



**THE ASSOCIATION OF PRISON LAWYERS**  
THE APL IS THE PROFESSIONAL ASSOCIATION OF PRISON LAWYERS IN ENGLAND & WALES

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By [admin.justice@justice.gsi.gov.uk](mailto:admin.justice@justice.gsi.gov.uk)

Dear Sir/Madam,

**Re: "Judicial Review: proposals for further reform" Cm 8703 September 2013**

This is the response by the Association of Prison Lawyers ("APL") to the Ministry of Justice consultation paper, "*Judicial Review: proposals for further reform*".

**The APL**

1. The APL was formed by a group of specialist prison lawyers in 2008 to represent the interests and views of practitioners in prison law. It currently represents the interests of around 360 members who specialize in representing prisoners in judicial proceedings. The membership is made up of around 300 firms of solicitors and around 60 individual members (who include specialist counsel).

2. APL members have extensive experience of representing prisoners in the Administrative Court and have witnessed and played a part in the development of public law in the prison context over the past three decades. Some of our members have been representing prisoners for well over twenty years.

### **Introduction and executive summary**

3. The APL has responded in detail the previous consultation on proposals for reform of judicial review, and to the Transforming Legal Aid consultation.<sup>1</sup> The APL has also provided comprehensive submissions to the Joint Committee on Human Rights on this subject<sup>2</sup>. This response should be read in conjunction with our previous responses and submissions.

4. Meaningful and effective access to the Court is critical for prisoners or those who have sufficient interest in protecting their interests. This was recognised in a recent Supreme Court judgment by Lord Reed who stated that

“...procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear...”<sup>3</sup>

5. Lord Reed also pointed to the potentially grave consequences of unfair decision-making prisoners on the both the prisoner and the public:

“The potential implications [of unfair decision-making] for the prospects of rehabilitation, and ultimately for public safety, are evident.”<sup>4</sup>

6. Judicial review has also been a critical mechanism to shine a light behind the closed doors of the prison system. Stephen Sedley, a former Lord Justice of Appeal, and

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<sup>1</sup> [http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/06/APL-Legal-Aid-Consultation-Response.Final\\_.03.6.13.pdf](http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/06/APL-Legal-Aid-Consultation-Response.Final_.03.6.13.pdf)

<sup>2</sup> [http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/09/JCHR-Written-evidence-submitted-by-the-Association-of-Prison-Lawyers\\_2013\\_09\\_27.docx](http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/09/JCHR-Written-evidence-submitted-by-the-Association-of-Prison-Lawyers_2013_09_27.docx)

<sup>3</sup> *Osborn and Booth v The Parole Board* [2013] UKSC 61 at para 72

<sup>4</sup> *Osborn and Booth v The Parole Board* [2013] UKSC 61 at para 70

currently a visiting professor at Oxford, recently<sup>5</sup> described judicial review in prison law as:

“[A]n area of legal practice which since 1980 has let much needed daylight into a system which until then stood largely outside the law.”

7. This consultation, as noted above, has been issued shortly after extensive previous consultations on judicial review and public funding. Only 8 weeks has been provided to respond to wide ranging and important proposals that will overturn rules that have been developed through careful judicial consideration over decades. APL does not consider that this timetable has provided sufficient time to respond to issues of such constitutional importance.

#### *Flawed basis for 'reform'*

8. This consultation document raises similar concerns in relation to the rationale and evidence base for the proposed changes. In particular APL does not recognise the validity of the issue raised in the consultation document's introduction regarding the “use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making”. No proper evidence is provided to justify this concern. The reality is that the proposals are founded, as in the earlier consultations, on a failure to understand the role of judicial review in preventing misuse of power by the executive.

#### *Standing*

9. The courts have recognised the important role that non-governmental organisations (NGOs), other groups with special expertise in areas of government policy, and even individuals with genuine concern, can play in bringing such misuses of power to their attention through judicial review. This is the case even where the body or individual is not directly affected. It is against this background that the special rules on standing and orders for costs have developed in judicial review.

#### *Procedural defects and the Equality Duty proposals based on misunderstanding of role of Judicial Review*

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<sup>5</sup> *London Review of Books*, 12 September 2013, available at <http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers>

10. Similarly the proposals on how the courts should approach cases involving procedural defects in decision-making, and those where the public sector equality duty (PSED) is engaged, fail to understand the role of the judicial review court. In particular, it is not the court's role to second guess the outcome of a lawful decision making process.

### **Responses to the consultation questions**

**Questions 1 to 8: The APL does not propose to respond to these questions as they relate solely to judicial reviews of planning decisions and challenges to infrastructure projects.**

### **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 examples?**

11. The APL **DOES NOT** consider that there is a problem with cases being brought where the claimant has little or no direct interest in the matter.

