Response of Young Legal Aid Lawyers to
"Judicial Review: Proposals for further reform", published September 2013

Introduction

1. This is the response of Young Legal Aid Lawyers (YLAL) to the Ministry of Justice consultation paper "Judicial Review: Proposals for further reform" ("the consultation").

2. YLAL is a group of lawyers who are committed to practicing in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protect the interests of the vulnerable in society and uphold the rule of law.

3. The consultation poses a number of questions. We have responded to these below. However, at the outset we wish to raise a number of general concerns about the impact and political motivation behind the proposals. All references are to the consultation unless otherwise stated.

The political context of the consultation

4. Judicial review is a vital mechanism by which the citizen can hold the state to account. The importance of its constitutional role as a check on executive power is paramount: without judicial review, a citizen negatively affected by an unfair, irrational, or unlawful executive decision may have no means of redress. It provides an incentive for public bodies to act in accordance with the law and the will of Parliament. As Lord Dyson stated: "there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review" (*R (on the application of Cart) v The Upper Tribunal)*[1].

5. We understand the need for the Ministry of Justice to find cost savings within its budget and we are generally supportive of measures which would make the judicial review procedure more efficient. However, we oppose any unnecessary attempt by the Government to restrict the ability of the citizen to access judicial review and hold the state to account. In our view, the proposed changes to standing, the Public Sector Equality Duties (PSED) cases, procedural impropriety, and payment on pre-permission work are not strictly necessary and are not based on a sufficient body of evidence. We urge the Government to reconsider before implementing these proposals.

[1] [2010] EWCA Civ 859, para 122)

6. The current proposals to reform judicial review are rushed and premature. The drastic reduction of public funding for cases introduced by the Legal Aid, Sentencing and Punishment and Offenders Act 2012 (LASPO) only came into effect in April this year. Further, in July 2013 there were further changes made to the to the judicial review procedure arising from the consultation "Judicial Review: proposals for reform", to shorten the time limit in planning cases and some procurement cases, to remove the right to oral renewal where a case is considered to be totally without merit by a judge on the papers, and to introduce a fee for an oral renewal hearing where permission is refused on the papers.

7. The impact of these cuts and changes has not yet been felt. The transfer of immigration and asylum judicial review cases from the Administrative Court to the Upper Tribunal will take place from 1 November 2013.[2] In addition, the "Transforming Legal Aid" (TLA) proposals to cut legal aid are also under consultation. TLA measures such as introducing a residence test will apply to all publicly funded cases, including judicial review. Cumulatively, these changes will have a significant impact on the day-to-day workings of the Administrative Court and on the ability of citizens to access the court. In our view no further changes should be made until these existing changes have had time to bed-in.

8. YLAL welcomes the Government's decision to conduct a separate consultation on these latest judicial review proposals, which were initially included in the first TLA consultation. However, we are concerned at the number of additional and wide ranging reforms (such as to the test on standing, PSED cases, and procedural impropriety) included in this latest consultation. Rather than waiting to see the effect of the significant reforms outlined above, the Government is seeking to push through further reforms to judicial review that we believe will reduce access to justice for ordinary people. We believe this rushed timetable is a deliberate strategy to frustrate a proper public debate on the negative impact of the Government's agenda to curb judicial review.

9. Many responses to the last judicial review consultation challenged the Government's poor evidential basis for proposed reforms. The consultation was said to lack "any evidence-base supporting the rationale for change" by public law firm Leigh Day.[3] The Administrative Law Bar Association concluded that it is "unacceptable to seek to bring about far reaching change on the basis of the flimsy evidence presented in the paper"[4] Unfortunately, it appears the Ministry of Justice has made no attempt to research the matter further before releasing this latest, more extensive consultation for reform to judicial review.

10. The motivation behind the Government's proposed reforms to judicial review is based on a false perception that judicial review is being "abused" by claimants (para 5 of the consultation). A number of assumptions underpin the consultation: 1) there has been a significant growth in the number of judicial review cases; 2) too many unmeritorious judicial review applications are being issued; 3) judicial review is pursued as a campaign strategy by groups to generate publicity or as a delaying tactic; 4) public confidence in, and the credibility of, the legal aid system is being undermined; 5) proper executive decision making and action is being hindered; and 6) the unnecessary costs and delay caused is "bad for the economy and bad for the taxpayer" (para 1). We address each assumption in turn below.

[2] www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf
[3] Para 7, available at http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Judicial%20review/Judicial-Review_proposals-for-reform.pdf?ext=.pdf
[4] Para 10, available at http://www.adminlaw.org.uk/docs/ALBA%20Consultation%20Jan%202013.pdf

"There has been a significant growth in the number of judicial review cases"

11. As recognised within the consultation, the growth in judicial review cases in the last 10 years largely relates to immigration and asylum cases (para 10). Seventy six per cent of applications in 2012 were immigration and asylum matters (para 10). However, measures are already in place to address this increased demand, namely the transfer of these cases to the Upper Tribunal and the establishment of Administrative Courts in Birmingham, Manchester, Cardiff and Leeds..Moreover, immigration practitioners frequently explain the rise in judicial review cases against the UKBA/Home Office as being a direct result of poor decision making, a significant backlog of cases at the Home Office, and ill conduct by the UKBA as a litigant, rather than by abuse of the system by claimants.[5]

12. Further, it is clear from the Government's impact assessment that numbers of publicly funded judicial reviews are reducing:

> "In 2012/13 there were 3,633 Judicial review cases which received legal aid funding for legal representation, compared with 4,074 in 2011/12 (endpoint codes A-J)"[6]

13. These numbers will only reduce further with the imminent transfer of the majority of immigration judicial reviews to the Upper Tribunal.

14. As YLAL set out in our response to the last consultation on judicial review,[7] the small rise in the use of judicial review (7% in 16 years) actually corresponds with a 7.7% rise in the population of England and Wales over the same period.[8]

15. We also made the point that the increase in the judicial scrutiny of state actions is commensurate to the increased role that the state has taken on in public life over the last 40 years. We do not regard either of these trends as a negative development. As explained by Lord Browne-Wilkinson:

> "Judicial review's] social importance is self-evident. Growth in executive interference in the lives of individuals, inevitable in a modern state, has exposed us all to the risk that executive power may be exercised in an unbridled or abusive manner. If, as some thought, the common law had proved so senile and impotent that it could not develop to meet this change in society, the rule of law would not have regulated administrative action. Governments are not notorious for introducing legislation which limits their own powers. Happily, the common law has proved to be fertile not impotent."[9]

16. YLAL sees no cause for concern in the rise of judicial review cases, save to the extent that they could indicate the poor quality of decision making by some public bodies with a high volume of claims against them, such as the UKBA.

