JUDICIAL REVIEW:
PROPOSALS FOR FURTHER REFORM

CONSULTATION RESPONSE OF THE
CONSTITUTIONAL AND ADMINISTATIVE LAW BAR ASSOCIATION

1. This is the response of the Constitutional and Administrative Law Bar Association (ALBA). ALBA is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. It is predominantly an association of members of the Bar, but amongst its members are also judges, solicitors, lawyers in public (including Government) service, academics and students. It currently has over 1,000 members, including barristers who act for claimants and defendants in judicial review proceedings and in statutory appeals including in immigration, public procurement and planning cases.

Introduction

2. Several general matters about this consultation give use cause for concern.

3. Firstly the government appears to be pursuing a rapid policy of piecemeal change without any principled analysis and without assessing the effects of the changes that have already been introduced. This is the third consultation paper making significant proposals about judicial review and funding for judicial review in less than 12 months. Some changes have recently been introduced as a result of the earlier consultations (changes to time limits in some cases, restrictions on oral renewals where proceedings are judged to be totally without merit and fees for oral renewal). Sweeping restrictions on the scope of legal aid are being made and these are likely to have a substantial impact on judicial review cases even without the measures proposed in Chapter 7 of this paper. This is on top of the cuts that came into force on 1st April 2013 with the Legal Aid Sentencing and Punishment of Offenders Act 1012. In addition, the vast majority of immigration judicial reviews, will by the time this

consultation closes, have been moved to the Upper Tribunal. We explain below that in the majority of cases the paper has simply not made out any case for change but in any case it is premature to impose further far-reaching measures without waiting to assess the effects of the recent changes.

4. Secondly we are concerned about the tone of this paper. The first paragraph of the foreword refers to judicial review as a "crucial check to ensure lawful public administration" but the rest of the paper fails to follow this through and the overall impression given is that judicial review is an inconvenient obstacle to government action and that it needs to be modified to suit priorities set by the executive. This gravely misunderstands the point of judicial review. As recently explained by the President of the Supreme Court Lord Neuberger:

> "The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly".

5. The authors of this document seem not to understand this. Many of the proposals will strike at good cases as well as bad and so the consequence will inevitably be that unlawful action will go unchecked. This paper does not think that this is a problem and there is scant, if any reference to the very significant public interest in maintaining the rule of law. The paper often refers to judicial review as a means of changing "government policy" but fails to note that if this happens it is because the government has, in formulating or implementing that policy, broken the law. It is wrong for the government, guise of efficiency and "re-balancing" to make proposals like these which will seriously restrict access to the courts and will inhibit them in fulfilling the vital role referred to above.

6. The paper adopts the same approach as its predecessors in assuming that there is significant abuse of judicial review and that problems with delay or excessive cost are wholly the responsibility of irresponsible claimants. As before, the evidential basis for

these claims is sorely lacking. We return to this point when considering the introduction to the paper.

7. A related point is the lack of balance. The paper repeatedly makes proposals to limit opportunities to bring judicial review claims and to penalise claimants and their lawyers if cases are weak or do not succeed. Of course we accept that it is proper to seek to avoid the court being burdened with unmeritorious claims but the paper nowhere suggests ways in which defendants can be discouraged from wasting court time or defending claims that ought to be conceded. Similarly the paper does nothing to consider ways in which ordinary members of the public can access judicial review. If as the document suggests, the government is committed to ensuring that judicial review is "readily available where it is necessary in the interests of justice and holding the executive to account" [introduction paragraph 8] then we would expect to find proposals to promote access to the court, for example by introducing qualified one way cost shifting in judicial review (as recommended by Sir Rupert Jackson but not implemented) or by otherwise limiting costs recovery by public bodies.

8. Finally we note that there the paper nowhere comes close to justifying general changes across the board. It presents a mishmash of proposals under the headline theme that large infrastructure and economic projects of benefit to the nation are being held up by pointless judicial reviews. We do not accept that this is the case but if there is a problem with projects of this kind then the remedy lies in reforming practice relating to planning cases. As we indicate below we are broadly supportive of changes of this kind. But it does not by any means follow that changes that might be made to tackle a perceived problem in these cases ought to be applied more generally where they will have predictably damaging effects.

The introduction

9. The paper does not invite responses to the introduction but it is necessary to address the assumptions that appear here.

10. At paragraph 7(i) the papers asserts that vital infrastructure projects can be delayed by unmeritorious and repeated challenges resulting in extra cost and risk. No evidence is given for this claim apart from a single anecdotal study. But it is hard to see how that study either establishes the proposition or is addressed by the proposals in this paper. It is a case where the challenge was sufficiently meritorious to be granted permission to proceed although ultimately it failed. It is not clear from this study why the challenge took two years to be resolved. It is our experience that where cases are urgent and delay is liable to cause substantial difficulty then claims can be heard quickly. One cannot draw any wider lesson from this example and it certainly does not point towards any problem with judicial review generally being abused.

11. This paragraph also demonstrates the lack of balance in this paper. There is no recognition of the costs incurred or damage done by permitting unlawful action to go unchallenged.

12. Paragraph 7(ii) refers to judicial review being used as an inappropriate "campaign tactic" and as a means of generating publicity and prolonging campaigns when "all proper decisions have been made". The paper offers no evidence for this claim and we suggest that it confuses a number of different things.

    a. In the first place, a judicial review challenge to a decision can only be made on the basis that the decision was not a "proper" one in that it is affected by some legal error. If no such claim can tenably be made then the claim will be refused permission to apply for judicial review. Claimants know this and they know that if they are refused permission then under the rules as they stand they are liable to pay the defendant's costs of preparing their defence. There is simply no evidence of the deliberate use of judicial review simply to generate publicity. If this is happening then the existing powers of the court are sufficient and the proposals in this paper will do nothing to change the position.

    b. It is undeniably the case that judicial review claims are often high profile and they do generate publicity. This may be what the paper is referring to but it is wrong to suggest that this is the reason why claims are being brought. The

publicity arises because of the importance of the underlying issues but that is not a reason to limit judicial review. On the contrary, where decisions are controversial then it is particularly important that the courts are able to scrutinise them to ensure that they have been lawfully made. For similar reasons it is wrong to suggest that judicial reviews are brought to "prolong" the campaign after proper decisions have been made. To argue in this way is to fail to recognise that judicial review is a remedy of last resort and it can only be used after all other avenues have been exhausted including representations in the decision-making process. It is only then that the court will rule on whether the decision was a lawful one. One possible response to this would be to enable judicial review claims to be brought earlier to test discrete issues of law. But it is not acceptable to criticise claimants for bringing proceedings at the only point that they can under the current rules.

c. We note that the example given in this paragraph does not support the proposition in paragraph 7(ii). Again, this was a case where permission was granted and so the grounds were arguable. It is therefore unaffected by most of the proposals in the paper. Nothing suggests that the campaign group was using the process simply to generate publicity as opposed to being a genuine claim that a decision was unlawful. Nonetheless, the use of this example is revealing. It assumes that there could be no legitimate objection to the free school development and that those who objected could only be doing so to obtain publicity. Such a chain of reasoning is dangerous and amounts to a claim that decisions ought in some way to be immune from judicial review simply because they have been made by or on behalf of elected bodies.

d. Paragraph 7(iii) objects to the use of judicial review to "hinder actions the executive wishes to take" and complains about the use of judicial review to frustrate "legitimate executive action". This overlooks the fact that where government policy or other decision-making is subject to judicial review then the question whether or not it is lawful or legitimate is the very point in issue. The fact that a policy is adopted by an elected government is no guarantee of its lawfulness and it is vital that the courts should be able to intervene where

the executive oversteps its powers. This is a fundamental feature of our Constitution and it is disturbing that this paper is so dismissive about it.

e. This part of the paper also overlooks the existing procedure for obtaining permission to apply for judicial review. If claims are unmeritorious then they will fail at this hurdle and so there is already an adequate check on the use of unwarranted challenges to executive action. Put simply this paragraph does not identify any problem that needs to be addressed.

13. Paragraphs 9 to 16 deal with the statistics on the use of judicial review. They note that there has been a two fold increase in the number of claims issued in the last 10 years. The assumption is that such a growth in judicial review is self-evidently to be deprecated but the paper makes no attempt to explain the phenomenon. There is no suggestion that judicial review claims brought now are inherently weaker than those brought 10 years ago[1] and the change may be the result of a number of things such as a greater awareness of legal rights (about which no complaint can rationally be made) or simply a larger number of decisions than cannot be challenged any other way (e.g. as immigration appeal rights are truncated). It is wrong to propose radical measures to control the "growth" in judicial review without examining why it has occurred. In any case, the number of judicial review claims brought each year is still tiny compared to the overall number of administrative decisions made and so the pattern that emerges is one of a well-functioning process of last resort.