*Constitutional role of judicial review: someone should be able to hold the state to account*

12. The case set out in the consultation document for change fails to appreciate the constitutional function of judicial review, which is to provide a check on abuse of power.

13. As Baroness Hale, noted in her address to the Public Law Project conference in October 2013:

“the issue is not about individual rights but about public wrongs. There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.”<sup>6</sup>

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<sup>6</sup>[http://www.publiclawproject.org.uk/data/resources/144/PLP\\_conference\\_Lady\\_Hale\\_address.pdf](http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf)

14. Accordingly the courts' approach in interpreting the sufficient benefit test has ensured that the question of standing to bring proceedings has not prevented the executive from being held to account. For example, in *R v Secretary of State for the Home Department ex parte Bulger* [2001] EWHC 119, the Court noted at para 20 that the threshold for standing was set at a low level "because of the importance in public law that someone should be able to call decision makers to account". It is of note that this case was one where standing was refused.

15. This is particularly important in the context of closed institutions such as prisons, young offender institutions, secure training centres, immigration removal centres and special hospitals. There are a number of NGOs with particular expertise who are sometimes the appropriate claimant. In certain cases, they are the only possible claimant.

*NGOs may be the most appropriate or only possible claimant*

16. One example is the work of the Howard League for Penal Reform, which has its own legal department that has issued many important judicial reviews. It was a Howard League case in 2003<sup>7</sup> that established that the Children Act 1989 applied equally to children in prison and resulted in child protection procedures being developed across the secure estate. This is an extremely important decision which has had positive consequences for vulnerable children in prison. The judge hearing that case commented that "the Howard League has performed a most useful service in bringing to the public's attention, matters which on the face of it ought to shock the conscience of every citizen".

17. An example of a case which could not have been brought by an individual is where the Children's Rights Alliance for England (CRAE) brought a judicial review to try and establish accountability for years of use of force against children in the secure detention estate, which was accepted as unlawful by the Ministry of Justice.<sup>8</sup> The judge stated "[t]he Claimant has served well the interests of those for whom it is concerned by shining a light into a corner that might otherwise have remained in the dark. It

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<sup>7</sup> *R. (Howard League) v Secretary of State for the Home Department and the Department of Health* [2003] 1 FLR 484

<sup>8</sup> *CRAE v Secretary of State for Justice* [2012] EWHC 8 Admin

remains to be seen whether, having done so, some of those who were the subject of unlawful restraint emerge to challenge and pursue what took place when they were detained.”

18. The issue in that case was the extent of the duty of the Ministry of Justice to take steps to ensure individuals were aware of how they could seek accountability for their mistreatment. Accordingly no-one in the directly affected group was in a position to be an individual Claimant.

19. Similarly, the judicial review brought by Medical Justice<sup>9</sup> which successfully challenged the Home Office policy of giving insufficient notice of removal, simply could not have been brought by the victims of the unlawful policy as they would have already been deported. The effect of the unlawful policy was to prevent the detainees having access to the court.

*No evidence to support the case for change*

20. The APL does not consider that there is any evidence to support a case for change, and in particular that claims are brought solely to gain publicity, cause delays, or in the words of the forward to the Consultation document, in pursuit of “cheap headlines”.

21. The APL agrees with the Public Law Project (PLP) that the evidence presented at paragraph 78 of the consultation document is insufficiently precise in order to make a case a reform. The consultation document itself recognises that claims brought by NGOs are more successful than other JR cases. The two mentioned in the body of the document, apparently to justify the case for change, were successful cases that prevented the transfer of detainees into conditions where they were likely to be tortured, and prevented abuse of the foreign aid programme respectively.<sup>10</sup>

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<sup>9</sup> [2011] EWCA 1710. Medical Justice is a charity that works to protect the rights of those detained under immigration powers.

<sup>10</sup> The *Evans* and *Pergau Dam* cases referred to in paras 75 – 76 of the Consultation document.

22. Further, research by the Public Law Project<sup>11</sup> has found that contrary to the assertion in the paper that 'around 50' judicial review claims are issued each year by 'NGOs, charities, pressure groups and faith organisations, i.e. by claimants who may not have had a direct interest in the matter at hands' (paragraph 78), between July 2010 and February 2012 there were only three non-environmental challenges that reached final hearing, brought by NGOs alone. These were brought by the Child Poverty Action Group, Medical Justice and the Children's Right Alliance. A few other challenges were brought by interest groups and individuals<sup>12</sup> or commercial bodies<sup>13</sup> directly affected. However, such cases would not be affected by the proposed restrictions on standing as the individuals or commercial bodies involved would be able to demonstrate a direct interest in the challenges.