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[5] Para 8 of ILPA's response to the last judicial review consultation, available at http://www.ilpa.org.uk/data/resources/17007/13.01.24-ILPA-response-to-Ministry-of-Justice-consultation-on-Judicial-Review-proposals-for-reform.pdf

[6] Impact Assessment - Payment to providers to work carried out on an application for Judicial review, MoJ 215, 6 September 2013, p.7 para 20

[7] Available at http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20JR%20consultation_Final.pdf

[8] (Research by Christopher Hood and Ruth Dixon of the Department of Politics and International Relations, University of Oxford (based on Government statistics)

[9] Lord Browne-Wilkinson, Foreword to Supperstone & Goudie, Judicial Review, London: Butterworths, 1992.

"Too many unmeritorious judicial review applications are being issued"

17. This argument was also employed in the last judicial review consultation. Despite a new handsome pictogram at page 9 of the consultation paper, no new data has been produced to demonstrate that too many judicial review cases lack merit. We therefore endorse the opinion of the Bingham Centre for the Rule of Law that this claim is not substantiated by the Government with any evidence.[10] Early withdrawal and settlement of cases does not indicate an illegitimate use of judicial review or that these cases are necessarily without merit.

18. YLAL believes that even where there are cases that lack all merit, the new ability for judges to prevent the case progressing to an oral renewal where permission is refused by categorising it as "totally without merit" is more than sufficient to prevent such cases causing concern.

19. The Legal Aid Agency collects end code data to track the success rate for publicly funded cases. If the Government persists in claiming that too many unmeritorious cases are being issued, then we invite the Ministry of Justice to disclose this data so that a proper assessment of the numbers of unmeritorious cases benefiting from public funding may be conducted.

"Judicial review is pursued as a campaign strategy by groups to generate publicity or as a delaying tactic"

20. Often, claimants do have a political as well as personal motivation for bringing a case. For example, the recent "bedroom tax" litigation, such as *R (on the application of MA & Ors) v The SoS for Work and Pensions and Birmingham City Council*[11] had the Equality and Human Rights Commission and Shelter intervening. When citizens feel concerned that a policy being pursued by the Government is unlawful, but that policy is pushed through Parliament in any event, bringing the case before the courts to assess the legality of the Government's assessment of the "public interest" is entirely appropriate. The Government may call this "campaigning", but whether or not the participants see their action as campaigning does not lessen the important constitutional role of the court: to assess the legality of the executive decision.

21. Politically motivated litigation is a tool employed by both right and left campaigners. YLAL sees no cause for concern that 50 claims per year – a relatively modest number – are brought by pressure groups or NGOs from across the political spectrum as part of a campaign strategy. In a democracy, the Government should welcome scrutiny of its actions by the court, regardless of who brought the matter to the court's attention.

22. Equally, YLAL does not believe there is a problem with publicity being generated by such claims. It is natural (and to be encouraged in a democratic society) that decisions with wide public interest should be widely reported and subject to public debate.

23. There are already sufficient procedural requirements to prevent judicial review causing delay to properly made decisions. The fact that a case can only be brought within 3 months, and without undue delay, with a tight pre-action timetable and court timetable in place on issue, is sufficient to balance the need to provide a means of challenging executive decision and the need to prevent unnecessary delay to public projects.

[10] Para 22, available at http://www.biicl.org/files/6304_moj_jr_consultation_-_bingham_centre_response_23_1_2013_final_final.pdf

[11] [2013] EWHC (2213)

Further, relief in judicial review proceedings is discretionary, so that the Court will not grant a remedy where it would be inappropriate to do so.

"Public confidence in, and the credibility of, the legal aid system is being undermined"

24. The Government has failed to show that the public has lost confidence in the legal aid system. The consultation does not cite any evidence to support the assertion. There is therefore no evidence to suggest a causal link between the growth of judicial review claims over the past 40 years and any public opinion about legal aid.

25. In contrast, there is evidence to show that there is public support for legal aid. In a recent survey conducted by the Bar Council, 75% of the public said that the poorest members of society will be most affected if the Government makes cuts to legal aid and 68% said legal aid is a worthwhile investment in our basic freedoms.[12]

"Proper executive decision making and action is being hindered"

26. The proposition that judicial review hinders executive decision making indicates that the Government fundamentally misunderstands the function of judicial review as a check on executive power. Public bodies must make rational decisions, act within the lawful remit of their powers, follow proper procedure, and act in accordance with human rights. Judicial review only hinders executive decision making to the extent that public bodies fail to act rationally, fairly and lawfully.

27. The Impact Assessment MOJ 212 states that "it is not a good use of public resources to fund one part of the state to challenge another and [the Government] wishes to limit the circumstances under which this may take place."[13] Again, this demonstrates a fundamental misunderstanding of the function of judicial review: to promote lawful decision making.

28. YLAL is concerned that the Government is seeking to diminish the vital constitutional role of the court in reviewing the legality of executive decisions on the basis that it is inconvenient to public bodies. As stated by the Administrative Law Bar Association in its response to the last judicial review consultation paper, "it is wrong to treat judicial review as a kind of bothersome red tape that can be removed or substantially altered without harm."[14]

29. Illegal decisions made by public bodies should be "hindered" by judicial review. If access to judicial review is restricted, there will be little incentive for public bodies to act lawfully.

30. We suggest that, if the Government is seeking to reduce the numbers of judicial review cases each year, then public bodies should seek to make lawful decisions in the first instance. This would eliminate the need for judicial review.

"The unnecessary costs and delay caused is bad for the economy and bad for the taxpayer"

31. Here the Government draws an artificial distinction between "the taxpayer" and claimants in judicial review proceedings, which in the majority of cases are one and the

[12] ComRes Bar Council Poll, p 3, available at http://www.barcouncil.org.uk/media/210826/headline_findings_-_comres_poll_-_may_2013.pdf
[13] Impact Assessment – Reforms to Judicial Review, MoJ 212, 6 September 2013
[14] Para 5, available at http://www.adminlaw.org.uk/docs/ALBA%20Consultation%20Jan%202013.pdf

same. Judicial review protects the interests of citizens, of taxpayers, in upholding the rule of law and preventing the abuse of power by members of the executive.

