Evidence

citizens advice bureau

Judicial Review

Proposals for further reform

Response to the Ministry of Justice from Citizens Advice

November 2013

Summary

- Citizens Advice believes the proposed changes to judicial review will seriously damage the ability of citizens, businesses and others to hold the state to account. We have often found that access to judicial review has been the key to preventing our clients from becoming homeless or securing essential services.
- The consultation claims the proposals seek to deal with 'unmeritorious cases which may be brought simply to generate publicity or delay implementation of a decision properly made' and references are made to 'groups who seek nothing more than cheap headlines'. This is not the experience of our advisers who report how hard it already is for their clients to be able to obtain a judicial review.
- We believe that there are already sufficient controls in place to deal with cases that lack merit and the Government's proposals risk denying ordinary people the advice and justice they deserve.
- Our key concerns are:
    - The combined effect of these proposals will make it very difficult for our clients to be able to find a lawyer to take on a judicial review even when there is strong evidence they have a good case.
    - The proposed changes to the rules on standing would mean that organisations who represent the interests of vulnerable people will not be able to take up a judicial review on their behalf. In some cases a representative body can now start the judicial review process before individuals are impacted by an unlawful decision. They can also represent large numbers of individuals affected by the same unlawful action, helping to clarify the law and preventing injustice. The proposed changes would make that impossible.
    - From the consultation document it is clear that the rise in judicial review has been caused by a rise in immigration and asylum cases. With plans to move these to a separate tribunal service, these will no longer clog up the system. Our experience of judicial review is that it is only ever used as a last resort and that there are far more strong cases being put off by the difficulty of securing legal aid funding rather than frivolous cases being funded by legal aid. On this basis we feel that the Government has failed to show any evidence that there is a need for such dramatic reforms.

Introduction

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

The service aims to:

- provide the advice people need for the problems they face
- improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of 338 independent advice centres that provide free, impartial advice from more than 3,300 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups.

General comments

Citizens Advice believes the proposed changes to judicial review will seriously damage the ability of citizens, businesses and others to hold the state to account.

As the foreword to the consultation makes clear, judicial review 'is a crucial check to ensure lawful public administration'. We have often found that access to judicial review has been the key to preventing our clients from becoming homeless or securing essential services.

Taken together these proposals will make it much harder for our clients to be able to take a case to judicial review and mean that unlawful actions by Government bodies will never be challenged.

Given the central importance of judicial review to the maintenance of the rule of law, any proposed changes which have the potential to limit access to justice must be scrutinised carefully. The case for change must also be made clearly, particularly where the Government is seeking to change the way citizens can seek redress against the Government itself.

The consultation claims the proposals seek to deal with 'unmeritorious cases which may be brought simply to generate publicity or delay implementation of a decision properly made' and references are made to 'groups who seek nothing more than cheap headlines'. This is not the experience of our advisers who report how hard it already is for their clients to be able to obtain a judicial review. We believe that there are already sufficient controls in place to deal with cases that lack merit and the Government's proposals risk denying ordinary people the advice and justice they deserve.

> A CAB in the South East reported the case of a brain damaged toddler who would have struggled to recover from a live-saving operation, if the bureau hadn't been able to use a threat of judicial review to challenge decisions by three councils not to house him and his mother. While living abroad the toddler had become ill with a brain tumour. Hospitals abroad said they could do nothing for him so his mother, a British national, brought him back to the UK. He survived the operation but suffered brain damage and needed further chemotherapy treatment. They had nowhere to live in the UK so once he was discharged from hospital