23. These facts contradict government assertions of abuse and raise questions as to the rationale and evidence relied upon by the government in proposing such far reaching restrictions on access to judicial review.

**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?**

24. **NO.** The APL considers that, for the reasons set out above there is no case for change. To amend the current test for standing would inevitably mean that some abuses of power would go unchallenged. In applying the current rules on standing the courts are required to treat the merits of the claim as an important, if not dominant, factor. Other significant factors are the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger and the nature of the breach of duty against which relief was sought.<sup>14</sup> This approach means that the courts are already alert to any abuse of the current rules on standing.

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<sup>11</sup> Summarised in a briefing paper available at

[http://www.publiclawproject.org.uk/data/resources/143/JR\\_Proposals\\_for\\_further\\_reform\\_briefing.pdf](http://www.publiclawproject.org.uk/data/resources/143/JR_Proposals_for_further_reform_briefing.pdf)

<sup>12</sup> e.g. *Bone and National Secular Society v Bideford Town Hall*.

<sup>13</sup> e.g. *Homesun Holdings and Friends of the Earth v Secretary of State for Energy and Climate Change*

<sup>14</sup> *Ex parte WDM* [1995] 1 WLR 386

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

25. **NO.** Again APL rejects the premise of this question and does not accept that there is a “problem” of judicial review being used as a campaigning tool. The consultation document provides no evidence on this issue to justify any proposals to change the approach to standing in judicial review. APL understands that this question (see paragraph 90 of the consultation document) is premised on the assumption that if rules on standing were tightened, then rules on interveners and interested parties might need to be altered. APL considers that consultation document sets out no basis for altering the current relationship between the rules on standing, and those relating to interveners and interested parties.

**Procedural Defects**

**Question 12: Should consideration of the “no difference” argument be brought forward to permission stage on the assertion of the Defendant in the Acknowledgement of Service?**

**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?**

26. **NO.** APL is concerned that no evidence has been produced to demonstrate that there is any concern over how the courts currently approach the issue of procedural flaws in decision-making and whether to grant a remedy. Further it is unclear what is the intended scope of cases involving “procedural defects” (for example bias). There is in fact a danger in seeking to devalue the court’s role in ensuring that decisions of public bodies are made following a lawful process. It is contrary to the interests of justice and good public administration to remove the means to enforce rules designed to ensure good decision making. This critical importance of procedural fairness regardless of the outcome was reinforced as an important common law concept by the Supreme Court in *Osborn and Booth v The Parole Board* [2013] UKSC 61, at paragraph 67ff:



“There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested.... the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.”

The Court outlined the two important values as ‘the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel’ and ‘the rule of law’ (see below).

27. Thus, the distinction made in the consultation paper between cases where the unlawfulness relates to a “procedural defect” rather than “substantive illegality” (see paragraph 99) is misplaced. It is not generally the reviewing court’s role to reconsider the merits of the decision under challenge (see further below).

28. It is difficult to understand how bringing forward consideration as to whether the unlawful decision making made “no difference” achieves the aim of allowing courts to deal more swiftly with cases. If the point is raised in the Acknowledgement of Service (AOS) it is likely there will be more need for oral hearings, longer statements of case, and more extensive preparation at the permission stage.

29. The proposal would also risk increasing the risk for claimants’ lawyers where they are acting under a legal aid certificate should the proposals on funding at the permission stage be implemented. The potential increase in costs risk would further impact on representatives’ willingness to act. This in turn would affect clients’ access to the Courts. It should be noted that the practical benefit to the claimant is already a factor considered in the grant of public funding.

**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?**

30. **NO.**

31. As noted above the premise of this question is premised on a false distinction between “procedural defects” and “substantive illegality”. The approach of the courts on this issue recognises that the judicial review court is usually concerned with the lawfulness of procedure, and does not generally consider the merits of a decision. Accordingly the court will only withhold a remedy where the same decision is inevitable – “[p]robability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision.”<sup>15</sup> In this sense the current consultation document makes the same error as the previous one in assuming that because an unlawful decision will be made again by the original decision-maker, that the victory is somehow “pyrrhic”.

32. There is also a danger in attempting to second guess the outcome of lawful decision making:

“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, 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.”<sup>16</sup>

33. As noted above, the courts have also recognised that the purpose of a fair procedure is not merely to improve the chances of the tribunal reaching the right decision. In *Osborn and Booth*<sup>17</sup>, a successful challenge to the lawfulness of parole procedures, Lord Reed held that at least two other values are engaged: firstly “the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that

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<sup>15</sup> *Smith v NE Derbyshire PCT* [2006] EWCA Civ 1291 at para 10

<sup>16</sup> *John v Rees* [1970] Ch 345 at para 402

<sup>17</sup> [2013] UKSC 61 paras 67 - 72

justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions"; and secondly "the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions."

