

Director:
Professor Sir Jeffrey Jowell, KCMG, QC

Bingham Centre

Response to Ministry of Justice Consultation Paper CM 8703

Judicial Review: Proposals for further reform

1 November 2013

INTRODUCTION

1. The Bingham Centre for the Rule of Law submits the following response to the Ministry of Justice's Consultation Paper Cm 8703, *Judicial Review: Proposals for Further Reform* ("the Consultation Paper"). This response was prepared for the Bingham Centre by Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow of the Bingham Centre), Dr Tom Hickman (Barrister, Reader in Public Law, UCL, and Fellow of the Bingham Centre), Mr Stephen Grosz QC (Hon) (Bindmans Solicitors and Fellow of the Bingham Centre), Sir Jeffrey Jowell QC (Director of the Bingham Centre) and Dr Lawrence McNamara (Deputy Director and Senior Research Fellow, Bingham Centre), with research assistance provided by Ms Leo Zhi Wei.
2. The Bingham Centre for the Rule of Law was launched in December 2010 and is an independent research institute devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity based in London.
3. In this response, we focus on three aspects of the proposals contained in the Consultation Paper: standing, procedural defects, and the rebalancing of financial incentives.

The Bingham Centre's approach to judicial review reform

4. The Bingham Centre recognises that the present judicial review system could be improved, and that it should not be unthinkingly assumed that any change to current arrangements would necessarily undermine the courts' capacity to discharge their constitutional functions in this area. Indeed, the Centre



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has recently established a review, led by Michael Fordham QC, to consider and report on possible ways of improving judicial review procedures in the Administrative Court, to save and protect public funds, in a manner consistent with the rule of law.¹ At the same time, however, it is necessary – as Lord Neuberger recently put it – to “be very careful about any proposals whose aim is to cut down the right to judicial review” given the need for “abuses and excesses” of executive power to be “brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly”.² It is against this background that we assess the proposals advanced in the present Consultation Paper.

STANDING

5. As the Consultation Paper notes, the courts have taken a generous approach to the test of “sufficient interest” set down in s 31 of the Senior Courts Act 1981. It is important, however, to bear in mind that although the courts have adopted a generous reading of the test, clear limits still remain. Indeed, the Consultation Paper itself acknowledges – correctly – that in the absence of a direct interest, a “strong public interest” must instead be shown.³ This is apparent, *inter alia*, from the approach adopted in the leading case concerning the funding of the Pergau Dam.⁴ In that case the Divisional Court emphasised that in the absence of a direct interest, the pressure-group claimant was under a heavy obligation to establish not only a strong public interest in the case being litigated but also its credentials as a body capable of representing that interest to the court in an informed and effective manner. It is certainly not the case, then, that the courts have embraced a free-for-all. Prospective claimants who are not directly affected by the measure about which they wish to complain are in a different position from those who are.
6. A proper appreciation of the current position helps to illuminate exactly what is being proposed. The Consultation Paper stops short of proposing an alternative standing test, but it is clear that a “tighter” test is envisaged that would likely require a “direct” interest in the matter.⁵ The intention is clearly that cases in which such an interest is absent but which would currently attract standing would be excluded from the revised standing test. The Consultation Paper implies that this proposal would merely weed out cases that are inappropriate or time-wasting, the concern articulated in the Paper being that “judicial review [is] used to seek publicity or otherwise to hinder the process of proper decision-making”.⁶
7. **The reality, however, is that:**
 - (a) **The courts grant standing to claimants lacking a direct interest only if it is established that there is a strong public interest in the matter being judicially reviewed. It is well established, as the Consultation notes, that courts will deny standing to a “meddlesome interloper” or “busybody”⁷.**

and
 - (b) **It is well established that the courts will deny standing even where there are public interest grounds where a person directly affected could bring a claim and is the proper person to do so.⁸** Thus, the courts denied standing to the father of Jamie Bulger to challenge the sentence imposed on those convicted of his killing as the Crown was the correct entity to challenge any sentence.⁹
8. On this second point, the Government wrongly cites the example of Maya Evans in support of its position; her case (*‘Evans (No 1)’*) is in fact an example to the contrary.¹⁰ The Consultation suggests that the court

¹ Further information is on the Review’s website at: <http://www.binghamcentre.biicl.org/JRIInquiry>.