32. It is unclear how restricting access to judicial review will stimulate the economy. The Government cites examples of environmental campaigners seeking judicial review of capital investment projects. However, new reforms to planning and procurement cases are already in effect, as stated above. Moreover, most proposals in the consultation will restrict access to judicial review for ordinary people in cases that have nothing to do with policies pursued by the Government to stimulate the economy.

33. Again, YLAL submits that the Government should seek to improve the quality of executive decision making, rather than curb access to judicial review, if it wishes to prevent unnecessary costs to the public purse incurred by judicial review proceedings. The Government has made no attempt to quantify the unnecessary costs incurred by unlawful action on the part of public bodies.

34. As Lord Neuberger has stated, to deny someone with a claim the chance to pursue it "is a rank denial of justice and a blot on the rule of law."[15]

35. We also agree with the Government's own Treasury counsel that:

> "...judicial review provides a prompt and efficient remedy for many persons affected by government action in large numbers of cases, often of critical importance to them, which are conceded by public bodies at an early stage, and at little cost either to the public body or the legal aid fund. By ensuring that officials are accountable to the law, judicial review provides a powerful corrective to poor decision making, the importance of which goes well beyond the relatively small number of cases which get near a court. We consider that the proposals in the Consultation Paper will undermine the accountability of public bodies to the detriment of society as a whole and the vulnerable in particular.".[16]

Planning

Streamlining planning challenges

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

36. YLAL does not have a view on this.

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

37. YLAL does not have a view on this.

[15] Lord Neuberger, "Justice in an age of Austerity", Tom Sargant annual memorial lecture, 15 October 2013, para 44 www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf
[16] http://legalaidchanges.wordpress.com/2013/06/06/46/

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

38. Without direct knowledge of this subject area it is difficult for us to comment meaningfully. However, since one of our main objectives is ensuring access to justice, we emphasise that any attempt to restrict the ability of persons to bring a challenge to the lawfulness of a public body decision must not be unfairly prevented. Any case for introducing a permission filter should only be based on a sound body of evidence.

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

39. No.

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

40. No.

Local Authorities challenging Infrastructure Projects

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

41. Local authorities represent the interest of their communities. Where decisions on national projects conflict with those interests it is appropriate that local authorities have a mechanism by which to challenge these decisions. Without personal knowledge of this area it is difficult for us to comment meaningfully, but we tend to the view that it would be inappropriate to place obstacles in the way of local authorities seeking to challenge decisions of central government on grounds of illegality or procedural unfairness.

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

42. No.

Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

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

43. As long as there is a right of appeal to the court, legal aid should remain available. The removal of legal aid would have the result that those who could afford to pay privately for a lawyer could access the appeal mechanism while those who lacked the means could not. This would have the effect of removing the right of appeal to the court for poorer litigants by the back door. Such a change would be unprincipled. The right of appeal to the Secretary of State and the ability of the Secretary of State to call in an application are insufficient safeguards. The Secretary of State is not and does not purport to be independent. It is imperative that the citizen in such a case has recourse to an independent tribunal to challenge the legality of any decision where there are grounds to do so.

Standing

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

44. No; YLAL disagrees with the Government's concern that cases are being brought where the claimant has little or no direct interest in the matter for the reasons set out below.

45. The current test on standing, as set out in Section 31(3) of the Senior Courts Act 1981, provides:

> "No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates" [Our emphasis.]

46. The Government believes that this test on standing has become a "relatively low hurdle" and that the court's "increasingly expansive approach" has "tipped the balance too far" (paras 74 and 79). It suggests a stricter test requiring a "direct or tangible interest" and has expressed the view that pressure groups and individuals who cannot meet this should be prevented from being able to bring a claim in judicial review (para 80).

47. We believe the current requirement for a Claimant to demonstrate an interest in the outcome of the matter in question is important in preventing vexatious claims hampering the exercise of executive decision making. This test is applied at the permission stage and is sufficient to prevent any case proceeding to a substantive hearing[17] where the Claimant has no real interest in the matter to which the proceedings relate. Defendant public bodies have this early opportunity to challenge the standing of the Claimant where this may be an issue.

48. It is appropriate that the role of assessing standing is a matter for the judiciary at the permission stage and YLAL therefore opposes any attempt by the Government to legislate a more restrictive test on standing. We are particularly concerned that a more restrictive test will prevent citizens' access to judicial review, thereby undermining the constitutional role of judicial review as a mechanism for holding the Government to account.

49. YLAL endorses the assessment of standing provided by Lord Reed in the 2011

[17] With the exception of rolled-up hearings which are, in our experience, rare.

Supreme Court case *AXA General Insurance Ltd v Lord Advocate*:

> "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."[18]

50. YLAL strongly supports the right of individuals to bring judicial review claims which are in the public interest. The Consultation uses the example of Maya Evans as grounds for restricting the test for standing. However, the Court of Appeal in this case recognised the importance of allowing the claim when it is "brought in the public interest, with the benefit of public funding" and that it "raises issues of real substance."[19]. We note that this particular case concerned the legality of the UK policy of transferring detainees held by the armed forces to the Afghan authorities in circumstances where there was a real concern that these detainees were being tortured. The public interest in eliminating all forms of torture is overwhelming. As such, this case is a particularly good example of why the rules on standing should not be restricted. The Government should not be seeking to amend these rules simply because it finds such decisions embarrassing. Quite the opposite, it should be a point of pride for all concerned that we live in a democracy where such importance is attached to the rule of law, and such cases can be scrutinized by the courts.

51. The Government is concerned that claims in judicial review are being used to seek publicity and to promote political interests, and that they "hinder the process of proper decision-making" and prevent economic growth (para 79). The Government states its concern is based on the principle that "Parliament and the elected Government are best placed to determine what is in the public interest" (para 80). This statement reveals a failure by the Government to grasp the basic constitutional role of judicial review as a check on executive power. While it is quite proper that the executive should attempt to determine what is in the public interest, it is for the courts to determine whether the state has acted lawfully. Given the restricted bases on which the court can quash a decision – for example, the decision must be unlawful rather than one which the court disagrees with – it is irrelevant whether the claimant had a political motivation as well as a personal motivation in bringing the claim.