34. The APL also considers that good public decision-making will be better encouraged by the maintenance of the current approach. The proposed change could provide an incentive for decision makers to bypass fair procedure on the assumption that if they consider this made "no difference" to the outcome, the court will not be likely to quash the decision. This is especially the case in prison law matters where prisoners have so little control over their lives, every aspect of which is regulated by rules, policies and procedures.

**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?**

35. The APL does not consider that the impact of judicial reviews brought on the grounds of "procedural defects" should be addressed by any changes to the procedures applicable to such proceedings. The obvious way to ensure that the numbers of such challenges are reduced is to take steps to improve the quality and lawfulness of decision-making by public bodies.

**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)?**

36. We do not have evidence of negative impact caused by cases brought on the grounds of procedural defects. However, it is the experience of APL members that it is often the case, for example in Category A and parole cases, that where decisions that were flawed are remade following a successful judicial review (including those cases which

are conceded before or after a grant of permission) that the outcome is positive for the prisoner.

## **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.**

37. **NO.** Again the APL does not accept that the consultation document justifies a different procedure for resolving disputes involving the PSED. As has been noted in the ILPA response to this consultation, the document provides a partial analysis of the independent Steering Group's investigation of the PSED. The Group found that it was a lack of clear guidance on how to implement the PSED had led to the adoption of overly onerous practices by some public bodies,<sup>18</sup> and respondents in fact reported that case law was helpful in the absence of any formal guidance on the meaning of "due regard", a term that was ambiguous and not adequately qualified in the Equality Act.<sup>19</sup>

38. The consultation states that the court where it concludes that there has been a failure to comply with the PSED that "often it only orders that body to re-take the decision." This again demonstrates the same failure to understand the role of the judicial review court as noted above. It also, in line with the consultation paper's view of "procedural defects", risks encouraging bad decision making by public bodies. In a case involving failure to comply with race equality duties before laying rules before parliament permitting use of force against children in the secure estate for reasons of "good order and discipline" Buxton LJ held, when quashing those rules<sup>20</sup>:

"Leading judges have stressed the importance of [Race Equality Impact Assessments] as an instrument in guarding against race discrimination. They include Arden LJ in *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*, para 274 and Sedley LJ

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<sup>18</sup> Government Equalities Office, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013, page 16.

<sup>19</sup> *Ibid*, p.28

<sup>20</sup> *R (C) v Secretary of State for Justice [2008] EWCA Civ 882* at para 49

in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 ... Inattention to it is both unlawful and bad government."

39. As with other types of procedural error "it is not normally for the Court to anticipate or pre-empt what a lawful decision would be if the correct process had been followed".<sup>21</sup>

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

40. The APL is not in a position to provide evidence of this sort. It is of concern that this consultation has been issued before such evidence is available. The government should not proceed with any changes until such information is obtained.

**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?**

41. **NO.** This proposal is a modified version of that contained in the Transforming Legal Aid consultation, namely that legal representatives would not be paid under a funding certificate unless permission was granted.

42. This modified proposal fails to properly take into account the APL and others made of the original proposals.<sup>22</sup> The proposal in Transforming Legal Aid asserted that there is a low number of judicial review cases where a 'substantive benefit to the client' is achieved. This assertion is factually inaccurate as set out in the APL's earlier response. The PLP research into outcomes in judicial review<sup>23</sup> shows that a substantive benefit to the client was achieved in over 40% of the non-immigration judicial reviews based on the statistics available in 2011.

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<sup>21</sup> *R (HA Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 Admin at 200

<sup>22</sup> see paras 104 – 115 of the APL response to Transforming Legal Aid

<sup>23</sup> <http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf>

43. The proposals again fail to take properly into account the fact that in many cases, a clear analysis of the merits of a case may be difficult to assess at the permission stage, especially as this might pre-date disclosure of relevant material by the Defendant. It is wrong to suggest as the consultation document does that the provider is necessarily “well placed to assess the strength of their client’s case and the likelihood of it being granted permission” (para 123).