² Lord Neuberger, ‘Justice in an Age of Austerity’, 2013 Tom Sargant Memorial Lecture, para 37 (<http://www.supremecourt.gov.uk/docs/speech-131015.pdf>).

³ Consultation Paper, para 74 (emphasis added).

⁴ *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 WLR 386.

⁵ Consultation Paper, paras 83-90.

⁶ Consultation Paper, para 79. We note that no evidence (other than the merely anecdotal) is advanced in the Paper to show that judicial review is being used in this way or what the scale of the perceived problem is.

⁷ *R v Monopolies and Mergers Commission, ex parte Argyll Group Plc* [1986] 1 WLR 763 per Lord Donaldson MR.

⁸ *R (Bulger) v SSHD* [2001] EWHC 119 Admin

⁹ *R (Bulger) v SSHD* [2001] EWHC 119 Admin

¹⁰ *The Queen (on the application of Maya Evans) v Secretary of State for Defence (‘Evans (No 1)’)* [2010] EWHC 1445.

granted standing to Ms Evans because of an increasingly liberal approach. The Consultation states that the court “noted” that “the applicant’s standing would at one time have been an issue”.¹¹ In fact, the judgment is misquoted. What actually happened in that case was that the Government conceded standing. And the court said this:

“The claim itself is brought in the public interest, with the benefit of public funding. It raises issues of real substance concerning the risk to transferees and, although the claimant’s standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.”¹²

9. The court’s point was not therefore that Ms Evans’ standing would at one time have been in issue, and nor did it grant her standing. Furthermore, in a second claim brought by Ms Evans in 2012, relating to the same issues of legality of handing-over UK captured detainees to the Afghan secret service, Ms Evans was denied standing in a judgment of Mr Justice Collins dated 15 May 2012 on the grounds that a directly interested person was better placed to bring the claim.¹³
10. The judgment (which we attach, as it appears not to be available on BALLII) makes the following important observations after referring to the Secretary of State’s concession as to standing in *Evans (No 1)*:

“[Standing was conceded] because the Secretary of State very properly recognised the real public interest in the issue and recognised too that at that stage there was no directly interested person who was available to take up the case and make the points that the public interest required to be made. But, as Mr Eady makes clear, the question of standing was not otherwise conceded and he submits that different considerations arise because, in the form of Mr Mohammed in the other case, there now is a directly interested person. Mr Mohammed’s case is that, as I say, he was transferred and he was tortured and the safeguards which were required by the Divisional Court were not met.

“... generally the need for the claim to be brought by someone in Miss Evans’ position does depend upon no-one who has a more direct interest being available and able to, and indeed intent on, bringing a similar claim.”¹⁴

11. **What the Consultation proposal reduces to, therefore, is that courts should be required to turn away cases even if there is a strong public interest in the court determining whether the Government has acted unlawfully in circumstances where there is nobody else who is an appropriate claimant.**
12. Two possible explanations exist for the Government’s adoption of this position, both of which rest upon misconceptions about the nature and role of judicial review.
13. The first misconception concerns the notion of “public interest” and its relevance in relation to the test for standing, on the one hand, and the conduct of judicial review, on the other. The misapprehension is disclosed by the following passage in the Consultation Paper:

“Parliament and the elected Government are best placed to determine what is in the public interest. On that basis, judicial review should not be used to undermine this role by putting cases before the courts from individuals with no direct interest in the outcome. The Government considers that people who bring judicial reviews should have an interest in the case and consequently wishes to receive views on whether the test for standing should require a more direct and tangible interest in the matter to which the application for judicial review relates. That would exclude persons who had only a political or theoretical interest, such as campaigning groups.”¹⁵

In this paragraph, two senses of “public interest” are conflated. The suggestion appears to be that permitting the courts (via a generous standing test) to entertain challenges on the ground that there is a

¹¹ Consultation Paper, para 75

¹² *The Queen (on the application of Maya Evans) v Secretary of State for Defence (‘Evans (No 1)’)* [2010] EWHC 1445 (Admin) at [2], per Richards LJ.

¹³ *The Queen (on the application of Mohammed & Evans) v Secretary of State for Defence* [2012] EWHC 1464 (Admin)

¹⁴ *Ibid.*, at [4], [10].