mother and toddler moved in to her friend's one bed flat, sleeping in the living room where all his medical equipment had to be stored. Doctors said this arrangement wasn't appropriate for a child with a suppressed immune system and standard emergency accommodation, like shared B&B facilities could have jeopardised his recovery. Mother and son then found themselves caught in the red-tape bureaucracy of three councils who all refused to house them as they said they weren't 'habitually resident' in the UK. Council A refused on the grounds that she wasn't a resident, she had a home abroad and that her husband, who had remained there to work and look after their children, should give her money to pay towards her living costs. If Council A had checked, they'd have seen that her husband's salary was equivalent to just £193 a month - not enough to cover a week's rent in London. Council A decided that as the hospital was in Council B's area, then that authority should house them. Council B refused because it couldn't take responsibility for every child and their family just because the hospital was located in their area. They also felt that as the toddler had had some respite care in between his chemotherapy sessions in a hospital in Council C's area, they should take responsibility for housing them. Instead of one of the councils taking responsibility to house them near the hospital so the child could continue having treatment and resolving the inter-authority dispute behind closed doors, this three way dispute between the councils carried on for three months. Mother and son only got some respite when a children's cancer charity offered to provide them with temporary accommodation. As a result of the bureau using a threat of judicial review, Council A were forced to find mother and son accommodation to fulfil their duty under the Children's Act and the UN's Convention on the Rights of Children to help a child in need in their area.

Given the relative power imbalance between the parties involved in a judicial review case, we do not believe that the case for further reform has been made.

The justification for change centres on the growth in the number of judicial review cases between 2007 and 2012. The consultation acknowledges that the driver for the majority of this increase has been an increase in the number of immigration and asylum cases. Other civil cases have shown a modest increase, but not the scale that would convince us that there is an unsustainable increase in unmeritorious cases or publicity seeking behaviour. Citizens Advice often sees the chaos caused by errors in the asylum system. Clients come to us when the Government has lost their documentation or decisions have been made which are clearly unlawful. The best way for the Government to reduce the number of judicial reviews is to deal with problems in the asylum and immigration system.

In terms of delays in the system, provisions have already been made under the Crime and Courts Act 2013 for immigration and asylum judicial reviews to be heard in the Upper Tribunal, which will free up capacity. Indeed Lord Neuberger, President of the Supreme Court has said, 'The cause of the delays complained of is largely historic, thanks the very recent removal of asylum and immigration cases from the Administrative Court to the Upper Tribunal'.[1]

The Government states that it 'will ensure that judicial review continues to retain its crucial role'. We believe that the proposals set out in this consultation will not achieve this. In particular, changes to rules on standing, payment for legal aid judicial reviews, protective cost orders and wasted cost orders would combine to restrict access to justice for some of the most vulnerable members of society.

[1] Justice – Tom Sargant memorial annual lecture 2013

Questions

We are only responding to those parts of the consultation on which we have expertise and are relevant to the work of the Citizens Advice service.

Standing

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

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

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

We do not accept that there is a significant problem to be resolved. The consultation asserts that the proposals are intended to deal with 'unmeritorious cases which may be brought simply to generate publicity or delay implementation of a decision properly made' or to stop 'groups who seek nothing more than cheap headlines'. However, we believe that the judiciary already have appropriate powers to deal with unmeritorious cases and the proposed changes will actually prevent organisations with a legitimate interest in the actions of public bodies bringing cases with significant public interest.

We welcome the acknowledgement of two important points in the consultation. First, judicial reviews brought by non government organisations (NGOs), charities, pressure groups and faith organisations are relatively successful compared to other types of judicial review, so clearly these successful cases are not simply publicity stunts. Second, that there are a relatively small number of judicial review cases in total. The statistics quoted in the consultation paper suggest a sober approach to the use of judicial review, with only fifty cases over a four year period, of which twenty were granted permission. According to the consultation document, around 30 per cent of these cases were environmental issues, which would be unaffected by the proposals, so we do not feel that the numbers support such a dramatic interference with the court's ability to hear cases.

If a case has no merit and is proposed purely to get a press release under the current system, it would not get any legal aid funding and the Government would not have to spend any taxpayers' money defending it. These proposals will make no difference to the ability of campaigning organisations to put out press releases but would stop what the consultation acknowledges is one of the most successful types of judicial review.

In addition, we feel strongly that the lawfulness of public administration is the legitimate concern of the whole of society. There will be situations when the intervention of an organisation with a concern about a particular issue will be the only means to challenge unlawful practices. One example of this is where a Government policy is unlawful but has yet to impact on individuals or where the affected person is in no position to bring a judicial review, for instance, where they have been unlawfully deported.