14. The paper also draws the wrong conclusions from the statistics that it does rely on.

a. Firstly, if there is a problem with the courts being overloaded with a large number of judicial review claims, it is historical. Most of the growth is in the immigration filed and other cases have grown by a much smaller proportion. If immigration cases are excluded then the number of claims issued will be about 4,000 per annum. The points made in the first bullet point in Para 16 about listing problems in the Administrative Court fail to take this into account.

[1] Some studies have shown that the rate of grants of permission has reduced but this is probably the result of the procedure introduced by CPR Part 54 under which the Defendant formally responds to the claim. Under the former procedure the grant of permission was *ex parte*.

b. At paragraph 16 the paper states that "many" applications are not successful and this is the backdrop to the proposals. The difficulty with this is that the statistics are extremely incomplete because they give no accurate account of the cases that are settled with a benefit to the client. Moreover, these statistics are not broken down to deal with immigration and non-immigration case so it is not possible to tell how the remaining cohort will behave once immigration cases move to the Upper Tribunal. The information we do have is that for 2011 permission was finally refused in some 39% of cases (4469[2] out of 11,360 cases issued). Only 4% of cases proceed to a final hearing but there is no reliable information about the remaining cases. Some studies have suggested that a substantial number settle on terms favourable to the claimants and so it is a wholly incomplete statement simply to assert that many claims fail. Nonetheless the paper justifies the proposals made by saying that it "whilst [cases may settle] because the applicant has a legitimate grievance, the Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve. That is why the proposals are designed to ensure that challenges can be heard quickly, that there is the right framework for costs in place and why the Government are looking at who should be able to bring challenges". This is an extraordinary position to adopt. The government proposes radical changes on the basis of no evidence whatsoever. All that can be said with certainty is that the changes proposed will lead to more unlawful action going unchallenged and it is hard to resist the inference that this is the true reason for them.

c. The final 3 bullet points in paragraph 16 refer to the costs of defending judicial reviews and the costs to third parties and others caused by delays in judicial reviews. We do not agree that these statements of the costs are necessarily accurate or fair. For example the costs estimates given by the Treasury Solicitors Department do not take account of the costs incurred in defending claims that ought to have been conceded or costs that have only been made

[2] This is 5593 less 329 cases where permission was granted on renewal and 795 where there was a renewal but the claim was then withdrawn.

necessarily because of pre-action delay or failure to respond to the pre-action protocol or to give prompt disclosure. But these points are open to a more fundamental objection in that they take no account whatsoever of the costs of allowing unlawful action to go unchallenged. It is precisely because these costs cannot easily be quantified that comparisons of the kind drawn here are problematic. They amount to saying that we can put up with a little less in the way of the Rule of Law provided there are economic benefits. This is a slippery and dangerous slope. We are not saying that costs and delay are irrelevant but the courts already have an array of powers to address them. They can expedite cases where needed and can guide the parties' behaviour by appropriate awards of costs. These powers can be applied on a case by case basis in a way that is sensitive to the interests of all the parties and without sacrificing legal principle.

Planning

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

15. Yes. A specialist planning chamber is welcomed. The only concern is that there should be a regular movement of judges between the Administrative Court and the Planning Chamber, so that planning and environmental law does not become an isolated area of law.

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

16. The current CPR could continue to operate in relation to cases in the planning chambers. It would be sensible for all cases linked to a planning decision to be subject to such transfer, e.g. environmental permits.

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

17. Yes. There should be definitely be a permission filter for statutory challenges under the TCPA, and other related statutes such as the Highways Act, the TWA and the Planning Act.

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

18. There are a small number of cases each year where challenges are brought with little merit, and where Claimants probably see a benefit in delay. However this issue is dealt with by a combination of a permission stage and it becoming easier to expedite the hearing. There are very few challenges to infrastructure decisions, and in those few cases the court is generally amenable to expedite the hearings. Case management is a matter best dealt with by the court, which already has adequate powers. There may be an issue around the resourcing of the court system in order to be able to expedite cases, but this should be improved by creating a specialist Planning Chamber.

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

19. The principle problem with JR in this field is that of delay and the problems that may flow in relation to timing and funding of development. However, it is important to understand that it is often the developer/Defendant which needs time to prepare its case. Since the time for bringing applications for JR has already been halved compared to other JR challenges there are likely to be some protective challenges and certainly more challenges brought before the applicant has all of the information that will be relevant to the decision impugned. Therefore while increasing the speed of cases is generally desirable, it should be recognised that speed may not always lead to a benefit to the overall process.

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

20. No. As is clear from the Paper, there have been no challenges by local authorities to Nationally Significant Infrastructure Projects. There is no evidence of the being any actual problem. LAs are subject to very significant financial control and are extremely cautious about commencing JRs because of the cost implications. They are also subject to democratic control, therefore if local residents feel the LA has not made sensible decisions and has wasted money they can (and do) express this through local elections. In appropriate cases, such as HS2, it is entirely right that LAs, which represent their local citizens, must have the right to bring challenges. In HS2 permission to proceed has been granted at every stage by the courts, and the case is considered appropriate for the Supreme Court. Therefore this case should not be used as evidence for an argument that local authorities are bringing inappropriate challenges.

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

21. Again we are not aware of any evidence of LAs bringing cases inappropriately. LAs have led the challenge to HS2, but this case was granted permission for JR in the High Court and permission in the CA to go to the Supreme Court.

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

22. The LAA are assiduous in planning challenges to ensure that the claimant has a personal interest in the decision. There are relatively few cases where LA is granted for planning cases. There are cases where a planning decision can have a major impact on an individual and in such cases it is appropriate that LA should be available.

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?

23. No. ALBA does not consider that there is any problem with judicial review claims being brought by representative groups or public spirited taxpayers. Such claims facilitate the rule of law imperative of ensuring government is conducted in accordance with the law. Furthermore, there is no evidence that claims brought in these circumstances are vexatious or unmeritorious. Indeed, the evidence presented in the consultation paper itself points to precisely the opposite conclusion.

24. The suggestion in the consultation paper that there is a problem with such claims proceeds on the flawed premise that ensuring that public authorities conduct themselves in accordance with the law is of private interest only. On the contrary, judicial review claims are brought not "to vindicate a right vested in the applicant, but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law".[3] That one's elected representatives conduct themselves in accordance with the law and not hold themselves above it is of central importance to all.

25. This does not undermine the principle outlined in the consultation paper that "Parliament and the elected Government are best placed to determine what is in the public interest". This principle is at the heart of the English law of judicial review. Lawful decisions and actions of the elected Government will always be respected by the Courts. However, the current approach to standing developed as a pragmatic response to the rule of law imperative that unlawful executive action must be capable of challenge. Lord Diplock put this point clearly and eloquently over three decades ago in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617:

> "[i]t would...be a grave lacuna in our system of public law if a pressure group...or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

26. The continuing importance of this is evident from the cases selected in the Consultation Paper to identify the 'problem'. The first is a recent challenge to the Defence Secretary's practice of transferring to the Afghan authorities suspected insurgents who had been detained by United

[3] *AXA General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 868 (SC), Para 159.

Kingdom armed forces in the course of operations in Afghanistan.[4] The second, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*,[5] revealed that £234 million of taxpayer's money had been illegally pledged towards the funding of an infrastructure project in Malaysia. The public importance of ensuring such decisions are made in accordance with the law, and exposure of any illegality, is self-evident. However, restrictive standing rules would effectively put these decisions beyond challenge.

27. In addition, the current pragmatic approach to standing means that tens of thousands of small and medium sized businesses and self-employed persons are able to rely on their trade or professional organisations to protect their interests and ensure that the regulation they are subject to is lawful. By way of example, judicial review proceedings have been brought on behalf of their members by the United Kingdom Association of Fish Producer Organisations,[6] the Hackney Drivers Association,[7] the Association of Plumbing and Heating Contractors,[8] the Infant and Dietetic Foods Association,[9] the Federation of Tour Operators,[10] the National Association of Memorial Masons,[11] the British Beer & Pub Association,[12] and the National Federation of Fishermen's Organisations.[13] Any reversion to a restrictive approach to standing would prejudice the ability for these groups to advocate on behalf of their members in this way.

28. Furthermore, the benefits of allowing representative groups to bring claims in their own right are considerable. As the Consultation Paper itself recognises, only a small number of cases are brought by representative groups. Only some thirteen claims per year proceed to a final hearing, and those which are brought have a high success rate.[14] This is unsurprising, and indicates that representative groups are not bringing frivolous applications for judicial review

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4 *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

5 [1995] 1 WLR 386.

