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Bingham Centre

Written Evidence to the Joint Committee on Human Rights

Inquiry into to Judicial Review Reforms

27 November 2013

INTRODUCTION

1. The Bingham Centre for the Rule of Law submits the following written evidence to the Joint Committee on Human Rights Inquiry into Judicial Review Reforms. Several people have contributed to the preparation of this response: Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow of the Bingham Centre), Mr Stephen Grosz QC (Hon) (Bindmans Solicitors and Fellow of the Bingham Centre), Dr Tom Hickman (Barrister, Reader in Public Law, UCL, 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).

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. We focus in this written evidence on three of the points on which the Committee has called for evidence: (1) standing and third party interventions; (2) costs; and (3) procedural delay as opposed to substantive defects (the 'no difference' issue). In each, we also address the combined effect of judicial review proposals and the legal aid proposals. While we do not address other issues in which the Committee has expressed an interest, that should not be taken as meaning that we think other proposed reforms are unproblematic.

The Bingham Centre's approach to the reform of judicial review and legal aid

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 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]

5. The Centre sees the proposed reforms to legal aid as being very significant in relation to judicial review and welcomes the Committee's consideration of the combined effects of all the proposals. We note the comments made by the Secretary of State for Justice and Lord Chancellor in his foreword to the first Legal Aid Consultation Paper where he said that access to justice should not be determined by ability to pay, and that legal aid is the "hallmark of a fair, open justice system".[3] We strongly agreed with that proposition at the time and still do. We welcome the comments in the foreword to the current consultation that legal aid and the right to a defence go "to the heart of a civilized society and underpin access to justice".[4] And, now as then, we also recognise that there are inevitably circumstances in which an individual's claim to publicly-funded legal advice or representation may have to yield to some extent in the face of countervailing considerations, including scarcity of resources. However, the extent to which such considerations can legitimately be permitted to attenuate the legal aid scheme is informed — and severely constrained — by the fundamentality of the values which that scheme serves to uphold. In order to appreciate the effects on access to justice, the rule of law, and to judge the evidence base for the appropriateness or necessity of the proposed reforms, that combined consideration is essential.

6. The relationship between the judicial review and legal aid proposals is important because it goes to the right of access to justice, which is a key element of the rule of law[5] and which is acknowledged both at common law, as a constitutional right,[6] and by the European Convention on Human Rights.[7] It is well-recognised that the right of access to justice is capable of being curtailed or infringed not only directly,[8] but also by placing recourse to litigation beyond individuals' financial means.[9] It is equally axiomatic that whatever other valuable mechanisms may exist for protecting the rights and interests of individuals, it is independent courts of law, in a democracy founded upon the rule of law, that stand as the ultimate guarantors of basic legal rights.

7. It is against this background that we assess the reform proposals.

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[1] Further information is on the Review's website at: http://www.binghamcentre.biicl.org/JRInquiry.

[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] Ministry of Justice, *Transforming legal aid: Delivering a more credible and efficient system* (CP 14/2013), p 3 (https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf).

[4] Ministry of Justice, *Transforming legal aid: Next steps*, p 3

[5] See Tom Bingham, *The Rule of Law* (2010), especially chapter 8.

[6] See, e.g., *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

[7] Article 6.

[8] E.g. by means of such devices as statutory ouster clauses.

[9] See, e.g., *Witham*, n 2 above, in which the court fees regime's inadequate accommodation of impecunious prospective litigants was found to breach the common law right of access to justice.

STANDING AND THIRD PARTY INTERVENTIONS

8. As the *Judicial Review: Proposals for Further Reform* 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.[10] This is apparent, *inter alia*, from the approach adopted in the leading case concerning the funding of the Pergau Dam.[11] 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.

9. 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.[12] 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".[13]

10. **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"[14].

    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.**[15] 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.[16]

11. 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.[17] The Consultation suggests that the court 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

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[10] Ministry of Justice, *Judicial Review: Proposals for Further Reform*, Sept 2013, para 74 (emphasis added).

