benefits to the Legal Aid Agency (LAA)*

2. 16 The LAA would only benefit if some legally aided cases are resolved more quickly and require less legal resource as a result of this change. The planning cases affected by these reforms are assumed not to fall within the scope of legal aid hence there should be no impacts on the LAA.

#### *Benefits to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 17 Third parties to a JR or statutory challenge may gain directly from the quicker implementation of planning related public decisions, or from less uncertainty about their implementation. In addition there is the potential for all cases in the Administrative Court to be resolved more quickly, as transferring planning JRs and statutory challenges to the Upper Tribunal may free up Administrative Court resources to process their remaining cases more quickly.
2. 18 Information provided by public bodies subject to JRs and statutory challenges indicates that the benefits to business from reduced delays in implementing planning decisions may be significant in individual cases. Delays and uncertainties in proceeding with planning 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

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<sup>7</sup> The same caveats as above apply to these figures.

a case. There may also be costs in bearing and managing the uncertainties and risks associated with possible JR delays and statutory challenge delays. These benefits to third parties have not been monetised as they vary from considerably between projects, but they could be particularly significant for larger infrastructure, regeneration or other construction projects.

#### *Wider Economic Benefits*

2. 19 There could be wider economic benefits if planning projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

#### **Costs of Option 1**

##### *Transitional costs*

2. 20 There may be one-off familiarisation and adjustment costs to claimants, defendants and HMCTS from planning cases being transferred to the Upper Tribunal. As outlined below, these are estimated to be around £100,000.

##### *Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 21 Some claimants may lose out from cases being resolved more quickly under Option 1 if they would have benefited from delays to resolving a JR or statutory challenge, particularly where this put the wider development at risk. This would include claimants who ultimately are unsuccessful in their challenge but would gain from delaying the implementation of public bodies' decisions.

##### *Costs to defendants (public bodies)*

2. 22 No ongoing costs to defendants are anticipated.

##### *Costs to HMCTS*

2. 23 The expansion of the Lands Chamber may require some one-off upfront investment to enable a greater range of cases to be heard. This may include the adaptation of IT systems. As mentioned above, these costs are initially estimated to be in the order of around £100,000.

##### *Costs to legal services providers*

2. 24 There may be some costs to legal services providers from reduced levels of business if cases, on average, settle more quickly and require less legal input following this change. This would free up resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

##### *Costs to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 25 The proposal may enable planning cases to be resolved more quickly due to more efficient listing and specialist judges in the Upper Tribunal. There is also the potential for all types of cases heard in the Administrative Court to be resolved more quickly as fewer applications may free up court resources to process remaining cases more efficiently. This may impose costs on all those individuals and businesses that would lose out from quicker implementation of public decisions.

#### **Assumptions and risks for Option 1**

2. 26 It is assumed under Option 1 that there would be no changes in case volumes and to case outcomes, including no change to appeal rates. It is assumed that the transferring of cases would simply result in the planning cases affected being resolved more quickly.
2. 27 It is assumed that the redeployment of existing judicial resource, more in accordance with the judicial specialisms appropriate for different cases, would not generate any adverse – or other – implications for cases arising in non-planning areas.
2. 28 It is assumed that less legal resource would be required to present and defend cases in the Upper Tribunal as specialist planning judges will be experts in planning law. Less legal resource may also be required due to shorter case duration.
2. 29 It is assumed that court fees and overall court fee income will not change as a result of these reforms and will remain the same for all cases affected. It is assumed that overall court costs will fall as a result of these reforms, and that the resources freed will be allocated to reducing court case durations and waiting times, to the benefit of court users.
2. 30 It is assumed that case durations and waiting times for other cases in the Upper Tribunal (i.e. not cases involving statutory planning changes or planning JRs) will remain the same following these reforms. This may involve transferring resource within HMCTS from the Administrative Court to the Upper Tribunal to reflect the new workloads following this change. In 2011/12 there were around 750 Lands Upper Tribunal cases (and around a further 4,900 other Upper Tribunal cases). The total number of planning challenges that would be added to the Lands Upper Tribunal may be around 400 cases per year.<sup>8</sup>