¹⁵ Consultation Paper, para 80.

public interest in the matter being examined is likely to result in courts usurping the elected branches' role in determining questions about where the public interest lies. This is not so.

14. When a court determines that a claimant lacking a direct interest should nevertheless be granted standing on public-interest grounds, the court does not impose its own view of the public interest **involved in the decision being challenged**. The court considers instead whether there is a public interest in **testing the legality of the decision being challenged**. Various reasons may motivate the court in a decision to grant standing, such as whether the law is due for clarification (which will settle matters and may indeed deter future pointless judicial reviews), or whether the claimant (especially when an intervener) would bring useful expertise, experience or argument to the attention of the court. These are not matters of public interest in the sense of policy-issues that might be suitable for parliament or the executive to decide. These are squarely matters for judges with their knowledge of the law and legal procedures. To remove the opportunity for judges to grant broader standing might well remove some speculative cases (although the courts are already astute to filtering these out), but **it will also in practice protect the administration from challenge to decisions which are clearly unlawful but where the person directly affected cannot or will not challenge**, for a variety of reasons, including the lack of funds. Reducing broader standing may also have adverse consequences to the very goals which the Consultation seeks to further. This is because a number of cases where such standing has been granted have resulted in cutting down, not expanding, the opportunity for judicial review. For example, one such case in which standing was granted to a public interest litigant resulted in the House of Lords reducing the opportunity to challenge prosecutorial discretion.¹⁶
15. What is in issue is the public interest in maintenance of the rule of law, of which the courts are guardians. This was made clear by the House of Lords in the Fleet Street casuals case in 1982. Lord Diplock explained the position in the following passage:

"It would be a grave lacuna in our system of public law if a pressure group like the federation, 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. It is not a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are accountable to a court of justice for the lawfulness of what they do, and of that the court is the only judge."¹⁷

16. The Consultation Paper's opposition to courts granting standing on public-interest grounds reveals a second misapprehension that is at least as fundamental as the first. It concerns the role of judicial review and, in particular, whether that role is limited to (or even principally concerned with) protection of the rights and interests of individual claimants. The legal standards upheld via judicial review ultimately constitute not only *rights* enjoyed by *individuals*, but *duties* owed by government to the *public*. It does not necessarily follow that the law should recognise an *actio popularis*, such that anyone can institute judicial review proceedings against the government irrespective of whether they have any connection with the subject-matter of the claim. The fact that a direct interest should *sometimes* be required does not mean that it should *always* be required.
17. This point was recognised by Lord Reed in his judgment in *AXA General Insurance Ltd v Lord Advocate*.¹⁸ Although that case was concerned with Scottish law, Lord Reed's comments are of general application:

"A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the

¹⁶ *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60

¹⁷ *R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, per Lord Diplock at 644E-G.

¹⁸ [2011] UKSC 46.

matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say “might”, because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant’s bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.”¹⁹

In this *dictum*, Lord Reed deftly acknowledges not only the constitutional significance of a broad standing test, but also the courts’ unwillingness to exploit its flexibility in an unthinking way. This is achieved by, in effect, requiring those unaffected by decisions to compensate for their lack of “direct interest” by establishing either that they speak for those with such an interest, or that they speak for a public interest that deserves to be considered by the court – and that they are capable of litigating the case effectively. The “sufficient interest” test accommodates constitutional principle and pragmatic considerations in a way that a “direct interest” test does not.