6 *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

7 *R. (on the application of Hackney Drivers Association Ltd) v Parking Adjudicator* [2012] EWHC 3394 (Admin); [2013] RTR 34.

8 *R. (on the application of the Association of Plumbing and Heating Contractors) v Council for Registered Gas Installer* [2005] EWHC 3298 (Admin).

9 *R. (on the application of Infant and Dietetic Foods Association Ltd) v Secretary of State for Health* [2008] EWHC 575 (Admin); [2009] Eu LR 1.

10 *R. (on the application of Federation of Tour Operators) v HM Treasury* [2008] EWCA Civ 752.

11 *R. (on the application of National Association of Memorial Masons) v Cardiff City Council* [2011] EWHC 922 (Admin).

12 *British Beer & Pub Association v Canterbury City Council* [2005] EWHC 1318 (Admin).

13 *R. v Ministry of Agriculture, Fisheries and Food Ex p. National Federation of Fishermen's Organisations* [1994] 1 CMLR 907.

14 Consultation Paper, paragraph 78.

claims. Further, representative groups are almost invariably advised by competent legal representatives, who perform a valuable gatekeeping role of ensuring that unmeritorious claims are not put forward, and, where claims are brought that they are prosecuted efficiently and proportionately.

29. Claims brought by representative groups are also able to draw upon the considerable expertise that those groups have in the underlying issues. For example, the trade and professional associations described above are cognisant of the issues which arise in their industries and are able to assist the Court with the 'big picture' elements of particular challenges, rather than what would otherwise be a narrow focus through the lens of an affected individual. There are judicial reviews brought by bodies such as Child Poverty Action Group where in practice it will be extremely difficult for individuals to bring the claims, in benefits law often because the individual sums may not be large or the individual cases are picked off by the Defendant, but where there is a clear public interest in the claim being brought.

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?

30. ALBA believes that the current standing test, developed pragmatically by the Courts over the past several decades, strikes the right balance, ensuring that the rule of law is upheld, but that "meddlesome busybodies" are excluded.[15] We do not consider that there is any need for the current test to be modified, and we consider that any meddling with the current test would exclude meritorious claims without offering any countervailing practical benefits.

31. In particular, ALBA agrees that the 'direct and individual concern' test adopted by the European Courts would not be appropriate in a domestic judicial review context. That test, adopted in response to the narrow wording of the EU's foundational treaties, has had a very unhappy experience, and has been the subject of considerable criticism, in particular for the gaps it leaves in the judicial protection offered to those affected by the actions of EU institutions.[16]

32. The restrictive tests which obtain in respect of the Human Rights Act, civil legal aid and appeals under section 288 of the Town and Country Planning Act 1990 would also be inappropriate. These tests are applied in the context of individual rights, whereas, for the

[15] See *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Lord Rees- Mogg* [1994] QB 552.

[16] See e.g. the opinion of Advocate General Jacobs in C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

reasons provided above, judicial review is concerned not with individual rights but public wrongs.

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

33. This question proceeds on the flawed premise that judicial review being used as a campaigning tool is a problem. Judicial review challenges are brought to ensure that government is acting in accordance with the law. While representative organisations (e.g. trade or professional groups) bringing challenges will inevitably be campaigning on behalf of their members, this does not negate the public interest in ensuring that the decisions which they seek to challenge are lawful. There is no evidence that the claims brought by such groups are vexatious or unmeritorious.

34. With regard to interveners, ALBA does not consider there is any problem with the current rules on interventions in judicial review claims. The ability to intervene in a judicial review claim is not a right, as whether or not to allow a group or individual to intervene is always a matter of discretion for the Court, which will only accede to such a request where the involvement of that party is in the interests of justice. The assistance which interveners can provide on difficult questions of fact and law can be considerable. However, while the assistance which the Court would derive from the involvement of the intervener is an important factor, the House of Lords has emphasised that this must <u>always</u> be balanced against any inconvenience, delay or expense which that intervention may cause.[17] In our view this pragmatic and sensible approach strikes the correct balance. Altering it would serve only to deprive the courts of material which would assist it in adjudicating on the issues before it.

Procedural Defects

<u>Option 1</u>

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

35. No. ALBA considers that moving the assessment of the "no difference" to the very beginning of the judicial review process could have a number of potentially adverse consequences.

[17] *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25, para 32.

Certainly, ALBA does not perceive that it would have any *positive* impact, in costs savings or otherwise.

36. First, in practical terms we consider that were the assessment to be done properly a full substantive hearing would, in the majority of cases, be unavoidable. Thus, the proposal would have the potential to significantly increase the costs involved at the permission stage in affected cases, in effect requiring the Court and parties to engage in an unnecessary dress rehearsal of the substantive judicial review. We do not consider that those costs would be offset by the very small number of cases which might be refused permission on the "no difference" basis (as opposed to simply being refused permission on the basis of the current permission stage test).

37. Second, we consider that an assessment made at the permission stage *without* a substantive hearing could pose a significant challenge to the rule of law. Assessments of materiality are often complex and the arguments finely balanced. The power to dismiss a case on the basis that despite there being a procedural flaw it would have made "no difference" to the decision, must be exercised with a high degree of caution (*R v Ealing Magistrates' Court, ex p Fanneran* (1996) 8 Admin LR 351 at §365E). There is a real risk that without a substantive hearing those assessments would be made without adequate information and without a thorough examination of the issues. It would be wholly disproportionate, and contrary to the underlying principles of judicial review, to remove a claimant's opportunity to challenge the decision of a public body simply in order to reduce the "impact" of the challenge on the Government.

38. Third, in any event, the permission stage already allows the Court to reject an application where there are no arguable grounds for judicial review having a realistic prospect of success. Thus, there is already a mechanism by which cases in which it is clear that the same decision would have been inevitable notwithstanding the flaw, can be dismissed before the substantive judicial review.

39. Finally, ALBA considers that the Government is, with respect, overstating the number and impact of cases in which (a) the sole issue is procedural impropriety and (b) there is any suggestion that proceedings are brought in order to delay "perfectly reasonable decisions or actions". Thus this proposal, in practice (and even were it to operate in the way the Government hopes), is unlikely to be used sufficiently often to have any noticeable impact.

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?

40. As above, ALBA does not consider that proper consideration of the "no difference" principle at the permission stage could (or should) be prevented from turning into a full dress rehearsal.

41. It is therefore ALBA's view that there would be no cost benefit involved in moving consideration of the materiality principle to the permission stage, and that, in fact, as contemplated in the proposal, it is likely that it would simply add to the costs of proceedings.

Option 2

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?

42. No. ALBA considers that the current test of whether the decision would "inevitably" have been the same notwithstanding the procedural defect already provides sufficient means by which a case based on a flaw which would have had no effect on the decision can be dismissed.

43. The "inevitability" test is the product of many years of independent judicial assessment of the balance between the conflicting rights and interests at stake: "*the notion that when the rules of natural justice have not been observed, one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it is demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold conviction even if natural justice had not been done"* (Lord Justice Staughton in *R v Ealing Magistrates' Court, ex p Fanneran* (1996) 8 Admin LR 351 at §365E).

44. The proposal provides no rationale for interfering with that assessment. ALBA considers that any lowering of the threshold would be unconstitutional, for the following reasons.

45. First, a test that places the threshold any lower than "inevitability" risks requiring judges to consider the substantive merits of the public body's decision. That concern has been amply set out: see, for example, Lord Justice Kay in *R (Shoesmith) v Ofsted* [2011] EWCA Civ 642 (at §74, quoting from May LJ in *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315):

"[…] *this is not such a clear case that I feel able to say "no difference" without risking inappropriate encroachment into "the forbidden territory of evaluating the substantial merits of the decision*"."

46. See also, the court's refusal to interrogate the decision-maker's rationale in *R v Governors of Sheffield Hallam University, ex p R* [1995] ELR 267: *"to decline* […] *to grant the* [claimant] *the* [remedy] *which is otherwise due to her on the basis of my own appraisal of her chances. To do so would be, precisely, to substitute the court for the university as the decision-making body.".*

47. Second, in cases where the procedural flaw is a failure to consult, a decision that the failure made "no difference" always threatens to infringe the claimant's right to make representations. The current test is vital in limiting that infringement. To lower the threshold would be to extend the power of the court to decide that an individual should forego his right. The proposal makes no case whatsoever as to how or why that could be justified. We do not consider that it can be.

48. Third, similarly, a decision that even had a claimant had the chance to make representations the same decision would have been "highly likely" to have been reached, has the potential to threaten the democratic principle of proper and meaningful consultation. The current "inevitability" test means that it is only in extreme cases, where all the facts are pointing to one outcome (as in *Cotton*) that a decision reached by a decision-maker who has closed his mind to representations will be lawful. Lowering the threshold would widen the class of cases in which a failure to give a claimant the chance to make representation was deemed to be lawful. Again, no reason has been given as to how such an inroad into the principles of natural justice could be justified.