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

[12] *Judicial Review: Proposals for Further Reform*, paras 83-90.

[13] *Judicial Review: Proposals for Further Reform*, 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.

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

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

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

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

an issue".[18] 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."[19]

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.

12. 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.[20]

13. The judgment 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.
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> "… 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."[21]

14. **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.**

15. 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.

16. 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

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[18] *Judicial Review: Proposals for Further Reform*, para 75

[19] *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.

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

[21] Ibid, at [4], [10].

would exclude persons who had only a political or theoretical interest, such as campaigning groups."[22]

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 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.

17. 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.[23]

18. 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."[24]

19. 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.

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[22] *Judicial Review: Proposals for Further Reform*, para 80.

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

[24] *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.

20. This point was recognised by Lord Reed in his judgment in *AXA General Insurance Ltd v Lord Advocate*.[25] 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 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."[26]

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.

21. 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.

22. In addition, the Government appears to assume that challenge brought in the public interest is necessarily a challenge to 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.

23. 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

[25] [2011] UKSC 46.

[26] Ibid, at [170].

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.

24. For example, in *Maya Evans'* 2012 case[27], 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.

25. 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.

26. 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.

27. There are presently significant and adequate limits on the circumstances in which third parties will be granted standing. The continuing ability of third parties to seek and be granted standing in public interest cases is an important rule of law protection that helps ensure executive accountability. The standing reforms would diminish the accountability of government and detract from the possibility of effective challenge, which, in turn, has positive systemic effects by encouraging good administrative decision making and government according to law.

COSTS

28. We address costs under two main headings: (a) access to justice and effects issues and (b) the evidence for the proposed reforms relating to payment for permission work.

(A) Costs: access to justice and effects issues

29. Our general difficulty with costs section of the *Judicial Review: Proposals for Further Reform* 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 the 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

[27] *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.

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, addressing not only pre-permission and protective costs orders, but also noting related issues regarding oral permission and wasted costs orders.

30. ***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.[28] 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.

31. ***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.

32. 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.

33. 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.

34. 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.

35. ***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

[28] 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)

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 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.

36. ***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.

(B) Permission costs: reviewing the evidence base for the proposed reforms

The proposals

37. The proposal in the *Transforming Legal Aid Next Steps* consultation remains to a significant extent as it was originally set out in the first consultation: permission work will only be paid for by legal aid if permission is granted.[29] This is tempered by the revised proposal "to introduce a discretion to permit the LAA to pay providers in certain cases which conclude prior to a permission decision."[30] However, no payments will be made where permission is refused.[31]

38. While we welcome the revision of the original proposals with the LAA discretion, as we have explained above (para 30) it merely tempers – and does not solve – many of the concerns we raised in our response to the first Legal Aid consultation. With its inherent uncertainty and the fact that no payment will be made if permission is refused, the revision does not adequately alleviate what will be the detrimental effects on access to justice. We are particularly concerned that neither the original proposals nor the revisions are based on adequate evidence. We turn now to this matter.

The evidence

39. The *Next Steps* Consultation Paper summarises the key issues raised in responses to the original proposal, identifying the many concerns raised in response to the first consultation.[32] We note in particular that many respondents raised concerns about the lack of data and the inadequacy of

[29] *Transforming Legal Aid: Next Steps* Consultation Paper, Annex B, para 135.

[30] *Transforming Legal Aid: Next Steps* Consultation Paper, Annex B, para 156; *Judicial Review: Proposals for Further Reform* Consultation Paper, paras 118-129.

[31] *Judicial Review: Proposals for Further Reform* Consultation Paper, paras 130-131.

[32] *Transforming Legal Aid: Next Steps* Consultation Paper, Annex B, paras 137-152.

evidence that was provided in support of the proposals.[33] The Government's summary notes that arguments in responses included the following:

> '… the data presented did not provide evidence of a problem and in particular when compared to data on judicial reviews as a whole, legally-aided judicial reviews have a higher 'success rate' than non legally-aided cases and that this suggests providers are already assessing carefully whether to issue proceedings ….'