18. **To characterise as necessarily improper judicial review claims advanced by unaffected parties is to misconceive the place of judicial review within our constitution. Government is and ought to be accountable not only to Parliament but also to the law. There is a clear constitutional need for judicial review to be available – whether or not the case is brought by an affected party – when the seriousness of the alleged unlawfulness and the *prima facie* cogency of the claim disclose a strong public interest in judicial oversight.** While this presently occurs within established limits (i.e., those in *Bulger*, above) it is a fundamental dimension of the rule of law that Government is accountable to and under the law.
19. In addition, the Government appears to assume that challenge brought in the public interest challenge Parliament and the elected Government’s view of the public interest. However, the Consultation paper fails to recognise that such challenges are likely to be brought to **enforce Parliament’s will** in cases in which a breach of a statute would otherwise go unremedied. Such actions can also be brought to enforce regulations made by Secretaries of State (and approved by Parliament) that are being disobeyed by, for example, local authorities, public bodies or devolved institutions. The assumption that public interest challenges do not *promote* the ability of Parliament and the central Government to govern is therefore mistaken.
20. The effects of narrowing the test for standing would be more marked when combined with the changes to be made to public funding adopted in *Transforming Legal Aid*, and the proposals for rebalancing financial incentives. In particular, we have in mind the residence test to qualify for public funding, the removal of funding for ‘borderline’ cases and the proposal to make legal costs for the permission stage ‘at risk’. These changes will (as they are intended to do) significantly reduce the ability of many people directly affected by public decision-making to bring challenges by way of judicial review. This makes the opportunity for public interest challenge more important rather than less.
21. For example, in *Maya Evans’ 2012 case*²⁰, Mr Mohammed (and all those directly affected) would fail the residence test and would have been denied public funding unless he could show that he qualified for exceptional funding. If a public interest challenger like Maya Evans were denied standing, in practice no one would be able to bring a challenge in an important matter.

Responses to specific questions - standing

22. 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?*

¹⁹ Ibid, at [170].

²⁰ *The Queen (on the application of Mohammed & Evans) v Secretary of State for Defence* [2012] EWHC 1464 (Admin), and see above at paras 8-10.

We are not satisfied that the bringing of claims by individuals lacking a direct interest is problematic. We note that the Consultation Paper supplies only anecdotal examples accompanied by contestable claims as to their problematic nature. The two specific examples given in the Consultation Paper – Maya Evans and the Pergau Dam case – were both cases where no directly affected claimant was available to challenge acts of the Executive that were held to be unlawful.

23. *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?*

For reasons given above, we are not in favour of revising the standing test.

24. *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?*

We do not recognise the Government's characterisation of judicial review as something that is being improperly used as a "campaigning tool". Judicial review, including by unaffected claimants, is a valuable means of facilitating participation and promoting accountability. On rare occasions, a campaign being advanced by a campaign group might happen to relate to a decision by a public body that is unlawful. Where that is the case it is entirely appropriate that the unlawfulness can be challenged. It is not appropriate for courts to disbar persons or groups from being challengers where they are also campaigners. It is appropriate for courts to prevent such claims if there is no serious issue raised by them and they are no more than meddlesome busybodies – and the courts do enforce such a rule. Third party interventions are strictly controlled by the courts and are recognised to be a valuable means of putting before the courts valuable information that is beyond the resources of individual claimants and their lawyers. Interveners are frequently voluntary organisations, often charities, with limited resources. Subjecting them to a costs risk will effectively prevent them from intervening. This will mean that interventions become the preserve of Government or of large commercial interests.

PROCEDURAL DEFECTS

25. The Consultation Paper identifies as problematic cases in which procedural defects undermine the lawfulness of decisions where those decisions would have been the same even if the procedural defect had not been present.
26. The general tenor of the Consultation Paper is to the effect that procedural failures constitute technicalities and that judicial review on procedural grounds amounts to something that gets in the way of "perfectly reasonable decisions or actions".²¹
27. However, a great many judicial review cases are concerned with correcting procedural defects and ensuring that decisions are made properly by those entrusted with them by Parliament or, as is very often the case, by central Government (e.g., via delegated legislation). The view that is (at least) implicit in the Consultation Paper – i.e., that judicial review is something that obstructs Government – is, then, a misplaced one. The complex machinery of modern administration is highly diffuse, and the availability of judicial review is key to ensuring that executive authority is exercised in a proper and fully-informed manner by decision-makers often operating at considerable remove from Ministers. Courts are rightly reluctant to accept a submission that adopting a proper procedure would have made no difference to the ultimate decision, because such an approach undermines important procedural protections built in to the common law or statute and undervalues the importance of participation in decision-making by those affected by decisions or by the public at large. That participation is rightly recognised to be an important part of our democracy.
28. We can do no better than to quote from 'The Judge Over Your Shoulder', produced by the Treasury Solicitor for the Government Legal Service:

²¹ Consultation Paper, para 99.