49. Moreover, as Lord Justice Bingham phrased it in *Cotton*: "*Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance"* (*R v Chief Constable of the Thames Valley Police,*

ex p Cotton [1990] IRLR 344, §352). In cases where it is not inevitable that the decision would have been the same, asking the court to speculate on what the claimant might have said and whether that might have affected the decision-maker's decision would be an unacceptable extension of judicial powers.

50. ALBA is concerned that the Government's proposal appears to be premised on the assumption that the only meaningful outcome of a judicial review is that the original decision is changed. That is fundamentally misconceived. Success for a claimant in a judicial review is recognition that the decision-maker erred in making his decision, and recognition that the unlawful decision cannot stand. It is offensive to claimants and to the rule of law to suggest that there is no point in challenging an unlawful decision unless, upon remittal, the decision would be different. The current test already imposes a proportionate restriction on that principle, in line with judicial assessment of the public interest balance. No justification has been offered to support a further restriction.

51. In summary, ALBA does not consider that there is currently a problem that requires solving. We consider that any *lowering* of the threshold would be unconstitutional, and should not be implemented. We do not think that there is any viable alternative test to the "inevitability" test.

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?

52. The Government's starting point appears to be that a "procedural defect" is distinguishable from, and less serious than, "substantive illegality".

53. That approach is highlighted in the Government's summary of the 'Issue' at paragraph 99 of the Consultation: *"The Government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality"*.

54. With respect, that approach is misconceived. A procedural defect renders a decision unlawful. Thus a judicial review founded "on the grounds of procedural defects" is just as valid as a judicial review brought on the grounds of an error of law or Wednesbury unreasonableness.

55. In any event, we consider that the Government is placing undue emphasis on cases brought solely on grounds of procedural defects, which are, in practice, uncommon. Similarly, the Government has cited no evidence of judicial reviews founded on procedural defects being used a campaign tool or other public relations activity. ALBA suggests that in practice such cases do not pose a significant problem.

56. ALBA therefore considers that the impact of judicial reviews brought solely on the ground of procedural defects is minimal, and that, in any event, where a claimant is granted permission to apply for judicial review (i.e. the Court is convinced that he has an arguable case) such impact is a necessary part of the democratic process by which citizens can hold the Government to account.

Question 16: Do you have any evidence or examples of cases being brought solely on the ground of procedural defects and the impact that such cases caused (e.g. cost or delay)?

57. No.

PUBLIC SECTOR EQUALITY DUTY

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.

58. No. We consider that this question is fundamentally misguided. If some other process is adopted then we consider that there are likely to be at least 3 unacceptable consequences.

59. In the first place we find it hard to see how an alternative procedure will be compatible with retaining the duty as such. S. 149 imposes an important duty on any public authority to have due regard to the stated objectives in carrying out any of its functions. Failure to comply with that duty is a public law error with the established consequences that follow from such an error. Among other things the decision is liable to be quashed on an application for judicial review. This may, in some cases, result in the same decision being taken but even if that does happen that does not mean that fulfillment of the PSED has been pointless. It may help to identify

mitigating measures or matters that need to be kept under review or revisited at some point in the future. At the very least the duty is important in maintaining and fostering good relations. It provides an assurance to those with protected characteristics and their communities that proper consideration has been given to them. Any new procedure must either replicate the remedies available on judicial review – in which case it will not produce any saving, or provide for some lesser relief in which case it may produce a saving but will dilute the duty. We think it is wholly wrong for this kind of debate to be presented as a procedural efficiency measure. If the government thinks that it is not important for public bodies to promote equality then it should have the political courage to say so and should lay primary legislation to repeal or modify s. 149. It should not try to achieve the same result indirectly.

60. Secondly we doubt that there will be much costs saving, if any. We accept that there has been a substantial volume of litigation around the duty and its predecessors but this is not unusual when the courts encounter innovative legislation. We are not in a position to make any observations about the costs of that litigation. But the position now is that the principles are well established and we consider that judicial review is likely to be a cost effective way of litigating the issues that arise. Most claims do not only consider a PSED claim and so consideration of the PSED will tend to be on material that is before the court for another reason in any event. It will not therefore significantly add to the costs of the claim. There is unlikely to be any live evidence and so the hearing can quickly dispose of the issues. If some other procedure is adopted then the costs are likely to be as great, particularly if live evidence is required. There is also likely to be satellite litigation about the powers and scope of the new procedure comparable to the early litigation on the PSED.

61. An alternative procedure to litigate PSED challenges fails to take account of the fact that the duty applies to all functions and so can be litigated in other fora in any event, for example as part of a homelessness appeal or in a possession claim. This can only be avoided by changing the nature of the duty but that engages the same points as at (1) above.

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

62. No.

REBALANCING FINANCIAL INCENTIVES

General

63. Paragraph 112 of the present paper demonstrates why the present proposals are premature and unnecessary. This refers to the fee for renewed hearings and the totally without merit procedure. These changes together with reductions in the caseload of the Court from transfers to the Upper Tribunal (and the planning proposals in this paper if accepted) need to be assessed before taking further action to "re-balance" the process. We suggest that until this has been assessed the government is in no position to assert that the present procedure is in need of "re-balancing" at all.

Paying for work in judicial review

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.

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

64. We do not agree. We responded in detail to this proposal in the last consultation paper and the revised proposal does nothing to meet the objections that we set out earlier. In particular:

65. The existing tests set out in the Legal Aid (Merits Criteria) Regulations adequately strike the appropriate balance. There is no evidence that these tests are not being properly and conscientiously applied by practitioners and the matter is in any event now in the control of officers at the MOJ because practitioners no longer have devolved powers. The present paper addresses this at Para 122 by saying that the LAA is "strongly guided by the providers assessment of the prospects of success". We do not accept this. The LAA has, or can have, access to the same material as the provider and since the issue is whether there is a point of law this will not turn on matters that the LAA cannot assess such as credibility. The LAA can and often does disagree with an assessment made by a practitioner. If, as the paper suggests, the LAA is not properly able to form an independent judgment then that calls into question the decision to remove devolved powers. This involves a substantial cost because it means that the merits have to be looked at twice instead of only once under the devolved system. If there is no real benefit to the LAA then those costs could be saved by handing back devolved powers.

66. The proposal assumes that where claims fail then that reflects an error of judgment on the part of the practitioners involved and that it is therefore just the make them bear the risk. This is inconsistent with the Merits Criteria Regulations and the current contracting arrangements. Even with the borderline category removed the threshold is a 50% chance of success or higher (Reg 56). Provided the client meets the means test and the other criteria (including the proportionality test) are satisfied then they can claim that they are entitled to representation. Indeed the current contract does not permit a practitioner to turn down a case by imposing a higher merits threshold in order to improve their own chances of being paid because clause 7.1 of the contract states: "you must act in the best interests of your Clients and be uninfluenced by any factor other than the Clients' (and potential Clients') best interests". It follows that a substantial number of cases will fail, even if the merits criteria are operated properly. We consider that the changes are likely to be unlawful for this reason. The consultation paper completely fails to address this and does not explain how it justifies not paying practitioners who have reasonably and properly acted as they are required to do in the interests of their clients.

67. Assuming these problems can be overcome the proposal will operate as a barrier to justice and so will run directly counter to the governments stated objective at paragraph 133 that it should not create such barriers. As we pointed out in our earlier response, legal aid practitioners have a higher than average record in predicting whether a court will grant permission but it will simply not be viable, given the exiguous rates of remuneration (a description used by Sir Nicholas Wall P in connection with family cases in *A Local Authority v S & Others* at Para 45(8) but equally applicable here) for them routinely to do work at risk, particularly given that:

    a. Judicial review claims are front-loaded and require extensive preparation when lodging the papers. All the relevant documents need to be included and the grounds need to be fully argued and prepared. There may also be a need to reply to grounds served by the Defendant. All of this has to be done within a short timescale that gives little time to investigate the merits fully.

    b. Despite the pre-action protocol it is common for claimants to have to start proceedings without all the relevant material because it has not been provided by the defendant before proceedings have to be issued, either to meet the time limit (when the client has only recently instructed solicitors) or because proceedings are otherwise urgent.

    c. There is a high settlement rate before the grant of permission (see above – this is about 40%) and it is likely that the stronger cases will settle yet the practitioners acting will find their financial position *less* secure in these cases and they will only have a possibility of being paid provided a discretion is exercised in their favour. Recent case law on cost recovery in the event of settlement is in some respects more favourable to Claimants but there are still a substantial number of cases where cases settle on terms beneficial to the Claimant or are withdrawn in circumstances that could not reasonably have been predicted at the outset (e.g. where new information comes to light) and where no costs orders are made. We appreciate that the MOJ proposes to introduce a power to pay in these circumstances but that is wholly insufficient to meet the objections we have raised for reasons we develop below.