### One-in-two-out assessment for Option 1

2. 31 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

### Option 2 – Procedural defects

#### Description

2. 32 There are two elements to Option 2. Under Option 2a, “no difference” arguments could be heard at the permission stage rather than later in the JR process at the request of the defendant in their Acknowledgement of Service letter. Option 2b would, in addition, lower the threshold for the likelihood of the defect in question affecting the outcome of a decision. Under this option cases could be refused permission, or the Court could refuse to grant a remedy, where it is judged that it is “highly likely” that the defect would not have altered the decision rather than “inevitable”.
2. 33 It is not currently known how many cases are captured by the “no difference” principle available under the existing rules. However, this reform is most likely to affect those cases that are currently granted permission and, under Option 2, would now potentially be refused permission earlier in the process. As Annex A illustrates, Administrative Court data shows that around 1,300 cases lodged in 2011 were granted permission. In practice, it is likely that only a small proportion of these cases would be affected by the reform as some of these cases would have substantive grounds for their challenge.
2. 34 The main impact of this option is expected to be that cases that are judged to be grounded on minor procedural flaws would be resolved more quickly (at the permission stage rather than a final hearing) and, as a result, this would require fewer resources for claimants and defendants.

### Benefits of Option 2

*Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 35 Claimants would benefit from reduced legal costs if cases are resolved at the permission stage rather than later in the JR process. Claimants may also benefit from quicker resolution if this would

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<sup>8</sup> Tribunal figures are available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218521/tribs-stats-tables-q1-2011-12.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218521/tribs-stats-tables-q1-2011-12.xls)

be in their interests. This may apply to cases where claimants win their case or the case is settled outside of court more quickly, and hence where they secure the positive outcome they were seeking at an earlier point in time.

#### *Benefits to defendants (public bodies)*

2. 36 Defendants would benefit if cases were resolved at the permission stage rather than later in the JR process. This is because defendants would require fewer resources to defend cases. Defendants would also be able to implement government decisions more quickly in cases where they win. Defendants may also gain from quicker resolution in cases which they lose if this enables an alternative solution to the issue at hand to be pursued more quickly than would otherwise be the case.
2. 37 Under Option 2b, defendants would also benefit if the number of remedies the court granted fell as a result of the application of a lower test, assuming these remedies are favourable to the claimant.

#### *Benefits to HMCTS*

2. 38 The quicker resolution of some cases would benefit HMCTS as fewer resources would be required to deal with the same volume of JR applications. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the long run.

#### *Benefits to the Legal Aid Agency (LAA)*

2. 39 The LAA may benefit if some legally aided cases are now resolved more quickly and require less funding from the legal aid budget as a result of this change.

#### *Benefits to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 40 Some third parties to the JR may stand to gain from the quicker implementation of public decisions, or from less uncertainty about their implementation. It is possible that some third parties may also gain as a result of the Court in some cases no longer providing remedies in favour of the claimant. This would depend upon the nature of the remedy and how this affected the third party's interests. There is the potential for all JR cases to be resolved more quickly, not just cases that are directly affected by Option 2, as quicker resolution of cases concerning minor procedural defects may free up court resources to process other cases more quickly.

#### *Wider economic benefits*

2. 41 There could be wider economic benefits if 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. 42 There may be some one-off transitional costs to claimants, defendants and HMCTS. These are expected to be negligible. There might be some initial satellite litigation to determine how the new test works.