Failures of consultation (and indeed other lapses in due process) usually occur through inadvertence on the part of the decision-maker; because he is in a hurry; and so on. When such a lapse forms the basis of a challenge to the decision, the decision-maker may be tempted to say: "But it was an open and shut case. Consultation [or an oral hearing; or full disclosure of reasons] would have made no difference. The decision would inevitably have been the same." That may well be true, but the Court is unlikely to be sympathetic to such a response. And for good reason: the principle is that only a fair procedure will enable the merits to be determined with confidence, and must therefore come first.²²

29. As far as the two options contained in this part of the Consultation Paper are concerned, we have reservations about each.

Option 1

30. Option 1 proposes that it should be possible to make "no difference" arguments at the permission stage. In fact, such arguments can be raised at the permission stage already and often are. The parties can and do contend that no remedy would be granted because the error made no difference. Defendants can support such contentions with a statement of truth or a short witness statement from the decision-maker. That they often do not do so must be taken to be a reflection of the fact that there are good reasons why not, often perhaps because there are other grounds of challenge that cannot be so easily dismissed. Another reason why this may not be done in many cases is that it is not clear or obvious that the decision would be the same.²³ A further consideration is that by the permission stage the parties are already "locked in" to litigation; considerable costs will have been incurred. This issue will be even more acute if the Government's suggestion to allow claimants their costs only if permission is granted is pursued. First, it would increase the amount of work that publicly funded lawyers have to undertake 'at risk'. Secondly, courts would be more reluctant to dismiss a case at the permission stage on this basis if the consequence would be that the claimants' costs would not be paid, notwithstanding that they had identified a genuine error in the decision making process.
31. This points towards an alternative, and better, way to avoid cases being pursued on the basis of procedural deficiencies alone. A major emphasis of the CPR is on resolving cases, including public law cases, before proceedings are issued. To correct acknowledged procedural defects, often the best way for all concerned, is for a public body to agree to remake a decision at an early stage, rather than insisting that legal proceedings are issued. Indeed, it seems to us that if a public body recognises that there was a procedural defect but believes it would make no difference to the decision then the proper and best course is for the decision to be quickly remade before costs are incurred. This is far preferable to a defendant requiring proceedings to be issued and the claim being defended on the basis that the defect made no difference. If the decision is remade before proceedings are issued, or an undertaking to remake the decision is given, then the defendant body will not usually have to pay any costs.
- 32. If there is a problem here that needs fixing (and the Government has only identified anecdotal evidence that there is) a more effective way of ensuring that cases are not pursued on the basis of procedural deficiencies that would make no difference is therefore to bolster the incentives on public bodies to re-make decisions swiftly, and ensure that the pre-action process is working as intended. This has to be better than encouraging such claims to be fought by providing new defences to public bodies based on idea that errors in the process made "no difference".**

Option 2

33. Option 2 proposes a new threshold for the "no difference" principle. Our concerns are these:
34. First, it invites the Administrative Court to engage in the second-guessing of Government decisions. The Court would effectively be required to substitute for the decision that has actually been made the decision that it thinks a public official would make if the evidence that the court has looked at had been looked at by the public official. This is generally thought to be undesirable and runs against the grain of the Government's proposals which, as noted above, emphasise the importance of the Government itself, rather than courts, being primarily responsible for determining questions of public interest. Option 2 is

²² Paragraph 2.46 Edition 4 (January 2006).

²³ On this see the classic dictum of Sir Robert Megarry V.C. in *John v Rees* [1970] Ch. 345

therefore likely to encourage a more activist judiciary and to erode the distinction between appeal and review.