68. The effect of this proposal is likely to be that a substantial number of practitioners will find it impossible to continue to offer publicly funded judicial review work with a consequent loss of access to justice for many vulnerable clients. Even if practitioners are able to continue to do the work they will only be able to do so in cases where they assess the merits as sufficiently high to justify taking the risk. This undermines the criteria in the Legal Aid (Merits Criteria) Regulations.

69. The present regime already provides a sufficient incentive for practitioners carefully to assess the merits before proceeding. If they do not get permission then they will only be remunerated at legal aid rates and so will have no chance of recovering inter partes costs.

70. If there is to be some rule under which practitioners must bear the risk of the permission stage then it makes no sense at all to make the grant of permission a condition of payment rather than refusing payment if permission is actually refused (and then only if the claim is totally without merit so that it ought not to have been brought at all). A rule framed in this way would bear some relationship to the claimed purpose, which is to provide a "disincentive to those considering judicial review whose cases have no merit" [para 20]. Where a claim has actually been refused permission then the court will usually have decided that the claim was a weak one[18]. In contrast, many of the claims that settle without permission are meritorious. The proposal as framed therefore, has no rational connection with its objects and is likely to be unlawful for that reason. This point was made in our earlier response and in responses provided by other bodies but the present consultation paper has not addressed it. Instead it baldy states at paragraph 123: "It is legitimate to use the permission test as the threshold for provision of legal aid. The provider is well placed to assess the strength of their client's case and the likelihood of it being granted permission; and thus well placed to make an informed judgement as to whether the permission test is met". This fails to address the point and it is clear from the impact assessment that an option of not paying only where permission was refused was not even considered.

[18] Although this does not necessarily follow because permission might be refused for other reasons - for example the case became academic.

71. For related reasons we do not understand why the rule should apply where the court orders a rolled up hearing. In such a case the court will have directed its mind to the issue and will have decided that the facts are such that the claim merits full consideration by the court. Often a rolled up hearing is ordered as a matter of speed and convenience or to preserve some technical point such as standing or time limits. These cases plainly fall outside the reason given for the proposed rule but if they are included in it then the risk for practitioners will be huge since they will have to prepare as if for a full hearing but at risk. Few will be able to afford to do so. This will also create an incentive for claimants to argue against a rolled up hearing and so produce further costs and delays if they insist on a traditional 2 stage process with permission followed by a full hearing.

72. The proposal also fails to address cases where the claimant is successful in obtaining an interim injunction or other interim relief. In many homelessness or community care cases the grant of such relief effectively determines the claim and is a clear success for the client even though, as a matter of form, permission has not been granted.

73. The government's proposal is to give the LAA discretion to pay costs where permission is not granted using a set of exhaustive criteria set out in paragraph 125. This is wholly insufficient and does nothing to mitigate the uncertainty about payment that will operate as a disincentive to claimant's lawyers in deciding whether or not to do work of this kind at all. We highlight the following factors:

    a. Payment will be discretionary and in practical terms will be impossible to enforce.

    b. The costs of attempting to secure payment will be disproportionate. Practitioners will have to make detailed representations addressing the reasons why they meet the criteria [129] and this may take many hours work, all of which will be unremunerated. The impact assessment fails to take account of these costs. The practical reality – and it is hard to think that this is unintended – is that many practitioners will simply not be able to afford to make a claim on the fund knowing the difficulties that they face.

c. The criteria are so exacting that there are unlikely to result in any substantial exercise of discretion in favour of practitioners. They overlap with, and in some respects are more strict than those used by the courts. In an event they are liable to lead to confusion and this may reflect a lack of understanding about how judicial review and public law remedies work. In particular they invite the LAA to make an assessment as to whether or not the claim was "meritorious at its conclusion" [126]. It is hard to tell what this means. An example of a case where the LAA will be expected to award costs is where a claim has become academic because of the actions of a third party [126] it is not clear why third party intervention is thought to be relevant). But in that case the claim would no longer be meritorious at its conclusion. Any judge in that case would refuse permission. Once it is accepted that payment is to be made in this kind of case then it is hard to see what the principled difference is between this and other case where some supervening matter leads to the claim not proceeding, for example fresh disclosure or a decision of the higher courts. In each case payment is warranted despite the fact that the new material led to permission not being granted. The discretion is aiming at fair remuneration for work properly done and the test for that is not whether the claim succeeded (or would have succeeded).

d. In any case it is costly and unproductive to try and determine what the "underlying" merits were. It is notable that this approach has been largely abandoned by the courts when conducting costs assessments on the basis was it is disproportionate.

e. We take issue with criterion (iii): "the reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings". We do not consider this to be relevant in the majority of cases. We can see that a defendant resisting a costs order might want to say that they have compromised the claim for pragmatic reasons and that they ought not to pay costs. However, such claims are treated with great scepticism by the courts and the question generally applied is whether the client has achieved success (*R (Bahta) v SSHD* [2011] EWCA Civ 895). We have much more difficulty in seeing why the Defendant's motives in wishing to settle a claim are relevant at

all to the question whether the Claimant's lawyers should be paid by the LAA for the work they have done. Legal aid is provided to the client, for their benefit and to promote the client's interests by ensuring that practitioners are paid for work that they reasonably do. Provided they have done the work reasonably and properly, and provided they have achieved a positive outcome for the client then they should be paid. The point can be tested by asking what the response would be if a private client refused to pay his solicitors because, having achieved success, he was not satisfied that the Defendant settled the claim for the right reasons. This would obviously not be a reason to refuse payment.

f. In any case the proposed criterion is impractical because it will not be possible in many cases to determine why the public body acted as it did. The correspondence cannot be taken at face value because defendants commonly include some formula such as "without admission of liability" in settlement agreements. They do so to protect their position but this cannot be taken as a reliable indication of their true state of mind if they have one. Is it contemplated that the LAA will delve behind such statements and if so how?

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?

74. We do not agree with this proposal. It is, unfortunately, typical of the tone of this paper that it focuses on costs claimed to be incurred because of weak claims for judicial review but does nothing to address wasteful action on the part of Defendants such as not responding or responding late to letters before claim, not providing disclosure or providing it late, or needlessly defending proceedings or putting points unnecessarily in issue. Any paper that was truly concerned with "rebalancing" the

costs of judicial review would address these matters. As it is we are left with a proposal that is calculated to reduce access to the courts on one side only.

75. The existing approach to costs is flexible and gives judges the power to do justice on a case by case basis. The current default position reflects the fact that attendance at an oral hearing is entirely optional for the Defendant. They have already set out their reasons for opposing the claim in writing and if permission is refused then they will ordinarily be granted the costs of that part of the procedure. If there truly is a "knock-out blow" which can show that the claim is unarguable then it will be clear from the summary grounds. It is rare for a Defendant attending at an oral renewal to have anything substantial to add. Against this background the proposal is wrong in principle, impractical and liable to act as a disproportionate barrier to justice.

76. As a matter of principle we consider that it is wrong for the executive to intervene to dictate how costs should be awarded in a particular class of case. This interferes with the exercise of a discretion that ought, as a matter of constitutional principle, to a matter for the judges to be exercised having regard to all of the circumstances. There is a case for reviewing judicial review procedure to ensure that it is accessible and affordable for all parties. But that would require a far ranging reconsideration that this paper does not provide.

77. The proposal is impractical in that it is likely to result in a greater waste of costs overall. It will create an incentive for Defendants to attend at oral hearings and to try to introduce more extensive argument in the knowledge that they will be remunerated for doing so if they succeed in getting the claim dismissed. This will create greater pressure on the oral hearing lists and will involve additional costs in cases where permission is refused and duplicate costs where permission is granted.

78. The proposal is an unwarranted barrier to justice because it will inevitably cause claimants not to renew applications for judicial review because they will be fearful of an adverse costs order if they do so. Claimants who are refused permission on the papers have a right to renew to an oral hearing unless the claim has been found to be totally without merit. The statistics show that this is an important safeguard. In 2011, of 2280 cases where there was a request for an oral renewal 329 were granted

permission at a hearing. This is 14.4% but this is far from the full picture. 795 cases were withdrawn and so the cases that actually reached a hearing were 1485 giving a grant rate of 22%. This is an underestimate of the true level of success because we do not know what happened to the claims that were withdrawn. Many will have settled on terms favourable to the Claimant. The statistics for 2012 referred to in paragraph 137 show the same general pattern. However these figures are looked at they are instructive. It must be remembered that each of these claims was initially found to be "unarguable". On reconsideration a substantial proportion are found to be arguable after all or otherwise achieve success. This suggests that the initial permission filter operates at a relatively broad brush level and it is crucial to maintain the oral stage if injustice is to be avoided. This is part of the procedural balance struck by the present rules which the proposal threatens to disturb.