#### *Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 43 Claimants who stand to benefit from delays to public decisions may lose out under Option 2a if their cases are dismissed earlier in the JR process than they otherwise would have been. This would include claimants who are ultimately unsuccessful but would have gained by delaying the implementation of government decisions.
2. 44 Some claimants whose cases might previously have resulted in a remedy from the court would also lose out if they are no longer awarded a remedy under Option 2b. These would be cases where it is judged that the procedural flaw would have stood a slim chance of changing the original decision

by the public body; specifically, it would be those cases where it is judged that it is more than “highly likely” but less than “inevitable” that the flaw would have resulted in no change in the final decision. Given the high threshold that “high likely” still represents it is expected that this would occur only in a small minority of case.

#### *Costs to Defendants (public bodies)*

2. 45 No ongoing costs are anticipated for defendants.

#### *Costs to HMCTS*

2. 46 HMCTS may receive less overall fee income if some cases are settled at an earlier stage of the JR process following this change, in particular if fewer final hearings take place. HMCTS operates on a full cost recovery basis in the long run and the overall financial impact on HMCTS of these reforms is expected to be neutral (because the reduction in total fee income from some cases being resolved without a final hearing would be balanced by the saving in HMCTS resources from providing fewer hearings).

#### *Costs to legal services providers*

2. 47 There may be some costs to legal services providers from reduced levels of business if some cases settle more quickly and require less legal input following this change. This would free up resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

#### *Costs to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 48 Third parties may lose out if cases are resolved more quickly and if delay would be in their interests. It is possible that some third parties may also gain as a result of the Court in some cases no longer providing remedies in favour of the claimant. This would depend upon the nature of the remedy and how this affected the third party’s interests.

### **Assumptions and risks for Option 2**

2. 49 It is assumed that under Option 2a the same number of cases would be lodged but some cases would be resolved more quickly than would otherwise have been the case. This would apply to cases that would previously have passed the permission test and subsequently been adjudicated to have made “no difference” to the public body’s decision, as this conclusion could now be reached at the permission stage.
2. 50 It is assumed that under Option 2b more cases would be judged as having potentially “no difference” to the final public decision. These additional cases would be those where the probability that the procedural flaw would have made “no difference” to the public body’s decision is higher than “highly likely” but less than “inevitable”. It is assumed that these cases could be settled earlier in the process than previously as a result of Option 2a. It is assumed that the outcomes of these cases might differ, in favour of defendants, if the Court provided fewer remedies in future which would have favoured the claimant.
2. 51 It is assumed that public bodies will correctly be able to identify cases that would have been “highly likely” to have made no difference in their Acknowledgement of Service letters. There is a risk that, if public bodies do not correctly identify these cases, some cases that would previously have been refused permission will require greater resources overall if they require an oral hearing at the permission stage to determine the “no difference” principle instead of being adjudicated on the papers as they currently are.
2. 52 There is a risk that following these changes claimants may devote more resources to their challenges in order to demonstrate that the procedural flaws in question would have made a substantive impact on the public body’s decision. This is because claimants would now face a higher bar following the change in the “no difference” test. If this is the case defendants in turn may devote more resources in defence of the case.



2. 53 It is assumed that court fees and overall court fee income will not change as a result of these reforms and will remain the same for all cases affected. It is assumed that overall court costs per case will fall as a result of these reforms, as some cases will be resolved more quickly in future, and that the resources freed will be allocated to reducing court case durations and waiting times, to the benefit of court users.