52. We take the view that it is entirely appropriate that a concerned citizen should be able to challenge the legality of an executive decision. As Lord Diplock stated in *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd*:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group … or even a single public-spirited taxpayer … were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."[20]

53. We also feel that the Government's concern over the number of judicial review cases

[18] [2011] UKSC 46 (Although this case is concerned with Scottish law, Lord Reed's comments are of general application)
[19] *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), para [2]
[20] [1982] AC 617, at 618-619

brought by charities and NGOs is misguided. By its own assessment, only 50 cases per year are brought by NGOs, pressure groups and faith groups (para 78). If 12,400 judicial review applications were made in 2012 (para 9), then only 0.4% of these were brought by such groups. We do not believe this number of cases represent a problem, particularly given that by the Government's own assessment these cases are more likely to be successful than other judicial review cases (para 78). This latter fact suggests that when charities or NGOs bring judicial review cases as a claimant, the case is more likely to have strong merits.

54. In light of the analysis above, we consider the Government's assessment of standing to be flawed. We reiterate that it is a fundamental principle of democracy that individuals and groups are able to access the courts to hold executive decision makers accountable. The bottom line is that there is no justification for the state to act unlawfully. Any change that permits this should be rejected.

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?

55. YLAL objects to the Government's proposals to amend the test for standing for the reasons explained above. The Government has failed to establish a need to change the current test, which is sufficient. The suggested alternatives will all restrict the test on standing and therefore the availability of judicial review. The current test for standing and the test for the availability of civil public funding for judicial review claims is sufficient to prevent vexatious claims brought by timewasters.

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

56. YLAL does not agree that there is a "problem of judicial review being used as a campaigning tool" for the reasons set out above. It is clear that the Government finds it inconvenient that groups have a mechanism by which to challenge executive decision making. It brands this as "campaigning" in an attempt to discredit such action. However, as explained above, judicial review is an important constitutional check on executive power and is a perfectly legitimate method of challenging unlawful behaviour by public bodies.

57. YLAL strongly objects to any proposal which limits the ability of charities and organisations to intervene in judicial review proceedings. Their input is invaluable to the process of judicial review. Charities and organisations acting as interveners frequently provide expert evidence to the court and contribute to an equality of arms between the individual seeking remedy and the public body in question. For example, in *R (on the application of HC (a child, by his litigation friend CC)) v The Secretary of State for the Home Department and The Commissioner of Police of the Metropolis*[21], the High Court determined that seventeen-year-olds who are arrested and taken into police custody should be treated as children. Much of the substantial material before the court came from the submissions of the two intervening charities: the Howard League for Penal Reform and the Coram Children's Legal Centre. Both of these charities specialise in children's legal rights and both have expertise and knowledge which individual litigants are unlikely to match when putting their own case forward.

[21] [2013] EWHC 982 (Admin)

Procedural Defects

Option 1 - Bring forward the Consideration

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

58. No. Practically, this is not something that the court can take a view on until it has heard legal argument on the merits of the case. Whether a procedural defect would have made "no difference" to a decision will depend on the nature and seriousness of the defect in question. It is appropriate for this issue to be considered at the substantive hearing and not at the permission stage.

59. In addition, taken with the proposal to restrict legal aid in cases where permission is refused, this would create an additional barrier to justice for legally aided litigants since a case with good legal merits could still be refused permission if the court took the view, without having heard full argument on the merits, that the illegality would have made no difference to the decision. In such a case public funding would probably not be available despite the claim being meritorious.

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?

60. YLAL opposes the proposal to bring forward a consideration of the "no difference" argument in principle. It would inevitably make the permission stage a full dress rehearsal for the substantive hearing, thereby escalating costs. It would be impossible to test the facts to the extent that a "no difference" argument could be made out by the defendant without conducting substantial work on the case, which would be carried out in preparation for a substantive hearing.

Option 2 – Apply a lower test

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

61. No. We oppose a lower threshold being introduced.

62. We are particularly concerned by the reasoning behind this proposal, which seems to be based on a view that cases where the public body has followed an unlawful or unfair procedure are somehow unimportant. This is not the case. It is vital and in the public interest that public bodies act lawfully and fairly. If judicial review is not available in such cases then what incentive is there for public bodies to follow a lawful procedure? It is imperative that public bodies follow proper procedure because it will aid good, as well as lawful, decision-making. It follows that there must be consequences for failing to follow proper procedure. Otherwise, public bodies may break the law with impunity and will lose the benefit of coming to well-reasoned decisions subject to due process. Consequently, we do not believe any additional bar should be introduced for procedural impropriety judicial review cases.

63. There are many examples of cases succeeding on the basis of procedural impropriety where the ultimate effect of a quashing order by the court led to a totally different outcome for the claimants. In a case against Hillingdon Council's decision in January 2012 to close three day centres for disabled adults, the claimants were given permission to proceed with a claim for judicial review on the basis that no lawful consultation was conducted and the local authority breached its PSED.[22] In response, Hillingdon announced a new consultation on 1 November 2012 and its website suggests that the three original day centres remain open.

64. Procedural impropriety cases are essential in preventing local authorities acting out of bias. For example, in *R v Kirklees Metropolitan Borough Council, Ex Parte Beaumont & Ors*,[23] in 2000 a local authority decided to close Birkdale High School. Two councillors voting for closure were governors of another school, Westborough School, which would be significantly enlarged as a result of the closure. The decision was quashed due to this bias and the school remained open for another 11 years.

65. Procedural impropriety cases can often have a significant effect on unlawful policies that would otherwise be put into effect. For example in *R (on the application of C) v Secretary Of State For Justice*,[24] the court quashed new Secure Training Centre (Amendment) Rules 2007, which substantially widened the purposes for which force or "restraint" could be used against children held in Secure Training Centres. While this had previously been limited to very specific circumstances, for example, to prevent escape, the new rules allowed force to be used for the purpose of "ensuring good order and discipline." The lack of proper consultation and impact assessment led to the quashing of these regulations which would have had an important impact on the safety and lives of children living in these centres.

66. Given the significance of cases such as those outlined above to the public, it is wrong to consider procedural impropriety cases as wasting court time and resources on mere technicalities. We therefore oppose in principle an extra barrier to bringing these cases over and above the tests that already exist.

67. The comments above are directed at the general importance of procedural fairness and the principle of altering the threshold in cases involving procedural defects. However, there are two further specific reasons for objecting to the introduction of a lower threshold.