The *Next Steps* Consultation Paper does not assert in any way that this argument is incorrect. It also does not provide data which would suggest it is incorrect.

40. Our response to the first consultation provided a detailed analysis of the available evidence.[34] We reached the following conclusions, and given that the position is not contested, we re-state some of the key points, which will also help show the extent to which the further data provided makes a difference.

> First, … permission is sought in only 44% of legally aided applications but, by contrast, it is sought in 65% of non-legally-aided applications.
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> Second, can any inference be drawn about whether the availability of legal aid significantly incentivises (one way or the other) decisions whether to take cases forward to the permission stage? The fact that permission is sought in a much higher proportion of unfunded cases than in funded cases suggests that the provision of legal aid does not at all provide an incentive to pursue an unarguable claim. On the contrary, the comparative statistics suggest that it is privately funded matters which are more readily pursued and less likely to succeed. … [W]hen viewed as a proportion of applications where permission is sought, permission is granted to 48% of legally aided applications and to just 9% of non-legally aided applications. Therefore, a legally aided application is over five times more likely to receive permission than an application which is not legally aided.
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> … Put simply, there is nothing to suggest legally aided judicial review claims are pursued in a reckless way that results in a relatively high number of "weak" cases. On the contrary, there is everything to suggest that legally aided cases appear to be handled far more cautiously than those which are unfunded, and lawyers in legally-aided applications are far more likely only to pursue cases with merit.

The further data that has been provided

41. The current consultations have provided some further data about legally aided judicial review claims. This is provided in the *Judicial Review: Further Proposals for Reform* consultation paper and the accompanying Impact Assessment.[35] This data is helpful in forming a more accurate picture of how judicial review claims proceed. Accordingly, the table below is a revised version of the analysis we presented in our response to the first consultation, amended to take account of the more accurate data provided for the number of legally aid cases which were granted permission in 2011/12.

42. We have not presented a table for 2012/13 data and the varying and sometimes uncertain nature of the available data means that an exact comparison is not possible. However, the data does mean

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[33] *Transforming Legal Aid: Next Steps* Consultation Paper, Annex B, see especially para 148.

[34] Bingham Centre for the Rule of Law, 'Response to *Transforming Legal Aid*', 4 June 2013, paras 25-30 http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf

[35] *Judicial Review: Proposals for Further Reform* Consultation Paper, para 132-143; Impact Assessment MoJ 215, Evidence Base, paras 15-21.

that a general picture can be discerned sufficiently clearly, and more clearly than was possible when we prepared the table for the first consultation.

43. The table shows our original analysis and the effects of the further data which has been provided, using strike-through and underline to show what is different. Put simply, the further data reveals that where we had estimated that 845 cases were granted permission, the more accurate figure is 663 cases. As a result, the position now appears that over one year:

    - permission was sought in only 44% of legally aided applications but, by contrast, it was sought in 65% of non-legally-aided applications. (The additional data makes no difference.)

    - when viewed as a proportion of applications where permission is sought, permission is granted to 36% of legally aided applications and to just 13% of non-legally aided applications. Therefore, **a legally aided application is three times more likely to receive permission than an application which is not legally aided.** (The additional data has made a difference here; the previous estimate was that it was five times more likely to receive permission.)