### One-in-two-out assessment for Option 2

2. 54 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

### Option 3 – Leapfrogging

#### Description

2. 55 There are three elements to Option 3:
- Option 3a – Extending the relevant circumstances.
  - Option 3b – Consent.
  - Option 3c – Extending the court and tribunal bodies from which a leapfrog appeal may be brought.
2. 56 All three elements of Option 3 would work to increase the number of cases that leapfrog the Court of Appeal and proceed directly to the Supreme Court. This option would apply to all civil cases and not just JR cases.
2. 57 Little information is available on the extent of leapfrogging under the current arrangements, although this reform would only affect a small number of cases that make onwards appeals from the eligible courts. Court statistics show that on average between 2007 and 2012 there were around 1,300 appeals filed at the civil division of the Court of Appeal per year. It appears that only a small proportion of these cases go on to appeal to at the Supreme Court; since the Supreme Court was opened in 2009 and up to 2012, it has had a total caseload of 221 cases from England and Wales, with around 70 of these being for the latest year, 2012.<sup>9</sup>
2. 58 Indicative management information from the Court of Appeal also provides some information on the timeliness of JR appeals (rather than all civil cases) and indicates that between June 2008 and May 2013 on average, the Court of Appeal made a decision on applications for leave to appeal to the Court of Appeal in around 140 days.<sup>10</sup>
2. 59 As these figures illustrate, this change is likely to affect only a small number of cases, however, these cases tend to be particularly important or complex and, therefore, there are potentially significant benefits to their quicker resolution which is expected to be the main impact of Option 3.

#### Benefits of Option 3

##### *Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 60 Some claimants might benefit if a decision on their case is reached more quickly in future and if reduced delay was in their interests. This may apply to cases where claimants win their case or the case is settled outside of court more quickly, and hence where they secure the positive outcome they were seeking at an earlier point in time.
2. 61 Claimants would benefit from reduced legal costs if cases were resolved with the same outcomes but after going through fewer court stages, i.e. one appeal stage not two appeal stages.

##### *Benefits to defendants (public bodies)*

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<sup>9</sup> Figures on the caseloads at the Court of Appeal and Supreme Court are available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207807/court-stats-q1-ad-tables.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls)

<sup>10</sup> These figures are a further breakdown of the already published data from the Court of Appeal, which is available here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207807/court-stats-q1-ad-tables.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls)

2. 62 Defendants would be able to implement government decisions more quickly in cases where they win. Defendants may also gain from quicker resolution in cases which they lose if this enables an alternative solution to the issue at hand to be pursued more quickly than would otherwise be the case.
2. 63 Defendants would benefit from reduced legal costs if cases were resolved with the same outcomes but after going through fewer court stages, i.e. one appeal stage not two appeal stages.

#### *Benefits to HMCTS*

2. 64 Fewer HMCTS resources would be required to deal with civil appeals at the Court of Appeal. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the long run.

#### *Benefits to the Legal Aid Agency (LAA)*

2. 65 The LAA may benefit if some legally aided cases are now resolved more quickly and require less funding from the legal aid budget as a result of this change.

#### *Benefits to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 66 Some individuals and businesses who are third parties to the civil case stand to gain from the quicker implementation of public decisions, or less uncertainty about their implementation. There is the potential for all cases that appeal to superior courts to be resolved more quickly, not just those that leapfrog the Court of Appeal. This is because leapfrogging may free up court resources to process other cases more quickly. This will depend on the allocation of resources across the court system following this change.

#### *Wider economic benefits*

2. 67 There could be wider economic benefits if projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

### **Costs of Option 3**

#### *Transitional costs*

2. 68 There may be some one-off transitional costs to claimants, defendants and HMCTS. These are expected to be negligible. There might be some initial satellite litigation to determine how the new arrangements work.

#### *Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)*

2. 69 Claimants who stand to benefit from delays to public decisions may lose out under Option 3 if their appeals are resolved more quickly than they otherwise would have been.

#### *Defendants (public bodies)*

2. 70 No ongoing costs are anticipated for defendants.

#### *Costs to HMCTS*

2. 71 HMCTS may receive less overall fee income if some cases leapfrog the Court of Appeal following this change. HMCTS operates on a full cost recovery basis in the long run and the overall financial impact on HMCTS of these reforms is expected to be neutral (because the reduction in total fee income from some cases leapfrogging the Court of Appeal would be balanced by the saving in HMCTS resources from providing fewer Court of Appeal hearings).