68. The first is that it is for elected officials and democratically accountable public bodies to make decisions rather than the courts. We find it surprising that the consultation seems to have overlooked this point in this particular context. It follows that the courts should not be too quick to rush in and substitute their own view for that of the elected decision-maker by saying that it would make no difference if the decision were taken again following a lawful process. The appropriate course is for the decision to be remitted so that the public body can make up its own mind (in a lawful manner).

69. The second point is that it is notoriously difficult to identify those cases where a fair process would have made no difference. Famously, in *John v Rees* [1970] Ch 345, 402, Megarry J observed about the argument that "it will make no difference":

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow,

[22] See http://www.irwinmitchell.com/newsandmedia/2012/july/day-centres-to-stay-open-as-families-secure-right-to-judicial-review
[23] (2000) QBD (Newman J) 28/07/2000
[24] [2008] EWCA Civ 882

> were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

70. We endorse these comments and for these reasons take the view that a lower threshold should not be introduced.

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?

71. YLAL does not believe the Government has made out any need for reducing the numbers of procedural impropriety cases. As explained above, we are concerned that the Government is trying to reduce these cases given the importance of judicial review as a safeguard to prevent public bodies following unlawful procedures.

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)?

72. No.

The Public Sector Equality Duty and Judicial Review

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

73. Section 149 of the Equality Act 2010 sets out the duty of all public bodies to ensure that they eliminate discrimination in the exercise of their functions, and endeavour to level the playing field for those who have a "protected characteristic". We emphasize the importance of the PSED to groups facing marginalisation. For example, in the recent Supreme Court case *R (HA (Nigeria) v SSHD*[25], the court found that the Secretary of State had failed to comply with her duties under the Race Relations Act 1976 and the Disability Discrimination Act 1995 in detaining a mentally ill man. Without the PSED, vulnerable groups and individuals may not otherwise factor into executive decision making. It is therefore an important safeguard against discrimination and YLAL resists any attempt by the Government to reduce the availability of a means of redress for Claimants where a public body has failed to comply with its PSED.

74. The consultation indicates that judicial review is not the most effective or efficient way of ensuring that public bodies adhere to the PSED. It is not clear what alternative is envisaged. One difficulty of creating a separate route for PSED challenges is that frequently a PSED challenge is pursued by claimants alongside other arguments, for example, that a public body failed to conduct a lawful consultation before decision and failed to comply with its PSED before reaching a decision. In such cases, would the PSED challenge be heard separately in a tribunal and the judicial review case in the High Court? This would duplicate proceedings and create extra costs on both sides.

75. If an alternative mechanism is pursued, we would simply stress two points. Firstly, any alternative mechanism for resolving disputes – such as a Tribunal – should provide for legal aid to be available for individuals to challenge discrimination. It would be unrealistic to expect people to bring their cases as litigants in person, particularly

[25] [2012] EWHC 979 (Admin)

where claimants are likely to be vulnerable, and the issues surrounding PSED are complex. Secondly, such a body would need to have the same powers as High Court judges in deciding judicial review claims: the power to make quashing, mandatory and prohibiting orders.

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

76. No. We have seen no evidence to indicate that the current volume or nature of PSED challenges is a problem. We reiterate: without the ability to fully review public authorities' implementation of the PSED, those that are socially disadvantaged are likely to go unnoticed when a policy or practice directly or inadvertently discriminates against them. Without the availability of judicial review for PSED challenges, public bodies will lack an incentive to comply with the PSED in the first instance.

Rebalancing Financial Incentives

Paying for permission work in judicial review cases

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

77. We strongly disagree with this proposal for the reasons set out below. We endorse our comments made in response to the Government's TLA consultation, in particular, at paragraphs 70 to 83.[26]

Negative impact on access to justice

78. YLAL opposes any amendment to secondary legislation that restricts public funding to people claiming judicial review, which is already subject to a rigorous means and merits test. The merits test in particular is specifically designed to ensure that claimants cannot obtain public funding to bring weak or pointless cases.

79. The level of scrutiny over funding applications has increased since April 2013, as devolved powers (now delegated functions) were removed from providers doing judicial review work in the majority of civil cases.[27]

80. YLAL does not agree that it is appropriate for providers to bear the risk of bringing a claim for judicial review. The discretionary scheme means practitioners would undertake all work "at risk", even if they may claim at the conclusion of a case, for example, for court fees and work pursuing costs against a Defendant. This radical recalibration of the payment structure makes judicial review work unviable in the legal aid landscape post April 2013.

81. The effect of this proposal will be to make providers reluctant to take on judicial review cases. Many firms may simply stop doing this kind of work entirely, which would not be in the public interest. Where normal people on low incomes cannot find a lawyer to

[26] YLAL response to Transforming Legal Aid: delivering a more credible and efficient system, 3 June 2013, available at www.younglegalaidlawyers.org/sites/default/files/YLAL%20TLA%20response_final.pdf

[27] www.justice.gov.uk/legal-aid/newslatest-updates/civil-news/jr-proceedings-funding-change

represent them by public funding, the effect will be the same as if judicial review was taken out of scope entirely. Having no lawyer willing to undertake the work means no access to justice for that citizen.

Limited or no savings to be made

82. YLAL is pleased that the Government accepts that its original TLA proposals for judicial review would affect both meritorious and unmeritorious claims (para 115). However the revised proposal is a very long way from addressing the problem. It states that the "current approach... does not provide the right incentives to prevent the pursuit of repeated and unmeritorious claims often at a cost to the taxpayer" (para 112). This is simply not supported by the data available. As we wrote in our response to the last consultation:

> "Based on the Government's 2011-12 statistics, 515 cases out of 4,074 legally aided cases did not settle and ended with permission being refused and no "substantive benefit to the client" recorded. This means that just 13% of cases resulted in no substantive benefit to the client; that is in fact a success rate of 87%. We consider this to be a reasonable proportion. In any event judicial review provides a wider function in ensuring fair, rational and lawful public administration and the 13% of unsuccessful cases may well have resulted in a benefit to the public body in question, in terms of improving its decision making" (para 72).