[Continues on next page with Table]

	All applications (Source: MoJ, 2011)	Legally aided applications (Source: LAA, 2011-12; IA MoJ 215)	Thus:	Non-legally aided applications
Applications lodged	11,359 total[36]	4,074[37]	⇨	7,285
Applications terminated prior to permission	4,828[38] (43% of total)	2,275[39] (56% of legally aided applications)	⇨	2,553 (35% of non-legally-aided applications)
Applications where permission sought	6,531[40] (57% of total)	1799[41] (44% of legally aided applications	⇨	4732 (65% of non-legally-aided applications)
Applications where permission granted (either at first stage or after oral renewal)	1,268[42] (19% of all applications where permission sought) (11% of total applications)	~~864~~[43] 663[44] (~~48%~~ 36% of legally aided applications where permission is sought) (~~21%~~ 16% of all legally aided applications)	⇨	~~404~~ 605 (~~9%~~ 13% of non-legally aided applications where permission is sought) (~~6%~~ 8% of all non-legally aided applications)
Applications where permission refused	4,479[45] (69% of applications where permission is sought)	845[46] (47% of legally aided applications where permission is sought)	⇨	3,634 (77% of non-legally aided applications where permission is sought)

[36] MoJ JR statistics, Table 1: figure stated.

[37] *Transforming Legal Aid: Next Steps*, para 3.65: figure stated.

[38] MoJ JR statistics, Table 1: 11,359 total applications less 6,531 applications where permission sought

[39] *Transforming Legal Aid: Next Steps*, para 3.65: figure stated.

[40] MoJ JR statistics, Table 1: 945 granted at first stage plus 5,586 refused at first stage = 6531 applications where permission sought.

[41] *Transforming Legal Aid: Next Steps*, para 3.66: figure stated.

[42] MoJ JR statistics, Table 1: figure stated.

[43] *Transforming Legal Aid: Next Steps*, para 3.66: Estimated. 1,799 sought permission, less 845 that received permission = 954 remaining. Presuming around 90 cases were withdrawn or similar before an an oral renewal decision, that leaves 864. The estimate of 90 follows the proportions of withdrawals at the oral renewal stage shown in MoJ 2011 statistics, Table 6: where the MoJ was the defendant, 721 refused at first stage, and 79 withdrawn in oral renewal stage; where local authorities were the defendant, 314 refused and 41 withdrawn in oral renewal.

[44] *Judicial Review: Proposals for Further Reform* Consultation, Impact Assessment MoJ 215, Evidence Base, para 20.

[45] MoJ JR statistics, Table 1: figures stated: 5,586 refused at first stage less 323 granted on renewal less 784 where renewal withdrawn = 4,479.

[46] *Transforming Legal Aid: Next Steps*, para 3.66: figure stated.

44. The additional data is to be welcomed. However, even taking account of that data, it is still clear that:

(a) **The general picture remains the same: privately funded claims are far less likely to be granted permission than legally aided claims.** Even with the updated data, and taking account of various uncertainties about how comparisons can be made, the evidence still suggests that a legally aided application is around three times more likely to be granted permission than a non-legally aided claim.

(b) **The available evidence still suggests that it is not legally aided claimants or their representatives who are failing to consider or handle matters appropriately; rather, the evidence suggests is privately funded litigants who are proceeding with less care.**[47] This is directly relevant to the *Judicial Review: Proposals for Further Reform* Consultation which seeks views as to how the costs for judicial review "can be adjusted to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings".[48]

(c) **There is no comparative data provided by the government – even though the best available evidence suggests that legally aided claims are far more likely to receive permission – and thus there is still no adequate evidence base for the proposed reforms.** Without comparative data, the Impact Assessment does not provide an adequate evidence base on which to make judgments about whether the stated policy objective of "ensur[ing] public confidence in the civil legal aid system" can be achieved, because such confidence can surely only be achieved if reforms to the system is based on evidence.

45. These conclusions have a particular resonance in light of the rationale provided by the Lord Chancellor and Secretary of State in the foreword to the current *Next Steps* Consultation where he states that the case for restricting payments for permission work is that "if a private individual would not likely fund the case, the taxpayer should not either". Based on this rationale, and the fact that the best available evidence suggests that private litigants are far more inclined than legally aided litigants to pursue permission cases that are less likely to succeed, the conclusion that should follow from the available evidence is that the current legal aid arrangements for permission work are entirely appropriate. Certainly, there has been no case made that there is any evidence which supports the reforms based on the stated rationale.