44. This in turn may have the effect of inhibiting development of the law. There are many examples of cases that have provided important clarification of the law where permission was not granted until the case reached the higher courts, precisely because of uncertainty over the law. For example in the prison law context the following cases were only granted permission in the Court of Appeal, and were only successful in the House of Lords or Supreme Court:

- a. *Daly*<sup>24</sup> – involving the lawfulness of a cell-searching policy, the case became a leading authority on how the courts should approach lawfulness of decision-making following the coming into force of the Human Rights Act 1998.
- b. *Smith and West*<sup>25</sup> – a case that established that the Parole Board had been applying an unlawful approach when considering whether recalled prisoners should have an oral hearing before the Board.
- c. *Osborn and Booth*<sup>26</sup> – a recent re-visit by the Supreme Court to the lawfulness of the Parole Board’s approach to oral hearings.

45. In these circumstances it is unworkable to place the costs risk of seeking permission on Claimants’ solicitors, when there has already been substantial cuts made to the rates of payment for civil work in recent years. The proposals will make it less likely that even in meritorious cases Claimants will be able to find competent specialist solicitors who are able to take on the financial risks in bringing judicial reviews. It is misleading to suggest that Claimants, and in particular prisoners, bring judicial reviews as a matter of

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<sup>24</sup> [2001] UKHL 26

<sup>25</sup> [2005] UKHL 1

<sup>26</sup> [2013] UKSC 61

choice. They will in any event be expected by the Court to have exhausted appropriate alternative remedies. If a viable alternative remedy exists the claims will fail the merits test and the Claimant will not therefore be eligible for legal aid.

46. The APL strongly refutes the suggestion that the LAA in any way rubber-stamps the merits assessment made by providers in the legal aid application (see paragraph 122). All applications for funding in prison law judicial review cases are dealt with by a specialist team in the Special Cases Unit (SCU) in the LAA's Brighton Office. In response to a written question in 2010, it was confirmed in the House of Commons that the SCU contained the following expertise: "10 solicitors, three barristers and five legal executives (qualified or in training). They operate in teams specialising in areas of law with senior case managers providing supervision. Senior case managers are typically solicitors and barristers of 20 to 30 years' qualification."<sup>27</sup> There appears to be no recognition whatsoever in the consultation paper of the rigorous process already employed by the LAA in ensuring that the stringent test for public funding is met at the point where applications for funding are made.

47. It is the experience of APL members that the SCU is rigorous, sometimes overly so, in reviewing the merits of funding. APL members have also been appointed as members of the LAA's Special Controls Review Panel (SCRIP), and are responsible for dealing with appeals against the LAA's decisions on funding, and confirm that the SCU is quite capable of identifying weak applications, regardless of the provider's assessment of the prospects of success. To suggest that there is any institutional presumption in the LAA to accept the provider's assessment of the merits of the case is fanciful.

48. The proposals, by providing a serious financial disincentive to providing representation, will result in more cases being brought by litigants in person at the permission stage. This will place a burden on the Courts and increase costs to Defendants, who will have to ensure that all relevant material is before the Court in accordance with their duty of candour. Cases brought by litigants in person are likely to take up more court time. It

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<sup>27</sup> See House of Commons, Written Answers, Hansard for 8 February 2010, Col 315732, available at <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100208/text/100208w0024.htm#10020854000004>

is not made clear how prisoners or immigration detainees will be able to represent themselves.

49. There may be a perverse incentive for Defendants to not settle cases at the pre-Claim stage, precisely to see if represented Claimants are willing to take the risks of issuing proceedings. All of these factors are capable of imposing far more costs on other parts of the system than the anticipated savings to legal aid of this proposal. None of these appear to have been factored into the proposal.

50. The modified proposal increases uncertainty for claimants' representatives as, in the absence of a costs order a further time consuming process will have to be followed to determine whether the work prior to the permission decision will be paid for. Experience of LAA decision making in relation to applications for exceptional funding suggest that applying criteria to determine whether the provider should be paid will be cumbersome and time consuming.

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

51. **NO.** For essentially the reasons set out in response to the previous question. There is no good evidence to show that the current procedures whereby the LAA assesses merits at the outset before the grant of a funding certificate should be changed.

52. The proposed criteria would in any event provide uncertainty about whether providers would be paid for preparation of permission cases. The notion that the LAA will easily be able to exercise a discretion to identify where "the underlying claim was meritorious and there were good reasons why the provider did not obtain a costs order or agreement as part of their settlement, despite making every effort to do so" is fanciful and is likely to increase significantly, rather than reduce, the administrative burden on the LAA and legal aid providers.