Challenge from an organisation can also be necessary where a defendant decides to settle cases with multiple individuals rather than cease the unlawful activities which affect many more. It will be detrimental to the rule of law to close off this avenue of challenge.

The importance of setting the threshold for judicial review at a reasonable level was commented on in *R v Secretary of State for the Home Department, ex p Bulger* [2001] EWHC Admin 119 at 20 ' the threshold for standing in judicial review has generally been set by the courts at a low level. This…is because of the importance in public law that someone should be able to call decision makers to account'.

Where a policy is being applied in a detrimental way to a large number of people, it may take the intervention of an organisation to challenge the practice and if necessary take judicial review proceedings. Such action would be taken as a last resort but could be the only means to challenge the widespread impact of potentially unlawful activities.

> A CAB in Londonsaw a woman who, with her husband, had made a claim for jobsekers allowance.. When her husband subsequently started working, they immediately informed the Jobcentre and provided payslips as soon as they were issued. Despite this, the DWP decided to recover the overpayment of benefit and impose a civil penalty on the mistaken grounds that they had failed to disclose a material fact. The couple were deeply unsettled by having a large debt which had arisen due to the Jobcentre's failure to act on the information they provided. The civil penalty appeared to have been imposed without looking at all the evidence relating to the JSA claim. The bureau believed that, if the application of civil penalties in this way was found to be a blanket policy, judicial review proceedings may be appropriate.

Procedural Defects

Option 1 - Bring forward the Consideration

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

No. Permission hearings are shorter hearings where the evidence is not considered in depth. 'No difference' arguments heard later in the process often rely on extensive evidence. The proposals would increased the complexity of the permission stage by requiring more lengthy pleadings and it appears most likely that more cases will need to be dealt with at an oral hearing. This would result in increased delays at this stage in the process.

In addition, bringing forward 'no difference' arguments to the permission stage is likely to further disadvantage Litigants in Person (LIPs) who are often only able to secure (mostly pro bono) representation after the permission stage. Bringing forward such complex issues will make it harder for a LIP to progress a meritorious case. The Royal Courts of Justice Citizens Advice Bureau have identified that, of their client group of LIPs, 25 per cent have a protected characteristic. This suggests that the proposal would raise equality issues.

Coupled with proposals to restrict legal aid payments for permission work, this proposal would act as a serious disincentive for legal aid representatives when considering the risks of representation. Not only would further work be required at this early stage, which would be done at risk of non-payment, but the proposals would also introduce further uncertainty. Given the low levels of legal aid funding, we doubt whether many organisations with legal aid funding will be able to do the initial work when there is a significant risk they will not be paid, even in a good case with a successful outcome for the client. Please see also our response to question 19 below.

No evidence has been put forward by the Government to suggest that the current process and test applied by the courts are not dealing adequately with 'no difference' situations.

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

We cannot see how these issues could be considered fairly other than at a full hearing. Any attempt to consider 'no difference' arguments at this stage would need a full dress rehearsal which could increase the expense for tax payers.

Option 2 – Apply a lower test

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

We do not agree that were the test to be changed to 'highly likely' the outcome would be the same. Judicial review is routinely concerned with challenges to the lawfulness of the decision making process, but is not always equipped to consider the merits of the decision.

Public Law Project have identified the case of *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 where May LJ stated (paragraph 10 of the judgment): *'I have already noted that neither [counsel] contended that the judge's second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion, that is a proper concession. Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court most not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision'*. Lowering the test from inevitable to 'highly likely' would mean that courts would be required to stray into this 'forbidden territory' adding further complexity and costs. Identifying when a public body has acted unlawfully in its procedures is an important means to hold the public body to account and prevent future illegality. Weakening of the test could be detrimental to standards in public administration.

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

Guidance and support should be provided to public bodies to improve adherence to correct procedure. Learning from judicial review cases should be shared and acted upon.