#### *Costs to legal services providers*

2. 72 There may be some costs to legal services providers from reduced levels of business if some cases settle more quickly and require less legal input following this change. This would free up resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

*Costs to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 73 Third parties may lose out if cases are resolved more quickly and if delay would be in their interests.

### Assumptions and risks for Option 3

2. 74 It is assumed under Option 3 that more civil cases that appeal to superior courts would be leapfrogged to the Supreme Court. It is also assumed that these cases would be resolved more quickly as a result of leapfrogging. The volume of JR appeals is assumed to remain the same.
2. 75 It is assumed that parties are able to correctly judge which cases would ultimately have appealed to the Supreme Court so that only cases that would otherwise have appealed to the Supreme Court following a Court of Appeal judgement would leapfrog. It is therefore assumed that participants would save the resources used to argue cases in the Court of Appeal. There is a risk that if parties are unable to correctly identify these cases that some cases would be heard in the Supreme Court that would previously not have reached this stage; this may require greater resources than if these cases had been settled in an inferior court.
2. 76 It is assumed that the same final judgement and case outcomes would be made for cases that leapfrog under Option 3 and no additional resources would be required for participants making their case directly in Supreme Court. There is a risk that cases take longer in the Supreme Court if lines of argument are less well rehearsed because of the omission of earlier hearings at the Court of Appeal.
2. 77 It is assumed that, in the medium term, the resources available in the Court of Appeal and Supreme Court will adjust to reflect new workloads following this change. If this does not occur, there is a risk that backlogs or spare capacity may arise in the court system.

### One-in-two-out assessment for Option 3

2. 78 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

## Option 4 – Standing for Local Authorities challenging Infrastructure Projects.

### Description

2. 79 Option 4 seeks views on whether, unless they were the applicant (for development consent), local authorities might not have standing to challenge projects by JR where the project has been subject to the regime established under the Planning Act 2008. If so, local authorities would still be able to influence and challenge relevant projects through routes other than JR, such as mediation.
2. 80 Between 2007 and 2011 internal Administrative Court management information indicates around 8 JRs per year relating to the Administrative Court category “Town and Country Planning” seem to have been brought by local authorities and parish councils against public bodies. Of these, around 5 JRs per year seem to have been brought against central government Departments.<sup>11</sup> In relation to the 13 “Town and Country Planning” cases lodged by local authorities and parish councils in 2011, 7 were against other local authorities or parish councils.
2. 81 If Option 4 is pursued it has been assumed that there would be a reduction in the number of planning JR applications, with challenges instead resolved via mediation or through other channels. It has been assumed that these alternatives would be less costly, may deliver broadly comparable outcomes, and may do so more quickly.
2. 82 The following assessment of benefits and costs assumes that Option 4 will be implemented.

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<sup>11</sup> The figures on claimants are based on a high level review of the Administrative Court data – any findings should be treated as largely indicative.

## **Benefits of Option 4**

### *Benefits to claimants (local authorities)*

2. 83 Claimants would benefit from the reduced costs associated with mediation and alternative dispute resolution compared to the costs of bringing a JR. Claimants would gain from quicker resolution if this would be in their interests.

### *Benefits to defendants (public bodies)*

2. 84 Defendants would benefit from the reduced costs associated with mediation and alternative dispute resolution compared to the costs of defending a JR. Defendants would gain from being able to implement government decisions more quickly in cases where this is the outcome of mediation or alternative resolution. Defendants may also gain from quicker resolution in cases with other outcomes if this enables an alternative solution to the issue at hand to be pursued more quickly than would otherwise be the case.
2. 85 Case outcomes are assumed to be broadly comparable following the reforms. It is possible that some aspects of mediation or alternative resolution might be more favourable to defendants than is the case with JR.

### *Benefits to HMCTS*

2. 86 A reduction in the volume of cases would benefit HMCTS as fewer HMCTS resources would be required. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the long run.