83. The lack of any evidence underpinning the current consultation paper is concerning.

84. The consultation states that the revised proposal is designed to "encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way to handle proceedings" (para 113). There is no persuasive evidence that claimants and their legal representatives are failing to carefully consider the merits of bringing a judicial review or handling proceedings without due regard to the costs involved. The Government acknowledges in the impact assessment for the current consultation that:

> "If around 85% (the Bondy and Sunkin figure above) of non-I&A cases withdrawn before permission were settled on terms favourable to the claimant, then of all 3,000 non-I&A applications in 2012, around 44% might initially not be regarded as unmeritorious, in the sense of either being granted permission (either initially or after an oral renewal), or being settled upfront on terms favourable for the claimant."[28]

85. A success rate of around 44% of cases is far from constituting evidence of "repeated and unmeritorious claims". YLAL strongly disagrees with the implication in the consultation that legal aid lawyers are exaggerating the merits of claims in order to obtain funding. To do so would breach the professional duties of a lawyer and it is an unfounded and serious accusation.

86. In our view, the overall potential savings of this proposal are not proportionate to their impact on access to justice and the rule of law. The Government has calculated the cost of these proposals by using the full amount of an emergency certificate for public funding granted to claimants (£1,350) for each case that is refused at permission

[28] Impact Assessment, MoJ 210, 6 September 2013, p.20

stage, amounting to at least £1 million per year.[29] This fails to take into account the fact that many claims do not reach that level for permission stage work. The Government will have the data on actual claims at each stage as providers must record outcome and stage codes when submitting claims. We would ask for this data to be published and for consideration to be given as to whether it supports the Government's assessment of the costs of this proposal.

87. The impact assessment makes no allowance for claims which are refused permission but are later considered to still be meritorious by the Legal Aid Agency. These cases will reduce any potential savings of this proposal even further.

88. There has been no attempt to cost the impact on the court system. The Government merely states that courts may lose fee income if fewer permission applications are made.[30] It acknowledges there could be increased costs "for example from an increase in oral renewals or rolled up hearings, from increased satellite litigation, or from more litigants in person" but states this will be resolved as "HMCTS operates on a cost recovery basis in the longer term."[31]

89. There is no realistic assessment of the costs that will be involved from the Legal Aid Agency carrying out discretionary payment assessments. It is stated that there will be "ongoing costs to the LAA as it will be at the discretion of the LAA whether to award costs in cases that conclude before a permission decision," but no estimate of the numbers of cases that will benefit from this discretionary award if made.[32]

90. We strongly oppose this proposal on the basis that it will not save costs. We endorse the recent comments of the President of the Supreme Court, Lord Neuberger:

> "(i) The cause of the delays complained of is largely historic, thanks to the very recent removal of asylum and immigration cases from the Administrative Court to the Upper Tribunal, which the judges proposed in 2009. (ii) Cutting down time limits for JR applications may actually increase the work, due to rushed applications and many more requests for extensions of time. (iii) The cost-cutting proposals risk deterring a significant number of valid applications, and will save a pathetically small sum."[33]

91. Sir Stephen Sedley has echoed these concerns:

> "The superficially attractive reason is that it will inhibit the making of long-shot or speculative claims at public expense, but it is supported by no evidence, and the argument advanced in support of it – that the claimant's lawyer 'is in the best position to know the strength of their client's case' – displays a depressing degree of ignorance about how judicial review works. More often than not, it is the defendant authority which holds most of the relevant cards, and in many cases it holds on to them for longer than it is supposed to, either because there is too little time for proper disclosure of documents or because sitting tight affords the best hope that the claim will go away. The departmental calculation is that indigent claimants' lawyers will be deterred from taking on all but sure-fire claims. In proposing that other claimants can

[29] Impact Assessment - Payment to providers to work carried out on an application for Judicial review, MoJ 215, 6 September 2013, p.7 para 22
[30] ibid, p.8 para 26
[31] ibid p.9 para 40
[32] ibid, Table 1, LAA Judicial review end-point code data, p.8, paras 27 and 28
[33] Lord Neuberger, "Justice in an age of Austerity", Tom Sargant annual memorial lecture, 15 October 2013, para 43, available at www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf

> be left to their own devices without injustice, the paper makes no attempt to confront the consequences: a plethora of claims made by litigants in person, clogging up the courts as judges try to discern arguable points in the chaos of paper, and costing public authorities large sums in irrecoverable costs as they attempt to respond to such claims."[34]

92. We reiterate that this proposal is ill-timed, coming too quickly after recent reforms included the transfer of immigration judicial review cases to the Upper Tribunal. We also reiterate that this proposal fails to account for the fact that the number of publicly funded judicial review claims is in decline.

Costs incurred by the defendant

93. The burden of change is unfairly laid entirely on claimants by this consultation. This is particularly concerning given the evidence that the Government defends claims for judicial review which they have been advised by their lawyers that they are likely to lose. YLAL refers the Government to the letter from over 100 barristers who routinely represent government departments, in which they say:

> "Most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%... No one has ever suggested that, in such cases, government bodies should be barred from defending a claim for judicial review".[35]

94. We suggest that savings would be better made to the public purse if the Government stopped defending judicial reviews in which they have been advised that they are unlikely to succeed. Sir Stephen Sedley has made this observation:

> More immediately, the consultation paper has nothing to say about public authorities which play the judicial review system at public expense... It would be straightforward to propose that a public body which unjustifiably resists the grant of permission in a viable case should pay the costs of doing so; but the consultation paper has nothing to say about this, or about penalising late disclosure, or about other ways of saving public funds.[36]

Effect on small businesses

95. The Government has not considered the impact on small businesses in any meaningful way, merely stating that, if there is less judicial review work, providers' time will be "freed for other profitable activities."[37] There are now few or no "profitable activities" in legal aid due to the cuts introduced under LASPO and the TLA proposals to come in under secondary legislation, such as the residence test. As Lord Neuberger has observed, "the great majority of lawyers who do government-funded work do not make very much money – especially when one allows for their expenses."[38] Practitioners are already working close to the bone and further cuts will drive them out of business entirely.

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[34] Beware Kite-Flyers, Stephen Sedley, London Review of Books, Vol. 35 No. 17 · 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers

[35] http://legalaidchanges.wordpress.com/2013/06/06/46/

[36] Beware Kite-Flyers, Stephen Sedley, London Review of Books, Vol. 35 No. 17 · 12 September 2013 pp. 13-16 www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers

[37] Impact Assessment - Payment to providers to work carried out on an application for Judicial review, MoJ 215, 6 September 2013, pp.8-9 para 32

[38] Lord Neuberger, "Justice in an age of Austerity", Tom Sargant annual memorial lecture, 15 October 2013, para 52 www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf

96. We are particularly concerned for the future of the profession, both in terms of the impact these cuts will have on our members now and through the loss of opportunity in firms and chambers once the cuts take effect. This proposal will discourage young talented lawyers from practicing in legal aid, thereby turning back the clock on diversity within the legal aid profession and within small firms in particular.