53. A great deal of work goes into drafting letters before claim. Most of this work is currently completed under the legal help scheme. Where the matter arises from an issue within the criminal contract, the provider is able to do this work under the 'associated CLS' scheme. That means that those with expert knowledge of prison law issues may conduct the work even if they do not have a public law contract. Such work is not subject to matter starts. Once the scope cuts bite, the ambit of this scheme will be severely reduced. For challenges affecting issues other than parole or adjudications, the work currently completed under the legal help scheme will need to be undertaken by a firm with a public law contract, using one of their limited matter starts. There has been no promise of an increase in public law matter starts. The impact will be to restrict access to justice or to expect lawyers to do more work for free. Due to the indemnity principle, work undertaken for free will never be recovered – even if the case settles.

### **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?**

54. **NO.** The APL does not consider that the evidence base in support of the consultation document provides any basis to amend the current position that normally (although the court has a wide discretion as to costs) where permission is refused at an oral hearing that the Defendant should not recover costs beyond those relating to preparation of the AOS.

55. As noted in the *Mount Cook* case referred to in the consultation document:<sup>28</sup>

“if a defendant or other interested party chooses to attend and contest the grant of permission at a renewal hearing, the hearing should be short and not a rehearsal for, or effectively a hearing of, the substantive claim. The objects of the obligation on a defendant to file an acknowledgment of service setting out where appropriate his case are: 1) to assist claimants with a speedy and relatively inexpensive determination by the court of the arguability of their claims; and 2) to prompt defendants – public

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<sup>28</sup> [2003] EWCA Civ 1346 para 71

authorities – to give early consideration to and, where appropriate, to fulfil their public duties. It would frustrate those objects to discourage would-be claimants from seeking justice by the fear of a penalty in costs if they do not get beyond the permission stage or to clog up that stage with full-scale rehearsals of what would be the substantive hearing of a claim if permission is granted. Thus, not only the statutory scheme, as supplemented by the Practice Direction and the Pre-Action Protocol, but also the public law context, is different from that governing the generality of civil law proceedings, differences that suggest the need for, and intention to provide, a different costs regime in such cases.”

### **Wasted Costs Orders**

**Question 22: How could the approach to wasted costs orders be modified so that such orders are considered appropriate 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?**

56. It is of note that consultation document does not provide examples of any cases that demonstrate why the current bases upon which the court may make an order for a wasted costs order (WCO) are inadequate. Accordingly the APL does not accept that the current provisions as set out in section 51 Senior Courts Act 1981, as supplemented by CPR 46 and the relevant practice direction need to be amended.

57. The current arrangements penalise legal representatives for any “improper, unreasonable or negligent act or omission”.<sup>29</sup> As with other proposals in the consultation document the suggestion that there is a need for change is based on a mischaracterisation of public law proceedings, and assumptions over the merits of claims that have no evidential basis. The courts have a broad discretion as to costs that is wider than the ability to make a WCO, as recognised by the consultation document<sup>30</sup> and no evidence is provided to justify an extension of such powers.

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<sup>29</sup> Senior Courts Act 1981 s51(7)

<sup>30</sup> In particular the power under CPR 44.11 to make costs orders against legal representatives whose conduct is unreasonable or improper.

58. Moreover the leading case on WCOs that is referenced in the consultation document importantly held that “it is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved”.<sup>31</sup> In publicly funded cases legal representatives have a duty of full disclosure to the LAA when providing assessments of merits.

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

59. For the reasons provided in the response to the last question the APL does not consider that there is any need to change the current provisions on WCOs. Insofar as the consultation document envisages a widening of the circumstances in which a WCO might be awarded the risk is that the process of determining whether one is appropriate will be complicated as it will involve further litigation of the case at the costs stage.

**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?**

60. **NO.** It is not appropriate a party should be deterred from challenging the proposed imposition of a WCO. If unsuccessful at the least such a party will be responsible for their own costs in any event, and possibly the costs of the other party.

**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.**

61. APL does not consider that there is any need to change the current provisions as to WCOs in judicial reviews and accordingly does not consider that there is need in other types of case.

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<sup>31</sup> *Ridehalgh v Horsefield* [1994] Ch 205

## 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?**

62. The APL **DOES NOT** consider that it is appropriate to create a rule that PCOs should not be available in cases where there is an individual or private interest regardless of whether there is a wider public interest.

63. The current rules on PCOs have been developed by the courts conscious of the need to ensure that claimants in defendants in public law proceedings that raise serious matters of public interest.

64. As noted above a key purpose of judicial review is to ensure that abuse of power can be remedied. The courts now recognise that whilst a private interest in the proceedings is a matter to be taken into account in determining whether a PCO should be granted, it should not in itself be conclusive.<sup>32</sup> For these reasons the APL does not accept that any balance has been tipped too far, or that there is a risk that PCOs facilitate the use of judicial review as a “campaign tool”. In her address to the Public Law Project conference, Lady Hale<sup>33</sup> acknowledged that judicial review “costs money” but she also set this against the value brought by public interest applications:

“But it seems to me that the courts, and through them the law and the constitution, get a great deal of help from the people and organisations who bring proceedings or intervene in the public interest.”