79. The proposal is also premature. Various recent and prospective changes will affect the number of requests for oral reconsideration being the extended powers of the Upper Tribunal in immigration cases, the totally without merit filter and fees for renewal.

80. Finally, if the government insists on changing the rules, then it should do so in an even handed way. The paper suggests that a defendant who fails to resist permission will have to pay the claimant's costs in case. But this is the default position at the moment and it does nothing to encourage Defendants to take a realistic view at this stage since they will often calculate that this is a risk worth taking. The reasoning in this part of the paper would, if applied to Defendants, lead to a rule under which they would be required to pay the claimant's costs forthwith if they unsuccessfully resisted permission. We do not advocate such a change because we think that the existing rules work fairly between the parties. But if there is to be change it should be fairly applied.

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?

81. The paper does not make out any case for change. Few wasted costs orders are made but that does not mean that the threshold test is wrong.

82. Paragraphs 149-150 talk of "rebalancing financial incentives" but no clear proposal is made and so it is difficult to respond in detail. Paragraph 150 hints that the wasted costs jurisdiction should be capable of being invoked because an application for renewal was made where there was not a "high likelihood of success". This kind of formulation is wrong in principle for two main reasons:

    a. Firstly this cannot possibly justify invoking a penal procedure. Lawyers have duties to their clients to seek to secure a positive outcome for them. It would undermine that duty and put them in a position of conflict if they were made vulnerable to claims against them because they pursued a case where victory was less than certain. The paper seems to want to put claimant lawyers in judicial review claims in the position of insurers of their client's costs liabilities. This has never been the position in the English courts and the paper does not come close to explaining why an exception should be made in this case. We accept that in some cases, if a claim is totally misconceived, then that might justify a costs sanction – but the existing rules provide for this and the paper offers no evidence of any widespread or systematic practice of lawyers renewing claims for permission that they know to be hopeless.

    b. The proposal fails to recognize that lawyers are required to act on the instructions of their clients. This is referred to in the general discussion at para 145 but is then apparently ignored here, without any further explanation. If, in a privately funded case, a client instructs their lawyers to proceed with a case that the lawyer thinks is weak then they must continue with it, provided that they consider the claims put forward to be properly arguable (which is not the same thing as saying that the claim will meet the test for permission for judicial review). Many clients will be guided by the advice that they are given about the prospects of success but it is their right to

proceed in the face of negative advice. If wasted costs are to be opened up simply because the claim did not have a high chance of success then lawyers will be put in an impossible position defending claims for wasted costs because they will not be able to do so without relying on privileged advice that they gave to their clients.

83. These proposals are also misguided for the further reason that they are blatantly intended to operate in a discriminatory manner affecting only claimant's lawyers and then only in the context of judicial review. We consider that a rule aimed in this way is likely to be unlawful because of its partiality. We note that the impact assessment suggests that some wasted costs orders might be made against defendants if the threshold was reduced but the main body of the paper is focused only on claimants. We also fail to understand why it is thought to be justified to introduce a special and more rigorous test for judicial review claims only.

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

84. We do not consider that the process can be streamlined consistently with the duty to act fairly and in a non-discriminatory manner. Wasted costs applications are penal in nature and engage the respondent's civil rights for the purposes of Article 6 ECHR. In a matter of such importance a right to an oral hearing is indispensable. Moreover we do not think that it would be possible to frame a written procedure tailored only to this kind of case because it would unlawfully discriminate between these cases and other comparable cases and would not give equal access to the court.

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

85. This is misguided, and an illustration of just how unbalanced the proposals in this paper are. As a matter of general principle defendants should not have to pay a court fee for the privilege of defending a claim brought against them. This is not any less unfair if it is limited to the application for an oral hearing or if the fee will be returned in the event of success. Such a process would also be vulnerable to the same discrimination arguments as are mentioned above.

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.

86. We do not recommend any changes.

Protective Costs Orders

General comments

87. Protective Costs Orders have been an important development in access to public law justice. They have enabled potential claimants who would be bankrupted by having to pay costs to bring important challenges in the public interest. There is often a misconception that a PCO prevents the Defendant recovering any costs if the Claimant loses. This is not the case. Often, a PCO is sought where a Claimant can afford to pay most of the reasonable costs if they lose, but there is a chilling effect caused by the risk of having to pay an uncertain and unexpectedly large costs bill.

88. Our experience is that cases where a PCO is granted are those which are of real public importance, have often led to substantial development of the law, and have good prospects of success. PCOs are only granted in cases of real public interest and importance and are normally only granted in cases where permission has been given. Restricting access to PCOs therefore has real implications for the protection of the rule of law.

89. PCOs are granted in very small numbers of cases. Only a handful of PCOs are made each year. No figures are provided in the consultation paper, but any restriction on the availability of a PCO is likely to have a disproportionate adverse effect on access to justice in the most important cases heard in the Administrative Court whilst producing little or no savings in costs.

Q26: 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?

90. Such a restriction would not be appropriate. It wrongly assumes that proper standards public decision making are only of private interest to specific individuals or groups. As the Court of Appeal put it in *Corner House*: "*there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties*" [70]. The current position is that a private interest is a relevant factor when deciding whether to grant a PCO. However, it is not a bar to the grant of a PCO in an appropriate case.

91. For example, if a family wishes to challenge a coroner's decision in a case where a person has died during military training allegedly as a result of defective equipment, they have a private interest, even if the coroner's decision raises issues of law and principle of wider public importance. Such a family ought to be able to obtain a PCO in appropriate cases. There should be no absolute bar on a PCO application.

92. A good recent example is *R (Litvinenko) v SSHD* where Alexander Litvinenko's widow is challenging the decision of the Secretary of State not to hold a public inquiry. The case raises issues of wider public importance. Mrs Litvinenko's private interest in finding out how and why her husband was poisoned should not be an absolute bar to a PCO. On the facts, a PCO was refused because Mrs Litvineko had sufficient means to pursue the case without a PCO.

93. The consultation paper also suggests "*on a strict application of the principles as set out originally in the Corner House case, a PCO would be precluded if the claimant had a private interest or stake in the case*". In fact, this issue was not considered in *Corner House*. The guidance relating to private interest was copied across from an older case, *CPAG* [1999] 1 WLR 347. Since *Corner House*, the Courts have consistently taken the view that access to justice requires that private interest is not an absolute bar to costs protection. See, for example, *Morgan v Hinton Organics* [2009] EWCA Civ 107. The reasons are important: if private interest is an absolute bar, access to justice will be frustrated in some important cases that ought to be heard.

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?

94. The judge-developed principles concerning PCOs already strike a fair balance. PCOs are only granted in cases of real public interest and importance. The Courts have been sparing in the grant of PCOs. No evidence is provided in the consultation paper of any problem cases, or unfair results in practice.

95. Substantial PCO caps have been imposed, ensuring that the public body will be paid much or all of its reasonable costs if it wins. In cases where the litigant can afford to pay something towards costs, the Court has not hesitated to require a claimant to risk that sum. Caps of up to £100,000 have been set in the past:

    a. *Garner* [2012] PTSR 250: £5,000
    b. *Buglife* [2009] Env LR 18: £10,000
    c. *UK Uncut* [2013] EWHC 1283 (Admin): £20,000
    d. *Compton* [2009] 1 WLR 1436: £30,000
    e. *Corner House 2* [2008] EWHC 71 (Admin): £70,000
    f. *Public Interest Lawyers* [2010] EWHC 3259: £100,000

96. Lower caps are more often made in environmental cases, governed by the Aarhus Convention. A costs cap of £5,000-£10,000 in such cases has now been codified in the CPR. In non-environmental cases, it is already routine for very substantial PCO caps to be imposed, requiring Claimants to risk much of their funds or fundraise from members of the public.

97. A cross-cap is also imposed to protect the public interest if the Claimant wins the case. This is discussed further below.

98. There is no evidence of PCOs being granted in unmeritorious or unjustified cases. A case with a PCO is by definition one of the most important to be heard by the Administrative Court. Unmeritorious cases are weeded out at the permission stage.

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

99. No additional clarification is required. The authorities already require Claimants applying for a PCO to give proper disclosure of what their costs will be and to explain how they will be funded.[19] See, for example, *Litvineko* where Mrs Litvinenko disclosed her assets, and was refused a PCO on the basis that she had sufficient assets to bring the litigation without a PCO. If there is a CFA, this must also be disclosed. The duty of candour in judicial review applies to both parties. In *Corner House* the Court of Appeal said:

"78. We consider that a PCO should in normal circumstances be sought on the face of the initiating claim form, with the application supported by the requisite evidence, which should include a schedule of the claimant's future costs of and incidental to the full judicial review application."