Concluding comments

97. In our view, any potential savings created by this proposal are likely to be negligible. The proposals are ill-timed and counter-productive. They constitute a dangerous attack on a vital mechanism for holding the state to account. The consultation paper fails to recognise that judicial review is unlike normal civil litigation in that there is an inevitable inequality of arms between the parties because the claimant is usually an individual and the defendant the state.

98. Judicial review is also intended to prevent abuses of power by the Government. This means there is a clear public interest in ensuring that individuals can bring judicial review claims without the risk of financial ruin if the case is lost. Any further restriction on access to legal aid in judicial review cases would be detrimental to the rule of law in this country.

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

99. No. We are opposed to the introduction of a scheme that puts payments "at risk" in principle. However, we also disagree with the proposals for discretionary criteria as costly and unworkable for the reasons set out below.

100. The Government states that decisions must be made on "particular facts."[39] This will require a review of the case file, and it will take time to prepare claims and answer refusals on the part of the provider and to undertake the assessments at the Legal Aid Agency. In YLAL's experience, applications to the Legal Aid Agency are extremely burdensome, as we have seen through the escape cases and Exceptional Funding schemes. The Legal Aid Agency also frequently makes inconsistent and flawed decisions, and this proposal has the potential to open them up to satellite litigation, which would undermine the objective of reducing the volume of public law proceedings.

101. No part of the discretionary criteria considers the conduct of the defendant. For example, defendant public bodies frequently introduce new decision letters after proceedings have been issued.

102. The proposal requires Legal Aid Agency staff to act as effective costs judges. The criteria will require staff to assess the likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered from a specific indication in the proceedings by the Court or based on the strength of the claim at that point.[40] We are concerned that the Legal Aid Agency will lack the expertise to undertake this assessment. Further, depending on the point when the case concluded and the conduct of the Defendant, there may be no pre action correspondence or defence filed, and no response on the case on the court pre permission. The Legal Aid Agency would therefore be in the

[39] Consultation para 126
[40] Consultation para 125 (iv)

same position that it is now, where it must assess merits based on the papers provided by the Claimant.

103. The entire basis of these proposals is ill conceived and we cannot see how there will be any cost savings once the costs of implementing and carrying out the proposals are factored in.

Costs of oral permission hearings

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

104. If the above proposal relating to payment for pre-permission work is implemented – and we do not believe it should be – then yes, we would regard it as important that successful claimants are able to obtain *inter partes* costs at the permission stage. However, we consider that the development of practice and procedure in this area is best left to the courts.

Wasted Costs Orders

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

105. YLAL does not consider that the wasted costs order regime should be extended. There is no evidence to show that there is a problem with the regime as it is currently is. The Government has not identified any cases where a Wasted Costs Order (WCO) was not made but should have been. These orders already sanction lawyers for improper, negligent or unreasonable conduct, as conceded in the consultation (at para 147).

106. We note the consultation simply observes that WCOs are rarely made. This is not in itself evidence that they should be used more. Section 51(7) of the Senior Courts Act 1981 allows the court to penalise a legal representative for any "improper, unreasonable or negligent act or omission." It would be extremely worrying if this kind of behaviour was so extensive that wasted costs orders were being used regularly.

107. Extending the WCO regime could serve as a further factor inhibiting members of the public from bringing merit-worthy judicial reviews, which would be detrimental to the rule of law.

108. Further, we oppose the proposition that a wasted costs order should be made where a weak case has been pursued. The courts have made it clear that there are important public policy reasons why pursuing a weak case should never be a reason for making a wasted costs order (see *Ridehalgh v Horsefield* [1994] Ch 205). A lawyer is acting on the instructions of the client, so it may be that the client instructs the lawyer to pursue a case even though the lawyer has advised the client that it is a weak case. Clearly, this scenario should not lead to the lawyer being penalised since he or she is only performing the task which he is ethically bound to undertake.

109. YLAL considers that the current test in section 51(7) of the Senior Courts Act 1981 is the appropriate test for making a wasted costs order against a legal representative.

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

110. As explained above, YLAL does not agree that any change is justified.

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?

111. We do not feel that further change is justified.

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

112. We do not feel that further change is justified.

Protective costs orders

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

113. We do not agree that there is any need for proposals to change the scheme in place for Protective Costs Orders (PCOs). PCOs provide claimants in cases brought in the public interest with certainty that they will not face substantial costs against them. We are not aware of any abuse of the provisions. Research conducted by the Public Law Project and the University of Essex, funded by the Nuffield Foundation, reveals that during the 20 month period between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted, and these included awards to well respected NGOs such as Medical Justice and the Child Poverty Action Group.[41] In our view the current practice on PCOs is not a cause for concern and there is no evidence base to justify the change proposed, which would be inimical to the public interest.

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

114. We do not agree that PCOs need modification. Any constraints on the courts' powers to make PCOs will deter claims that would serve the public interest and will undermine legitimate checks on the abuse of power by the state.

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

115. The Government has provided no evidence of abuse of the PCO regime therefore there is no evidence of a need for "incentives" to discourage claimants from bringing actions that might lead to costs being enforced against the funder.

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

[41] Public Law Project, Judicial Review: Proposals for Further Reform briefing, October 2013, p.8 www.publiclawproject.org.uk/data/resources/143/JR_Proposals_for_further_reform_briefing.pdf

claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

116. The development of these principles is best left to the courts.

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?

117. No. The limit that is appropriate will vary from case to case.

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

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

118. We have no objection to the principle that interveners should bear their own costs.

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

119. We believe that the question of who should bear the costs arising from the intervention of a third party should remain as it is, in the discretion of the court. There is no evidence given for a need to change this system.

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

120. We believe that the existing powers under s.51 of the Senior Courts Act 1981 and CPR 46.2 enabling the courts to make an award of costs against a person that is not a party to a claim are sufficient. We would be concerned by the introduction of any new measure that would discourage third parties from contributing to proceedings in which they may assist the court and the parties to make a just determination of a claim.