65. Restricting the grant of PCOs where claimants have a private interest in the proceedings is clearly inappropriate as it would prevent matters coming before the court, no matter how overwhelming the public interest in the case might be, and no matter how small the private interest.

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<sup>32</sup> See *Morgan v Hinton Organics* [2009] EWCA Civ 107

<sup>33</sup> Lady Hale, Public Law Project, 14 October 2013

66. As with other matters raised in the consultation document there is little evidence presented that the grant of PCOs is actually causative of any problems in the administration of justice. The APL would refer to the submissions of the PLP, especially in relation to the lack of any evidence base, on this point.

67. The PLP has also raised the point that NGOs, which might have compelling reasons to bring a challenge to a public law decision, would (if the proposals on standing are brought into effect) not be able to do so unless they had an interest in the outcome, and then, no matter how serious the issue and limited their means, would be unable to apply for a PCO.

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

68. The current approach of the courts when deciding whether to make a PCO take into account the public interest in the question to be determined, and the respective means of the parties. The APL does not accept that the consultation document has made out any case for change.

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

69. The APL considers that the current case law on applications for PCOs provides a sufficient guidance to courts to ensure that they are only made after consideration of the financial means of the claimant. It is unclear from the consultation document as to what problem this proposal is designed to address.

**Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the**

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

70. **NO.** Such a presumption is unnecessary as the court has a wide discretion to make an appropriate order in all the circumstances of the case. Given that in judicial review proceedings there will often be a massive disparity of resources of claimants as against defendants. In order to obtain a PCO on the basis of the current rules necessitates the applicant demonstrating real financial risk should the order not be made. To provide defendants with added protection against adverse costs order would only serve to exacerbate this imbalance between the parties.

**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?**

71. **NO.** See the response to the previous question. The current rules on the grant of PCOs already require the court to consider the means of the parties. This enables the court to ensure that cases involving the public interest are litigated, but also that parties benefitting from a PCO might face costs consequences of losing. There is no reason to impose limits that would fetter the court's discretion to apply caps, or not, where appropriate.

**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 their own costs from either the claimant or the defendant?**

72. Insofar as the premise of this question is based on an assumption that third party interventions necessarily (see para 170 of the consultation document) have the potential to "significantly increase the legal costs of the case" the APL does not accept that premise.

73. The courts have a wide discretion as to the basis that interventions will be permitted, for example by limiting the intervention to written submissions or a tightly circumscribed length of oral submissions. There is no right to intervene and applications to do so will have to persuade the court that the proposed interveners will contribute to how the issues between the parties should be resolved and add 'real value'.

74. In public law cases this is often important to ensure that the case is put into context. As noted by the PLP it is for this reason that government departments are frequent interveners in judicial review proceedings.<sup>34</sup>

75. The benefit of third party interventions has been recognised at the highest level: "In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance".<sup>35</sup>

76. Despite the recognised importance of the right to apply to intervene, the experience of the APL is that interveners are already normally expected to bear their own costs at all levels.<sup>36</sup> Most interventions are 'pro bono' and provide a genuine public service.

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

77. **NO.** The APL does not consider that it is appropriate that there should be any presumption that interveners should bear the costs of other parties.

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<sup>34</sup> For example *Birmingham City Council v Ali* and others [2009] UKHL 36

<sup>35</sup> Lord Hoffman at para 2 of *In Re E (A Child)* [2008] UKHL 66; see also Baroness Hale's lecture for the Public Law Project, cited above, 14 October 2013.

<sup>36</sup> And the rules of the Supreme Court at 46(3) state that costs will "not normally be made either in favour or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent".

78. The APL agrees with Lady Hale's view as set out in her speech to the PLP Conference on 14 October 2013:

"As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party (rule 46): if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for."

79. The courts are quite capable, by applying the current rules on costs, to properly regulate the conduct of interveners.

**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?**

80. This question is the subject of one paragraph in the consultation document (paragraph 179) and the APL does not understand the concern behind the proposal. As noted the courts already have a wide discretion as to appropriate costs orders, including in relation to non-parties (see CPR 46.2). The APL does not consider that the consultation document has provided any basis for a change to the current arrangements.