The Public Sector Equality Duty and Judicial Review

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

Citizens Advice is a strong supporter of making the public sector equality duty (PSED) an essential tool of modern government. The PSED helps to ensure that the needs of different people are properly taken into account and balanced. The best alternative to having judicial reviews challenging the PSED duty is for the Government to make sure these issues are properly considered in the first place. The objective behind the PSED is to ensure that consideration of equality forms part of the day-to-day decision-making and operational delivery of public bodies. This is as vital now as ever, given that all public authorities are having to make difficult decisions about how to prioritise their scarce resources. From our experience it is clear that is not happening which is why judicial review is needed on PSED issues. We also believe that the rights protected by the PSED are of such importance that judicial review should be retained as the remedy for any breaches. Judicial review can achieve far reaching improvements for large numbers of people who might otherwise be subject to discrimination.

We have considered whether there might be a viable alternative to judicial review and, having looked at it, do not believe a workable alternative exists.

In the case below, litigation was necessary to secure adherence to the PSED.

> A CAB in the North West pursued a complaint about a care package for a woman who was bedbound and needed a hoist to get out of bed with carers attending four times a day to change her incontinence pads. She had dementia, neuropathy, incontinence and was unable to stand. Under the NHS funded care package, the primary care trust (PCT) insisted that they could only provide three pads per day, not enough in this case. The client could not meet the extra cost of additional pads. The bureau advised that the care package should meet the cost of however many pads were required and complaint on the woman's behalf, but the NHS claimed they were following their own policy to only allow three pads per day. After further advocacy by the bureau, the NHS incontinence team re-assessed the client and agreed to allow four pads. Although the client received a positive outcome to her individual case, the NHS would not amend their policy so that others need not face the same or similar disadvantage and barriers to getting their basic human needs met. The bureau threatened judicial review, which cited amongst other legal provisions the PSED. Following litigation in 2012 the NHS changed the policy so that everyone will now be assessed on their own individual needs.

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

Please see above for an example of the types of challenges made using the PSED.

Rebalancing Financial Incentives

Paying for permission work in judicial review cases

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

No. We believe that these proposals would prevent many strong cases from ever being heard. This would cause significant injustices and do nothing to prevent weak cases blocking up the system. The Government has failed to show any evidence that they are a problem in the first place.

The Legal Aid Agency (LAA) already conducts a merits assessment at each stage of provision of funding, usually requiring a barrister's opinion on prospects. We believe that this provides sufficient protection to the public purse from weak cases.

The underpinning justification for this proposal is that the Government feels that too many weak cases are being funded. We do not agree that any statistical evidence has been put forward to support this. A case may be strong but may be withdrawn before the permission stage because the public body concerned provides an acceptable remedy to the applicant. In the experience of bureaux, issuing judicial review proceedings often has the effect of escalating an issue and producing an acceptable outcome for the client when negotiation has failed to do so.

In addition we believe that cases with significant merit will not be taken because of the unreasonable burden of risk that would be placed upon representatives. Rather than weeding out weak cases, the proposals would in effect only fund the very strongest cases, those that representatives assessed as risk free as the case would be of a type where they would be certain that permission would be granted.

Many of our advisers report that it is already very difficult to find legal aid lawyers to take on a judicial review because of the recent cuts to the legal aid budget. The remaining law centres and solicitor firms are working on an incredibly tight budget. Lawyers are therefore going to stop taking on judicial review cases where there is a some likelihood that they will not get paid for the work. Cases with merit, but with an element of uncertainty because, for example, the law is developing or because further evidence needs to be obtained, will therefore be screened out of legal aid by representatives who simply cannot take the risk of not being paid. This will damage the development of case law and reduce the number of important test cases taken.

The consultation paper acknowledges that savings from this proposal could be as low as £1 million. The damage to the rule of law and detriment to enforcement of good public administration is not justified by such a proportionally small saving. In fact the proposals would result in additional costs, as there would be additional administrative costs for LAA which will have to decide which cases deserved exceptional costs. If this is anything like the exceptional costs regime introduced by LASPO, it will prove complex both for applicants and the LAA. These increased administrative costs, and potential increased wider costs of unchallenged poor public administration, call the economics of this proposal into question.