46. Moreover, there has been no attempt at undertaking a comparative analysis. The Bingham Centre raised these concerns and put the following questions to the Ministry of Justice in the MoJ 'web chat' consultation on 29 October 2013:

> "(1) Has the MoJ undertaken a comparison of the success of privately funded as against legally aided claims? (2) If yes, what are the figures and what do they reveal about comparative progress?"

The response was:

> "The data on the number of legally aided JR cases is drawn from the LAA and includes JR work undertaken at the pre-action stage. As such, these volumes are not directly comparable to the

[47] Of course, the question of whether representation makes a difference needs to be considered as well, though no data has been provided in any of the consultations in this regard. See further our response to the first Legal Aid consultation, Bingham Centre for the Rule of Law, 'Response to *Transforming Legal Aid*', 4 June 2013, para 30 http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf

[48] *Judicial Review: Proposals for Further Reform* Consultation Paper, para 113.

data on the overall volumes of JR applications i.e. cases that are formally lodged at the Admin Court. We're not able to drill down further into the Admin Court data."[49]

47. While we accept, of course, that there are resource and technical limits to the MoJ's ability to access data, and, again of course, the data needs to have been collected in order to be analysed, it nevertheless seems remarkable that the Government has not published or, it appears, even undertaken a comparison of the data that *is* available in order to get at least an indicative picture. This is especially concerning given that the Government has not contested the analyses that are available and that the approach of the private litigant is the stated basis for comparison.

48. As such, the position remains as it did at the time of the first consultation: it seems an almost inescapable conclusion from the comparative statistics that reducing access to legal aid in this area will have the consequence of reducing access to justice for the poor and disadvantaged in our community without any adequate justification.

49. Accordingly, we recommend that the proposed changes to paying for permission work should not be pursued.

PROCEDURAL AS OPPOSED TO SUBSTANTIVE DEFECTS IN DECISIONS

50. The *Judicial Review: Proposals for Further Reform* 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.

51. 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".[50]

52. 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.

53. We can do no better than to quote from 'The Judge Over Your Shoulder', produced by the Treasury Solicitor for the Government Legal Service:

> 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."

[49] Ministry of Justice Web Chats, 29 October 2013, Questions and Reply at 14:09 http://www.justice.gov.uk/ministry-of-justice-webchats (1 Nov 2013).

[50] *Judicial Review: Proposals for Further Reform*, para 99.

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.[51]

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

Option 1

55. 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.[52] 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.

56. 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.

57. 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

58. Option 2 proposes a new threshold for the "no difference" principle. Our concerns are these:

59. 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

[51] Paragraph 2.46 Edition 4 (January 2006).

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

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

60. 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".[53] Those concerns must be all the greater in relation to the *permanent* withholding of relief.

61. 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).

62. 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.

[53] [2010] UKSC 5 at [8].

CONCLUDING REMARKS

63. We have no problem with reforming judicial review in ways that streamline procedures, as long as reforms are consistent with the rule of law. Indeed, as explained above, the Bingham Centre is currently undertaking its own review of judicial review procedures in this regard.[54] However, many of the proposed reforms to judicial review, especially when combined with the proposed reforms to legal aid, would have very substantial and detrimental effects. They would have a major impact on access to justice for the purpose of holding public authorities to account and securing legal protection of basic rights and interests.

64. The value of a legal system that is equipped to subject the executive and all public officials to critical scrutiny consists not only in the benefits it yields to individual litigants, but in the wider public interest in ensuring that government is subject to adequate legal control. The legal aid system is thus a public good whose worth cannot satisfactorily be measured in purely financial terms and support for judicial review is a key part of that. It is against that background that the judicial review and legal aid proposals fall to be assessed – and it is in the light of such considerations that we find the justifications offered in support of those proposals to be wanting in terms of the rule of law.

[54] See note 1, above.