100. In *Buglife*, the Court of Appeal also made clear that if an uplift would be sought based on a conditional fee agreement, the exact percentage uplift must also be disclosed [27].

101. Where a Claimant has failed to give proper disclosure of the costs that it is running up, the Court has not hesitated to criticise the Claimant. See *R (Badger Trust) v Welsh Ministers* [2010] 6 Costs LR 896*:*

"19 It is not open to a party to keep its powder dry, both with respect to the level of costs it is incurring, and as to whether it objects to reciprocity, and, when it has won on appeal, to challenge the reciprocal order and put in a schedule of costs massively in excess of the sums provided in that order. Frankness is required from a party seeking a PCO, as is clear from Corner House and from Buglife."

102. Similarly in *Garner*, the Court of Appeal confirmed that in non-Aarhus cases, proper disclosure of means must be made. In appropriate cases, the Court will place

[19] As the consultation paper recognises, a different approach is adopted in environmental cases, as a result of the requirements of the Aarhus Convention. See *Garner* at [53].

restrictions on the collateral or public use of financial information to protect legitimate confidentiality concerns [51-53].

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability 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?

103. There is already such a presumption. The Court of Appeal in *Corner House* said at [76]:

104. "When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability… The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly."

105. The consultation paper suggests "*cross caps are not made in every case*". No examples are given. ALBA is only aware of one case in which this guidance has not been applied - *Corner House* itself, where the Defendant waived this requirement, because they were satisfied their interests would be properly protected on a detailed assessment of costs. If any other examples exist, they are rare and not consistent with the clear line of case law requiring a cross cap to be imposed. Where Claimants have tried to oppose the imposition of a cross cap, they have been firmly rebuffed by the Courts. See, for example, *Garner* at [53].

106. The reciprocal caps imposed by the Courts are, in our experience, modest. It is usual for Treasury Solicitor rates to be applied to Claimant solicitors and counsel and, in recent years, it is uncommon to permit recovery of a CFA uplift (such uplifts now been abolished in any event). See *R (Plantagenet Alliance) v Secretary of State for Justice* [2013] EWHC 3164 (Admin) at [67].

107. There is some suggestion in the consultation paper that it is unfair for there to be a disparity in the amounts capped for the claimant and the defendant. This is incorrect. The purpose of the PCO is to protect the Claimant from having to pay an unreasonable and unaffordable level if costs if it loses. The purpose of the cross cap is to ensure that the litigation is conducted responsibly and modestly and at reasonable cost. A PCO and a cross-cap serve different purposes and will not necessarily be the same. The Court of Appeal have consistently taken this approach, as a matter of fairness to both parties. See *Buglife* at [26-27]. The CPR provisions applying to Aarhus cases also take the same approach. The standard PCO is £5,000 (or £10,000 for an organisation), with a standard cross-cap of £35,000 (CPR PD 45, para. 5).

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?

108. A fixed cap for claimants and defendants would be inconsistent with the other proposals in the consultation paper, in particular those set out in question 28 and 29. A fixed cap would have the advantage of consistency with the approach taken in Aarhus environmental cases, but would prevent the Court taking an appropriately flexible approach to the various types of PCO application that are made. In many cases, fixed limits may well operate to the Defendant's disadvantage because the Claimant will be able to afford more than the capped sum. The Government will we are sure take note of Advocate General Kokott's Opinion in Case C-530/11 para 70 that reciprocal cost caps may serve to undermine the benefit of costs protection, in other words to serve as a barrier to access to justice.

109. 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?

110. This does not change existing practice. Interveners commonly bear their own costs.

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?

111. No. This question misunderstands the role of interveners. They do not "choose" to intervene in the way that the parties to the litigation may choose to litigate. They make an application to be heard which is subject to control by the court. The basis on which they make that application is that they have something of value to contribute to the court's deliberations on the issue that has not been introduced by the parties. They are therefore performing a function in the public interest in assisting the court reach a well informed decision. Indeed the government may itself intervene in proceedings for this reason. Since the whole point of the intervention is to *add* to the material already before the court it is obvious that this will involve some additional work for the parties. The additional costs so incurred will be in proportion to the value and relevance of the material adduced by the intervener. Given the purpose of interventions it is wrong in principle to make them bear the costs of any such additional work occasioned by their intervention. It would have the bizarre result that the more helpful and pertinent the intervention the greater would be the intervener's liability for costs.

112. We also think that a rule framed in the way suggested by this proposal will be impractical and impossible to apply. Cases of obvious time wasting would be easy to detect and can be addressed under the current rules. But apart from these cases, how is the court to tell whether the additional costs are truly the "responsibility" of the intervener? What if the intervention stimulates further research? Is that something for which they are "responsible" and so ought to pay the 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?

113. Claimants should not, as a general rule, be required to provide information as to how their litigation is funded. This raises matters of legal professional privilege. There are of course some exceptions such as in non-Aarhus PCO cases, where there is, for obvious reasons, a need to disclose funding arrangements so that the court can set a fair and appropriate cap for the PCO. But this can be accommodated in the existing rules.

114. No greater powers than exist at present are needed to award costs against non-parties. If third party funders are, in reality, the parties to the litigation then they are already liable to

have costs awarded against them. If third parties, including members of the public, choose to contribute to the costs of litigation because they are sympathetic to its objects then they should not thereby assume responsibility for the other party's costs.

115. The proposals cannot fairly or lawfully be framed so as to apply in judicial review proceedings only. If extended to other types of claim then they may have far reaching results. In particular they threaten to interfere with settled principles concerning the separate legal personality of a limited company (see *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34). Just as it is impossible to confine these changes to judicial review it is also hard, as a matter of principle, to limit them to costs as opposed to other kinds of company liability. It is inappropriate to make a change of this kind following a limited consultation like this. The paper fails to identify any real issue that needs attention.

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?

116. No, although this question is difficult to answer in relation to PCOs. In one sense any PCO with a mutual costs cap (see PCO's above) is an order "against" the intervener because it prevents them from recovering costs. We are of course aware of the case law on costs orders against third parties but assume that the paper is not asking for this.

LEAPFROG PROCEDURE

Extending the relevant circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

117. We do not agree with the proposed extensions in Question 35. At first sight this is a relatively minor proposal but it illustrates much of what is wrong with this paper, namely an underlying assumption that the existing procedural rules for judicial review should be tailored to suit the perceived needs of the executive.

118. Judicial time in the Supreme Court is a limited and important resource whose allocation is a matter for the judgment of the Justices of that Court. These proposals seek to place the executive in a privileged position relative to other litigants and give it the power to make a priority claim to the time and attention of the Supreme Court simply because it makes a unilateral assessment that the matter is an important one. We acknowledge that the decision would ultimately still be a matter for the Supreme Court but the application will inevitably create an expectation that the matter will be dealt with at that level and the Supreme Court will in any event have to take up time dealing with it. We are also concerned that this extension may place the Supreme Court in a difficult position, will drag it into having to make political judgments, and will lead to unseemly conflicts between that Court and the executive. What if the Supreme Court decides that the case is not one of national importance or that it does not raise significant issues? The examples given (which include the deportation of a person as a security risk) show how politically charged such decisions can be. The proposals leave the Supreme Court in the position where it will either have to accept the appeal without forming a view on its importance – in which case the executive will improperly have foisted the appeal on its attention, or it will have to decide whether or not the claim truly is of national importance, in which case it may be drawn into political conflict.

119. We also doubt the premise for this proposal that it is possible to identify significant cases where "it is clear" that permission to appeal to the Supreme Court will be sought. This does not follow. The matter may be conclusively determined in the lower courts. It is, for example, notable that the case of *Abu Qatada* – which is perhaps the inspiration for one of the examples given- ended its progress in the domestic courts in the Court of Appeal.

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

120. We consider that it may be appropriate to extend leapfrogging arrangements where an appeal is already pending in the Supreme Court and where a case in a court to which the leapfrog procedure applies raises the same or a closely related issue that

ought to be considered by the Supreme Court at the same time. In such cases it may be unnecessary and impractical for that case to be addressed in the Court of Appeal before proceeding to the Supreme Court.

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

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

121. We do not agree. The requirement for consent should remain. The leapfrog procedure removes a tier of appeal which the litigants would otherwise be entitled to use as a matter of right, subject to permission being granted. They should not be forced to give up that entitlement against their will, particularly if the rules on leapfrogging are to be changed to include grounds that are likely to be controversial, such as whether the case involves a matter of national importance.