We do not believe that the new proposals will give practitioners sufficient reassurance that they will be fairly paid for the work they undertake. First it is impossible to tell in advance how the proposed LAA discretion will be applied in cases which settle and second, practitioners will still need to risk substantial amounts on cases which are reasonably taken forward but which, for reasons outside of the control of the representative, may not progress beyond permission stage.

The claimant's representative, contrary to assertions in the consultation document (paragraph 150) will not necessarily be in the best position to judge the merits of the case until further information is disclosed by the defendant. In the majority of cases, it is the defendant who holds most of the crucial information and refuses to disclose it until forced to do so through the litigation process.

The principle of a discretionary scheme will add yet more uncertainty to the process and will require further work by the representative to make the application for payment (which will also itself be at risk of not being paid). In addition a discretionary scheme is unlikely to be sufficient to allay fears that clients will find it much harder to find a lawyer willing to take on their case, due to the financial uncertainty entailed in the proposal.

> One bureau reported that they have needed to find legal representation on a number of occasions to challenge a local authority's refusal to accept their duties to the children of asylum seekers. On each occasion the case was settled at the eleventh hour, almost on the steps of the court. On at least one occasion, this happened despite the local authority having received legal advice from its own legal department to comply. These cases show that without adequate access to the courts, such practices can go unchallenged. The bureau is concerned that in future, legal representation will be significantly harder to secure, if the representative is uncertain whether they will be paid.

Cases which clarify the way that the state should treat large numbers of citizens beyond those who took the case may not find representation in future and cases which make an overwhelming impact for a single client might not be taken on:

> A CAB in the South East reported the case of a man who sought advice after his homelessness application had been turned down by their council, despite the fact he had nowhere to live and was suffering from a serious lung condition. Not only did the council turn down the application but they also refused to house the man while their decision was reviewed. The CAB obtained a legal aid counsel opinion that they would be able to make an application for judicial review. With the threat of this judicial review the council agreed to provide accommodation pending review. With the CAB and counsel's opinion supporting the client, the review found in his favour, that he was in need of support to avoid homelessness and there was no need for a court hearing. If the council had known that the CAB could not afford to take it further they may have been less likely to bow to pressure.
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> A CAB in the North West advised a single homeless man. He had health issues and was vulnerable. The homeless section at the council had refused to take a homeless application from him and provide him with temporary accommodation while it was considered. The bureau attempted to resolve the issue without court action, but despite phone calls and a pre-action protocol letter, an agreement could not be reached. The bureau applied for legal aid on behalf of the man which enabled them to instruct counsel to prepare pleadings. Despite further calls explaining that the papers were ready to be issued at court, the council did not back down. An order was made that evening ex parte by the out of hours judge directing that the he was to be given temporary accommodation. The judge's order was sent to the council who made

arrangements to accommodate the client the same night, otherwise he would have been forced to sleep rough.

Under the proposals, the bureau would have been at risk of not being paid for the work they carried out to ensure that the local authority accepted their duties to a vulnerable man.

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

Subject to our objection to the introduction of a discretionary scheme we have specific concerns about the proposed criteria. We are concerned that:

- Conflicts of interest could arise between a representative and their client when agreeing the terms of settlement. The client might be satisfied by an offer from the defendant but accepting it could result in the lawyer not being paid at all for the work they had done to achieve it.

- Fewer cases may settle due to representatives needing the certainty of permission having been awarded in order to guarantee payment. This could ultimately increase costs as the lawyer would need a case to be successful at the permission stage in order to be certain of payment.

- It is unclear, under criterion (iii), who will be the judge of the reason the case settled. It is possible to conceive of situations where a public body could deny fault, but offer redress despite acting illegally. By arguing that they settled simply to avoid the cost of litigation, the representative could be denied payment. This could act as a serious disincentive to further challenges for similar unlawful decision making in future. Without effective access to legal aid, unlawful action by public bodies could continue almost with impunity.