35. Secondly, Option 2 would require courts to uphold decisions even where they are unlawful and where this unlawfulness might have made a difference to the outcome. It has, of course, always been possible for courts to turn a blind eye to unlawful decisions through the exercise of remedial discretion. Although in practice that discretion is used extremely sparingly, it is important to recognise that turning a blind eye in this way does not breathe legal life into the unlawful decision. Unlawful administrative action is unlawful because it lacks a valid legal basis, having been taken in a way that causes the decision-maker to exceed its statutory authority. The absence of a judicial remedy in respect of such administrative action does not render it valid: at best, it obscures its invalidity. In *Ahmed v HM Treasury (No 2)* the Supreme Court refused to withhold relief *temporarily* in respect of a measure that had been held to be unlawful, observing that the court “should not lend itself to a procedure that is designed to obfuscate the effect of its judgment”.²⁴ Those concerns must be all the greater in relation to the *permanent* withholding of relief.
36. At the same time, however, such withholding can only be of limited effect. Whether or not an unlawful decision is quashed, its unlawfulness entitles others to treat it as such and generally demands that other courts acknowledge the illegality through the medium of collateral challenge. **The insulation from all legal challenge of decisions rendered unlawful by procedural defects considered on the Option 2 test to be inconsequential would, in effect, require such decisions to benefit from a source of power different from the enabling statute. For a decision to be rendered lawful by the retrospective endorsement of the court, primary legislation would in our view be required.** Whilst technically possible according to the doctrine of parliamentary sovereignty, such a step would be highly questionable from a separation-of-powers perspective since it would give courts power to authorise executive action in any area in certain circumstances (where in their view an illegality probably made no difference).
37. We emphasise, then, that the solution – if one is needed – lies not in treating unlawful decisions as if they were lawful, but in increasing incentives and opportunities for pre-action settlement. A major problem is that public authorities do not reply under the pre-action protocol in a timely manner, meaning that defendants cannot agree to reconsider before parties are “locked in” to litigation with significant costs having been expended by claimants. Possible ways forward include:
- (a) removing the bar to the parties agreeing an extension of time for issuing judicial review proceedings or otherwise making explicit in the rules that a request by a defendant for more time will not penalise the claimant;
 - (b) requiring the defendant to pay the costs of a claimant if permission is refused on a ground – such as makes no difference – which was not raised in response to the letter before action. This would ensure that courts are not reluctant to refuse permission on this ground and ensure that injustice in terms of costs is not suffered by claimants who raise valid points but where defendants do not properly respond until claimants have issued proceedings;
 - (c) indicating that an award of costs will be likely to be appropriate if claimants issue proceedings after the defendant has undertaken to remake a decision afresh.

Responses to specific questions – procedural defects

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

No. There should be additional incentives to procedural defects being rectified before proceedings are issued.

²⁴ [2010] UKSC 5 at [8].

39. 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?

If the courts are to be invited to second guess Government decision making, we think it doubtful that the courts would be comfortable doing so, if at all, without very thorough consideration of the evidence.

40. 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?

No. See above.

41. 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?

We have indicated above our preferred approach to this issue.

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

We are surprised that the Consultation Paper requests rather supplies evidence of the perceived problem which it sets out to solve.

REBALANCING FINANCIAL INCENTIVES

43. Our general difficulty with this section of the Consultation Paper is that it fails to appreciate the main problem in the current arrangements. This is not that costs do not currently disincentivise claims sufficiently: it is that they are *far too much* of a disincentive. For most prospective claimants, cost issues are so potentially significant yet unpredictable that they run very substantial risks by embarking upon judicial review. Protective Costs Orders provide about the only way of managing these risks for the majority of people, but their scope remains partial and they are very rarely granted. In the remainder of this section, we comment on certain specific proposals contained in the relevant part of the Consultation Paper.

44. *Costs pre-permission*: The proposal about payment of legal aid costs on a discretionary basis pre-permission gives rise to three objections. First, it anticipates no costs if permission is refused. The Bingham Centre, in its response to the Government’s recent consultation on *Transforming Legal Aid*, explained why this is unjust and unfair.²⁵ Second, the proposal is likely to create satellite disputes with the Legal Aid Agency (LAA) over fees. Third, a discretionary test makes it too uncertain that costs will be recovered if there is a settlement. In turn, this would constitute a major disincentive to settlement unless the LAA agrees to pay costs before the case is settled (which would require a very proactive approach by the LAA). It would also cause for legal advisers a conflict between their client’s interest in early settlement and their own interest in seeking permission to ensure that they get paid. For these reasons in our view the suggestion of a discretionary payment is **likely to generate litigation by (i) disincentivising and making more difficult early settlement of cases, and (ii) inviting disputes with the Legal Aid Agency**. The proposal is all the more invidious given the removal of the ‘borderline’ category of cases from public funding, so that the only cases to proceed to the permission stage are those that the LAA has accepted to have a more than 50% prospect of success.