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

121. No we do not. It is incumbent on the Government to provide this evidence if it wishes to bring about change. We disagree that change is necessary and are not aware of any abuse of the current regime.

Leapfrogging

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant

infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

122. We do not object to cases being dealt with more quickly and at a more proportionate cost. However, we would be concerned if those at the centre of the most important cases were deprived of a "bite of the cherry" in the appellate process.

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

123. YLAL does not have a view on this.

Option 2 - Consent

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

124. YLAL does not have a view on this.

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

125. YLAL does not have a view on this.

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

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

126. YLAL does not have a view on this.

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

127. YLAL does not have a view on this.

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

128. YLAL does not have a view on this.

Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment? The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

Risk to small and medium sized firms practising public law

129. Impact Assessment (IA) MoJ 215 states that the LAA will have the discretion to pay for work undertaken in certain cases which conclude prior to a permission decision. However, the IA does not explore the problems surrounding the fact that providers will have to rely on the LAA fairly exercising this discretion once the work has been undertaken and costs incurred by the firm. Providers are justified in this concern, as the LAA has been reluctant to make discretionary payments in the past. For example, claimants have found it extremely difficult to obtain exceptional funding since April 2013.

130. Further, this IA does not take into account the time and costs that are likely to be incurred by providers in challenging negative decisions of the Legal Aid Agency.

131. YLAL is also concerned that the Government has not given any indication of the proportion of cases in which the LAA will exercise this discretion, or undertaken any analysis of the effect this will have on small and medium sized firms and chambers.

132. For providers in a particularly weak financial position, this risk of non-payment by the LAA will be too great. YLAL considers that many providers will no longer be able to conduct judicial review work for this reason. We expect some specialist public law firms and chambers will be forced to close.

133. This IA does not recognise that, for the many public law firms that are facing extreme financial difficulty in the wake of legal aid changes, even the most negligible risk that no payment will be made for the work will be too great. It is likely that many providers will cease to undertake legally aided judicial review cases as a result. This will make it harder for vulnerable and disadvantaged individuals in need of legal assistance to find legal advice and representation.

134. This IA stresses, for example in point 25, that "fewer weaker Judicial Review permission applications will be made." However, for the reasons set out in this consultation response, should the proposals be enacted, fewer strong permission applications will also be made, and the interests of society will not be protected.

Alternative sources of funding

135. YLAL considers that the suggestion in Impact Assessment (IA) MoJ 215 that firms may be able to continue with this line of work but with funding from alternative sources is deeply flawed. Third sector groups are now less likely than ever to be able to fund individuals' legal cases due to recent reductions in their own funding.

136. At point 38 it is stated that individuals may “represent themselves in court as litigants in person, pay for private representation or decide not to tackle the issue at all.” The implications of this have not been properly explored. The issues dealt with by way of judicial review are often extremely complex. An increase in litigants in person will pose further costs for the court system, and for defendants. Individuals that would be assessed as financially eligible for legal aid do not have the resources to pay for private representation. In many cases, the decision not to "tackle the issue" will have a devastating effect on the individual in question and, in some cases, will lead to more extensive costs to other government agencies.

Reallocation of firm resources

137. IAs 210, 212, and 215 all state that a key benefit for these proposals for legal aid providers is that “in cases where less work is undertaken resources would be freed for other profitable activities.” This statement is borne out of an ignorance of the complex

and valuable work carried out by legal aid firms specialising in public law and judicial review. Such firms employ highly skilled fee earners with extensive experience in representing vulnerable individuals. Should firms be forced to discontinue this socially valuable work, these lawyers and barristers would be made redundant, and many of the firms would be put at a real risk of closure.

138. Further, the work of these individuals and of the firms in question is driven by a dedication to justice, the rule of law, and protecting the interests of individuals. As a consequence, firms constantly balance the need to carry out poorly paid legal aid work in order to protect clients' interests, and to run a successful and profitable business. It is unreasonable to suggest that there are feasible "profitable activities" that are simply not being investigated by such firms.

Summary - impact on providers

139. The effect of these proposals on law firms and other SMEs would be devastating. YLAL considers that the IA does not reflect the true extent of this.

140. Businesses that will be at particular risk are as follows:

a. Specialist public law firms that do not have other departments to subsidise the work, or cannot afford to have a loss-leading department;

b. Law firms and barristers chambers that have already been affected by the changes to legal aid. These firms will not be able to survive further financial challenges. Many businesses have already been stretched as far as possible by the changes to date. The well-renowned chambers Tooks has dissolved and publicly announced that "[t]he dissolution of Chambers is the direct result of government policies on Legal Aid;"[42] and

c. Third sector advice providers. Providers that have already had to close centres or been forced into administration in the wake of legal aid changes include Shelter, Law for All, Birmingham Law Centre, and the Immigration Advisory Service.

Summary - impact on clients

141. Most importantly, the consequences of the proposals for providers will be passed on to the clients. The IAs do not reflect this. The vulnerable and disadvantaged individuals that currently benefit from these services will find it much more difficult, if not impossible, to obtain legal advice.

142. IA MOJ 210 repeatedly states that "it has not been possible to fully monetise the impacts of this reform at this time" but that further quantification will be sought throughout the consultation process. Given the unavailability of this information, YLAL considers it premature to pursue these proposals.

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

143. The reduction in the provision of legal advice will impact particularly on vulnerable clients, who are more likely to have a protected characteristic. For example, it will be

[42] http://www.tooks.co.uk/

more difficult for a disabled individual in need of further community care assistance to find a solicitor to judicially review a decision of their local authority not to provide the services that they require.

144. Immigrants and asylum seekers may be disadvantaged disproportionately by the proposals as a whole, owing to the large number of judicial reviews in this area.

145. Law firms that provide advice in this area, in particular those that conduct a large volume of publicly funded work, often have limited resources and therefore are not able to pay high salaries. Further, they may not be able to provide financial assistance for the legal and professional courses that staff must complete in order to pursue a career as a solicitor or barrister. If these firms lose income, it is inevitable that financial benefits for staff will not rise with the cost of living, and may decrease. This will increase the significant financial barrier to entry into this practice area that already exists, thereby making it even more difficult for those from disadvantaged backgrounds, who are more likely to share a protected characteristic, to enter the profession.

Young Legal Aid Lawyers
October 2013