- The test applied by criterion (iv) applies a test, where the actions of the representative are judged in retrospect with the benefit of hindsight. We believe this is unfair. This criterion will also require the LAA to make a judgment as to the likelihood that the case would have been given permission if it had progressed to a hearing. This contradicts the Transforming Legal Aid consultation which stated: *'When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case and specialist understanding of the law in the relevant area. The LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding.'*

- The proposals will not work on a practical basis. For example, if the LAA is so reliant on the provider at the stage when funding is awarded, it is not clear why the LAA will be more able to make a judgment as to the chance that permission will be allowed later in the process. If the LAA possess the necessary skills and knowledge to make this judgment, surely it should be applied at the outset of the case. We can only conclude that as hinted at in footnote 67, the decision will be based on 'evidence obtained since the determination was made that the client qualified for legal aid to bring the claim'. Rather than weeding out cases that were weak at the outset, the representative is merely being asked to second guess how the case might progress as further evidence is obtained. It is simply unfair to expect representatives to shoulder the full burden.

- There appears to be an additional administrative burden on both representatives in making the case for payment and the LAA in having to make the assessment and dealing with appeals.

Costs of oral permission hearings

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

We believe that the discretion should remain with the courts.

Wasted Costs Orders

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

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

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

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

We do not believe that the case for change has been made. The courts already have the power to penalise representatives for improper, negligent or unreasonable conduct and do so where appropriate. Wasted costs orders are not an appropriate means to deal with litigation of weak cases. Clients can and sometimes do decide to continue with a case despite the advice from their legal representatives. They may be obliged to continue with a case in such circumstances due to their professional obligations. Widening the use of wasted cost orders will have a further chilling effect on the willingness of representatives to take on cases for clients of limited financial means.

Protective costs orders

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

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

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

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

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

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

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

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

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

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

We do not believe that the case has been made to change the current process. The effect of the Government proposals would instead be to prevent cases that are in the public interest ever being heard. Insufficient evidence has been provided as to the scale of alleged detriment.

The proposals on standing combined with the proposals on PCOs risks creating a catch 22 situation where organisations who are able to show standing would be automatically barred from a PCO. PCOs are made where the proposed litigation is in the public interest. Individuals will be deterred from taking these important cases due to the risk of adverse costs. Even when such cases are lost, there is often benefit to the development of law by clarifying points. These cases can also confer benefit to public authorities by confirming the legality of their actions, helping to establish clearer guidance for good public administration.

The test proposed allows for no balancing of private interest and public benefit. Private interest can be slight but public benefit can be overwhelming. Lack of cost protection which deterred individuals from taking a cases, would have a detrimental impact on the wider public.

Furthermore, the current consultation, *Cost protection in defamation and privacy cases: the Government's proposals*, states, 'The rationale for introducing cost protection is to ensure that meritorious cases are able to be brought or defended by the less wealthy, who should not be deterred from bringing or defending an appropriate claim through fear of having to pay unaffordable legal costs to the other side if they lose'. We believe that there is a clear parallel to be drawn here. In defamation cases, there can often be a considerable power and financial imbalance between parties. This is also clearly the case of judicial reviews. The same deterrent to the bringing of appropriate cases will apply.

Impact Assessment and Equalities Impacts

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

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

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

The evidence quoted in the Impact Assessment is weak and does not support any case for change. As the Impact Assessment itself say *'The uncertainties in the Judicial Review legal aid data mean that the upper bound costs and benefits of this proposal are uncertain.'* We are concerned that the Government is proposing to make it much harder for our clients to be able to take a case to judicial review and mean that unlawful actions by Government bodies will never be challenged on the basis of evidence which is flimsy at best.

The Impact Assessment does not consider the potential knock-on costs of the proposals and therefore overestimates any potential savings.

The justification for change centres on the growth in the number of judicial review cases between 2007 and 2012. The consultation acknowledges that the driver for the majority of this increase has been an increase in the number of immigration and asylum cases. Other civil cases have shown a modest increase, but not the scale that would convince us that there is an unsustainable increase in 'unmeritorious case' or publicity seeking behaviour.