### *Benefits to third parties (including individuals, businesses, NGOs, charities, pressure groups)*

2. 87 Some third parties to a JR may gain from quicker resolution of issues and quicker implementation of public decisions, and may gain from less associated uncertainty.

### *Benefits to mediators and other alternative dispute resolution service providers*

2. 88 Mediators and other alternative dispute resolution service providers may gain from an increase in business from cases being resolved via these channels in future. These are secondary impacts.

### *Wider Economic Benefits*

2. 89 There could be wider economic benefits if projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

## **Costs of Option 4**

### *Transitional costs*

2. 90 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 test works.

### *Costs to claimants (local authorities)*

2. 91 Case outcomes are assumed to be broadly comparable following the reforms. It is possible that some aspects of mediation or alternative resolution might be less favourable to claimants than is the case with JR.

### *Costs to defendants (public bodies)*

2. 92 No ongoing net costs to defendants are anticipated.

*Costs to HMCTS*

2. 93 HMCTS would receive less fee income if there were fewer JR applications. HMCTS operates on a full cost recovery basis in the long run and the overall financial impact on HMCTS of these reforms is expected to be neutral (because the reduction in total fee income from reduced case volumes would be balanced by the saving in HMCTS resources from providing fewer hearings).

*Costs to legal services providers*

2. 94 There may be some indirect costs to legal services providers if there was less demand for their services if fewer JR cases were brought following this change. Legal services providers may devote the resources freed up to other profitable activities, for example mediation services. These impacts on legal services providers are secondary impacts.

*Costs to third parties (including individuals, businesses, NGOs, pressure groups, charities)*

2. 95 Some third parties to a JR may lose out from quicker resolution of issues and quicker implementation of public decisions.

**Risks and assumptions for Option 4**

2. 96 It is assumed that the volume of cases seeking resolution would remain the same.

2. 97 It is assumed that mediation and other alternative dispute resolution methods are less costly than JR, both for claimants and for defendants.

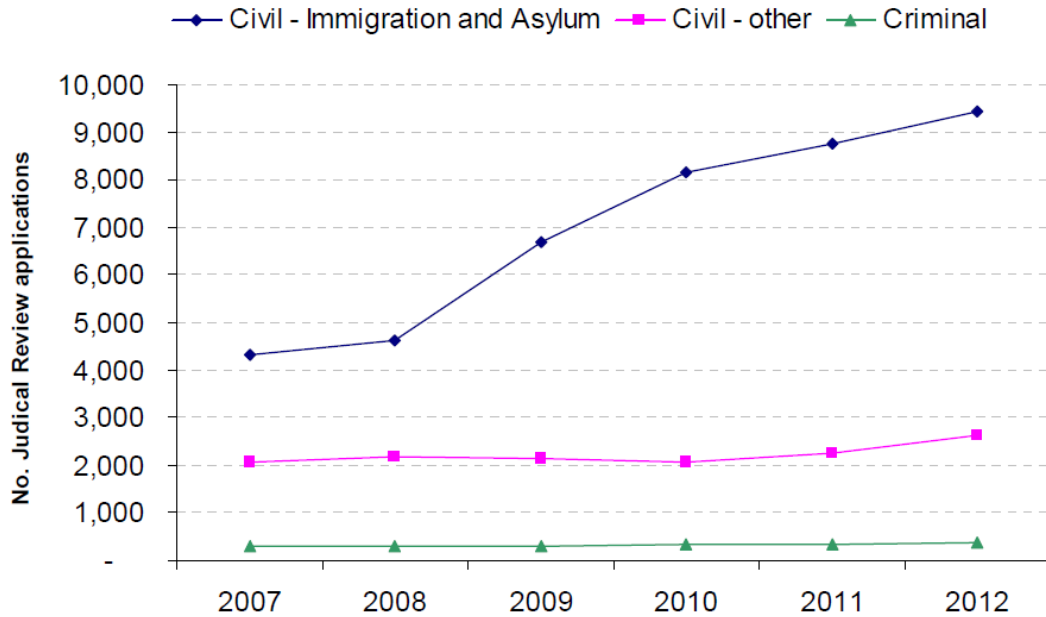
2. 98 It is assumed that case outcomes remain broadly comparable if issues are addressed via mediation and other alternative dispute mechanisms instead of via JR, but that some aspects of JR might be relatively more favourable to defendants and relatively less favourable to claimants.