**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?**

81. The APL does not have any examples of WCOs or costs orders against interveners or third parties.

82. However, as noted above, the ability of the Court to award PCOs in the appropriate case can be crucial in allowing Claimants to bring proceedings that engage serious



issues of public interest where there might be no individual claimant capable of bringing the case.<sup>37</sup>

## **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?**

83. The APL does not object in principle to the possibility of important cases being dealt with more quickly with the agreement of the parties. Such an approach does risk depriving the Supreme Court of the judgment of the Court of Appeal or the possibility of the matter being resolved at a lower level with reduced costs.

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

84. Subject to the risks highlighted above, it may be that cases where the delay causes a severe detriment to the parties, such as prolonged detention or deprivation of fundamental rights, may be suitable for consideration for leapfrogging.

### **Option 2: Consent**

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

85. No. Given the risks highlighted above, we do not consider this requirement should be removed.

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

86. See above.

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<sup>37</sup> For example see the *CRAE* and *Medical Justice* cases at footnotes 4 and 5 respectively above.

**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?**

87. This is not within the APL's sphere of expertise. We endorse the response by the Immigration Law Practitioners' Association (ILPA).

**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?**

88. This is not within the APL's sphere of expertise. We endorse the response by the Immigration Law Practitioners' Association (ILPA).

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

89. We are unable to respond to this question without further details.

**Impact Assessments and Equalities Impacts**

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

90. No. The APL is concerned that the Impact Assessment does not take into account the impact on providers of these proposals in combination with other cuts and changes to legal aid. For prison law providers, the cuts to the scope of legal aid, amounting to approximately 80 per cent of prison law cases funded by criminal legal aid, the restrictions on associated legal help as a consequence of the scope cuts and the proposed slash in prices may already make prison law practices unviable. The limited matter start scheme may mean that a significant portion of the market with experience

in prison law judicial review work is excluded. The residence test will also have a significant impact in reducing the work that can be undertaken.

91. The impact assessment does not deal sufficiently with the uncertainty provided by the permission or proposed discretionary criteria on providers.

92. The impact assessment does not deal comprehensively with the costs to the LAA and providers of determining whether to allow funding where permission has not been granted (IA, para 28). This is likely to be a painstaking exercise, mirroring comprehensive costs submissions made to Court in cases where the matter proceeds. There is no reference to the costs of satellite litigation challenging such decisions.

93. The impact assessment states that the only impact on the Court service might be a reduction in the number of applications and the reduction in Court fees. However, there is no mention of the likely increase in litigants in person and the increased burden that this places on Court system.

94. Critically, there is no impact assessment of the impact on clients. For prisoners, the scope cuts will mean that judicial review as the remedy of last resort. The hurdles that these proposals present undermine the assertion in Transforming Legal Aid that scope cuts can be justified in part due to the continuing availability of judicial review.

**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?**

95. It is well established that the prison population includes disproportionately high numbers of people with protected characteristics. The submission by the Equality and Human Rights Commission to the Joint Committee on Human Rights<sup>38</sup> notes errors in the original impact assessments produced for the Transforming Legal Aid consultation and states:

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<sup>38</sup> Available at <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/response-to-joint-committee-on-human-rights-inquiry-into-access-to-legal-aid-reform/>

“...estimates vary from five per cent (according to the prison database) to 34 per cent of surveyed prisoners self-reporting disability. In relation to mental health, the proportion of mentally ill people in the prison population is not measured routinely. It has been reported that one in ten prisoners has serious mental health problems, and a national evaluation shows that over 70 per cent of adult prisoners have a severe mental illness, substance misuse problem or both. In addition, 62 per cent of male and 57 per cent of female sentenced prisoners have a personality disorder. During 2012, there were over 23,000 recorded incidents of self-harm among prisoners. Research has also identified that 20 to 30 per cent of offenders have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system.”

96. It is the experience of APL members that prisoners struggle to access the Courts without expert representation. In particular, without legal assistance, many prisoners will struggle to complete the internal processes, such as the prisoner complaints process, required to enable them to make an application for judicial review. The Joint Committee on Human Rights heard extensive evidence from experts including the Chief Inspectorate of Prisons as to the difficulties that prisoners with protected characteristics face in navigating the complaints system on 23 October 2013<sup>39</sup>. These difficulties and the consequent bar to judicial review for failure to exhaust all other remedies will effectively hinder prisoners with protected characteristics from access to the Court.

## **Conclusion**

97. For the reasons set out above, the APL urges the Ministry of Justice not to implement the proposals in its paper.

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<sup>39</sup> Available at [http://www.parliament.uk/documents/joint-committees/human-rights/Legal\\_Aid\\_Inquiry\\_Transcript\\_231013.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Legal_Aid_Inquiry_Transcript_231013.pdf)

98. Should you consider it helpful, we would welcome the opportunity to further discuss these issues with you.

Yours faithfully,

Association of Prison Lawyers