45. *Costs of oral permission*: We are not satisfied that the case for change in this context has been made. The defendant is not obliged to make representations at a renewal hearing and can choose whether to turn up or not. If the defendant does, it is right in principle that it should bear its own costs. If, in spite of this, there

²⁵ Bingham Centre for the Rule of Law, *Response to Ministry of Justice Consultation Paper CP14/2013*, 4 June 2013 (http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf)

is to be any change, it is imperative that costs are a fixed amount so claimants know what their liability will be if they lose, or else there will be a very substantial chilling effect. At the same time, however, if there is a change, it will be likely to encourage defendants to turn up, submit skeleton arguments and seek to make representations. That is **likely to have the paradoxical effect of increasing costs and length of renewal hearings.**

46. *Wasted costs orders:* We have very serious reservations about this aspect of the proposals. The making of a Wasted Costs Order, which amounts to the imposition of liability upon an individual legal representative, is a very significant step. The high threshold of impropriety which a legal representative's conduct of the case must presently cross before an order can be imposed is entirely warranted, and serves to protect the independence of the legal profession. We also note that no evidence has been advanced in support of the proposition that there is a particular problem concerning improperly brought judicial review claims which warrants changes to the Wasted Costs Orders regime. The same point applies to the procedural protections that are currently applicable when Wasted Costs Orders are in contemplation. The imposition of liability upon an individual legal representative is a determination of their rights and – notwithstanding the Consultation Paper's assertion concerning the compensatory intention of such orders – amounts to the imposition of a penalty. Article 6 of the European Convention on Human Rights therefore applies with some rigour to decisions to impose Wasted Costs Orders, and the procedural regime for imposing such orders must be aligned with the requirements of Article 6. We are not satisfied that the proposal in the Consultation Paper of written consideration as a default model would satisfy Article 6.
47. *Protective Costs Orders:* We regard the introduction of Protective Costs Orders (PCOs) as one of the most important aids to access to justice developed in recent years. The availability of judicial review is often little more than theoretical in circumstances where legal aid is unavailable. PCOs represent a significant way in which the chilling effect of the risks normal associated with judicial review litigation can be addressed. Against that background, we consider the proposals in the Consultation Paper to reduce the availability of PCOs to be of substantial concern.
48. The proposal appears to be both that the absence-of-private-interest requirement be more strictly enforced and that PCOs should not be available for "political" or "campaigning" judicial review claims where there is no claimant with a private interest. These two classes of claim would appear to cover the whole field of judicial review claims, and adoption of the proposal would in effect end all such orders.
49. This proposal must also be considered in conjunction with the Government's stance in relation to public-interest standing, which calls into question whether, in the first place, judicial review should lie on public-interest grounds as distinct from circumstances in which the rights or interests of the individual claimant are implicated. **The cumulative impact of the proposals may therefore be that the unavailability of PCOs in private-interest cases will financially prevent many individuals from seeking judicial review in such circumstances, whilst public-interest challenges that might otherwise have assisted such individuals (e.g. by establishing the unlawfulness of an overarching policy that yielded the specific decision by which the individual is afflicted) will be ruled by the approach to standing advocated in the Consultation Paper. The proposal concerning PCOs therefore creates the risk of a real justice gap in relation to individuals ineligible for legal aid but with a private interest in challenging the decision – a problem liable to be exacerbated by the barring of public-interest challenges that might otherwise assist in such circumstances.**
50. If, as we submit, the courts should continue to entertain public interest challenges, it is also right that the closely controlled discretion to make PCOs should be retained for cases where there is a compelling public interest in the matter in issue being determined.

Responding to specific questions – rebalancing financial incentives

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

No. Our reasons are given above.

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

We are not in favour of an approach that would call for the LAA to exercise such discretion in the first place.

53. 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?

No.

54. 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?

We are not in favour of extending Wasted Costs Orders to a wider range of behaviour.

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

We have already noted that the imposition of a Wasted Costs Order is a very serious matter and we do not accept the premise that "streamlining" is appropriate.

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

No. PCOs are often sought by people who can only bring claims at all if they are not exposed to cost risks. To establish a cost risk in seeking a PCO would undermine access to justice.

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

In our view PCOs fulfill an important access to justice role and their scope should be left to the courts to develop on a case by case basis.

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

Persons seeking PCOs have a heavy duty to disclose their means and funding arrangements already.

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

In our view PCOs fulfill an important access to justice role and their scope should be left to the courts to develop on a case by case basis.

60. 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?

In our view PCOs fulfill an important access to justice role and their scope should be left to the courts to develop on a case by case basis.