2. 99 It is assumed that cases would be settled more quickly under mediation and other alternative dispute resolution methods than under JR.

## Annex A: Judicial Review Volumes

- A. 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 12,400.<sup>12</sup>
- A. 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 also increased over the period but at a much slower rate as shown in Chart 1 below.

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



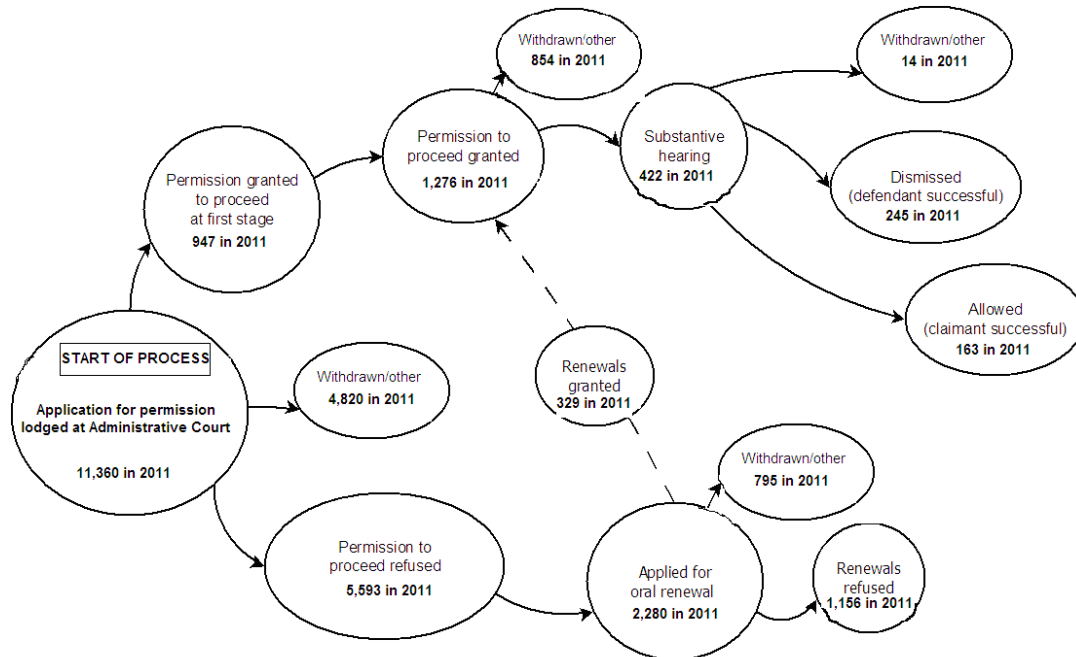
- A. 3 The Administrative Court data suggests that the majority of applications that reach a permission decision are refused. For cases lodged in 2012, only around 1 in 6 that reached the permission stage and were considered by the court were granted permission to proceed.
- A. 4 However, the data also 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.<sup>13</sup> 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.
- A. 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.

<sup>12</sup> Data on Judicial Reviews is available here: <https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013>

<sup>13</sup> Bondy, V., & Sunkin, M. (2009). The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing.

- A. 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.
- A. 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 volumes and case progression for cases lodged at the Administrative Court in 2011 (starting from “application” at left hand side)*



*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.*

- A. 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<sup>14</sup>, 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.
- A. 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.
- A. 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.
- A. 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

<sup>14</sup> 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.

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.

- A. 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.
- A. 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.
- A. 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.