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

122. We agree with the proposal in Question 39. Such appeals should be subject to the same criteria as other leapfrog appeals.

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

123. We agree that any changes to the leapfrog procedure should proposals should be applicable to all civil cases.

Impact assessments

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

124. There are three separate impact assessments which we deal with separately.

Paying for judicial review

125. We do not agree with the assessment of the impact in this assessment. The summary states:

> "At the margin it is possible that fewer weaker Judicial Review permission applications might be sought from the court, which probably would not have secured permission had they been pursued" – see also Para 17 and 25.

126. This seems not to recognise that the effect will be to prevent the brining of meritorious claims as well as weak ones. For reasons we have already explained we consider that the effect of this measure will be to cause some providers to stop taking judicial review claims altogether.

127. As to the assessment of costs and benefits:

g. We are unable to agree with paragraph 23 that the likely costs are within the range £1m-£3m. We accept that the number of cases affected will be between 754 and 2,493 but we do not agree that it is appropriate to cost each of those at the default rate of £1350. The actual cost may well be higher since cases where permission is <u>not</u> granted for one reason or another are likely to incur greater costs. If permission is refused on the papers then consideration will

have to be given to renewal and if an application is made then it will involve further work. If a claim settles then that will involve negotiation with the opponent about terms and costs. In contrast, if permission is granted then the provider will have little work to do between issue and the grant of permission. The effect is that the upper limit in this estimate needs to be increased, making the wide margin of error still greater.

h. We do not agree with the treatment of the costs of discretionary provision. It is not acceptable in an assessment of this kind for the LAA to make no attempt to monetise this cost, if only on an individual case by case basis so that some assessment can be made of the assumed savings per case. We consider that the costs of assessment will be significant, particularly if claims are pursued to an independent assessor. The assessment of costs here has also failed to take account of the costs to practitioners in preparing applications for discretionary payment. These will be substantial and are likely to involve several hours work per file.

i. The assessment also fails to take account of other costs and inefficiencies that the process will introduce. For example:

    i. There will be pressure on the court not to adopt the useful and cost effective procedure of a rolled up hearing.
    ii. Claimants will be far less inclined to settle cases without costs from the other side. This will mean that more cases will proceed to the permission stage. If cases do settle then Claimants will have to be more vigorous in pursuing costs from the Defendant in every case. This will involve higher court costs and also higher costs overall because *inter partes* costs will, if awarded, be payable at substantially higher rates than legal aid costs.
    iii. Some of these points are noted under risks and uncertainties but they ought to be included as costs. It is obvious that this will happen even if the precise amount cannot be monetised.

j. The assessment fails to recognise that the proposal involves a significant non-monetised cost in that Claimants with good cases will be unable to pursue them and that unlawful action will go uncorrected.

128. We do not agree with the assessment of doing less legal aid work as a benefit that in some way outweighs costs. Paragraph 32 states:

> "in other cases the legal aid provider might undertake less work, for example if permission is not sought in future. In such cases resources would be freed for other profitable activities".

This loses touch with reality. The effect of the proposal is to reduce the remunerated work available to practitioners. This is not any less a loss because some of them might be able to find work elsewhere. If this reasoning is to be applied here then it is hard to see why it is not equally apt in other areas where the paper complains that judicial review litigation stifles development and causes delay. Using the logic of this impact assessment there is no loss in that case because the parties affected are thereby freed to engage in profitable activity elsewhere. This point is repeatedly made in the other impact assessments and we do not repeat what we have said here.

129. The assessment completely fails to recognise that the effect of this proposal will be to reduce access to justice for publicly funded judicial review claimants, among whom are some of the most vulnerable individuals, including children the disabled and those sharing other protected characteristics. We are not in a position to provide statistics ourselves but it is surprising that the MOJ has not chosen to model the impact on protected groups by using its own statistics about legal aid grants in the past. If it does not have these statistics then it could obtain them by sampling. The paper seems to think that it does not need to undertake this work because it assumes that the only claims affected will be weak claims that would not obtain permission at all. This is gravely mistaken for the reasons we have given. The measure will prevent good as well as bad cases being taken up. This is partly a function of the fact that it can be difficult accurately to assess the merits at the outset and partly because practitioners will be deterred from taking on cases.

130. The assessment fails to consider the discriminatory impact on practitioners. Again we are not in a position to provide statistics but we would expect that a

substantial number of firms that will be adversely affected will be those from and serving BME groups. Such firms are likely to undertake this work and are also likely to be small, and so less able to absorb the risks of non-payment. Again, this is information that the MOJ ought to have had at its disposal and ought to have analysed.

131. We also consider that the proposal will adversely impact on junior practitioners, particularly at the bar. They are likely to come under pressure to undertake work at risk and will be in a poor position to refuse.

Impact assessment MOJ 210

Standing

132. We are not in a position to take issue with the number of cases potentially affected (400 pa) or with the costs estimates for individual cases. However, we suspect that the true figures here are much smaller as is suggested at 2.7. It would be possible to conduct a simple survey of cases through search engines such as BAILII to identify cases subject to this change with greater accuracy. ALBA as an organisation lacks the time and resources to do this but given the importance of the change proposed some study like this ought to be undertaken.

133. The assessment of non-monetised costs is misconceived. The only non-monetised costs mentioned (other than costs to legal services providers) are:

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

134. Interest groups who bring claims for judicial review do not simply do so in order to produce delay or uncertainty, nor is the process simply a political gambit to try to change government policy. Instead the point of a challenge in to ensure that action is taken lawfully. It is disturbing to finds the authors of this report repeatedly ignoring this. They seem not to understand that there is any "benefit" to the public or

others in securing compliance with the law. For example in paragraph 2.17 the authors state:

> "The fact that these claimants are currently willing to pursue JRs in these circumstances, and in so doing to incur costs, implies that there is a benefit to them from doing so. These benefits may take the form of raising public awareness of the issue, or raising the profile of the organisation bringing the case".

135. The same point is made in the section of this impact assessment about "improving" financial incentives for claimants and invites the same response.

136. Conversely, where the paper refers to "benefits for defendants from reduced delays and uncertainties relating to the implementation of decisions" [e.g para 2.10, 2.12] this overlooks the crucial element of lawfulness. This can only properly be regarded as a benefit if the action is question is lawful – but that is what judicial review is there to test. Time and again the paper proceeds on the mistaken assumption that because action has been decided upon by government[20] then it must be lawful and there can be no legitimate objection to it so that any challenge is something to be discouraged.

137. This section of the paper also ignores the value of giving standing to interest groups where there can, in practice, be no individual challenger. Vulnerable groups, including children and asylum seekers and the disabled, will continue to be subject to unlawful action if this measure goes through.

"Improving financial incentives" for claimants

138. We are not in a position to take issue with the figures mentioned in this part of the paper (subject to any points we have raised in the main text of our response above) but they largely miss the point which is that these measures will impose a disproportionate barrier to access to public law remedies and will discourage good claims as well as weak claims. The global amounts mentioned here are small overall but they are likely to have a substantial impact for an individual claimant who is

[20] This formulation assumes that all decisions subject to judicial review have the same level of democratic legitimacy and fails to take into account the many unaccountable bodies whose decisions are also controlled by judicial review.

contemplating brining proceedings or participating in them. This disincentive is far greater for them than it is for Defendants who may incur costs that they will not recover or who may be liable for costs. We do not underestimate the financial pressures on public bodies but they do have far greater resources available to them than the average litigant and they will be far less affected by adverse costs consequences in an individual case or series of cases. They may well decide to pursue a policy of aggressive opposition to judicial review claims knowing that they will incur costs in the short term but hoping thereby to establish a reputation that will frighten prospective claimants in the future.

139. Since these measures will prevent good claims from being brought forward they will have an adverse impact on judicial review claimants generally. Since judicial review is often the remedy of last resort for extremely vulnerable groups who have been unable to secure redress elsewhere the measure is likely to have a detrimental effect on the children, the disabled and asylum seekers among others. This has been ignored.

Impact assessment 212

140. We have no observations the impacts identified from Policy Option 1.

141. As regards Policy Option 2 we disagree with the assumption that "no difference cases" will be readily identified. We do not think this will be the case for the reasons we have already given. This proposal is not likely to save time or money but will instead open up further areas of costly dispute.

142. As regards policy Option 3 we do not agree that it is not possible to monetise the impact here. Presumably the government can tell, from past experience, what kind of cases it thinks ought to have been taken directly to the Supreme Court. It can therefore extrapolate as to likely costs in the future. This is more than a minor or technical point. It is difficult to respond properly to this option without knowing clearly what the government is proposing.

143. As regards Policy Option 4 a realistic assessment of the impact is nil. No such cases have been brought and such projects are in any event open to challenges by other parties.