

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Response to the Ministry of
Justice's Consultation '*Judicial review:
proposals for further reform*'**

November 2013

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/policy-papers.php>.

Contact

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

Introduction

1. Liberty welcomes the opportunity to respond to proposals with significant implications for the accessibility and operation of Judicial Review (JR) in England and Wales. JR performs a profoundly important constitutional role, allowing individuals, businesses and organisations to challenge the lawfulness of decisions or actions of the Executive including Ministers, local authorities and other public bodies exercising public functions. As the consultation paper acknowledges, JR is “the Rule of Law in action”. Indeed, this narrow and supervisory form of oversight over the legality of executive decision-making is part of our delicate system of checks and balances which must exist for democracy to flourish. JR also occupies a central place within our framework for the protection of civil liberties, providing a vital means of enforcing human rights standards.

2. Following an earlier JR consultation in January this year, Liberty is relieved that the Ministry of Justice (MOJ) has opted not to proceed with earlier proposals to amend the Civil Procedure Rules to require cases involving a continuing breach or multiple decisions to be brought within 3 months of the first point at which a breach occurred. We are also pleased that the MOJ has been persuaded not to remove the right to an oral renewal where there has been a prior judicial hearing on substantially the same matter. The MOJ has however pressed ahead with plans to shorten the time limit for bringing a JR from three months to six weeks in certain planning cases and to thirty days in certain procurement cases; removed the right to oral renewal where a case is assessed without merit on the papers; and introduced a fee for an oral renewal hearing where permission has already been refused by a judge on the papers. For cases lodged in 2012 an oral hearing was requested in 2600 cases and permission to proceed then granted in 300. This is a sizeable number of arguable cases that will now face new significant barriers to accessing judicial review.

3. While the reforms already and soon to be enacted will have a detrimental effect on access to JR they are now dwarfed by the radical proposals set out in the present consultation. Cumulatively, Government proposals will all but shut down the availability of judicial review with grave consequences for central government and local authority accountability and the Rule of Law. Liberty is deeply alarmed by the wrongheaded policies suggested in these latest proposals and equally disturbed by the incoherent and unsubstantiated arguments laid out in the consultation paper. We are also concerned by the manner in which the consultation was launched.

4. In a bizarre, divisive and misleading column in the Daily Mail the Lord Chancellor set out his plans for reform, claiming –

“The professional campaigners of Britain are growing in number, taking over charities, dominating BBC programmes and swarming around Westminster... Britain can not afford to allow a culture of Left-wing dominated, single issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state.”¹

5. Asserting that Government ministers alone are best placed to determine what is in the public interest, he – apparently without irony - attacks seemingly all civil society and pressure groups for ‘political’ campaigning. To attack and diminish one of the most vital checks on State power in such a partisan manner is deeply irresponsible and unbecoming of this great office of State.

6. The Lord Chancellor also appears badly confused over the functions of JR. Under our system of Government the Executive is given a broad and powerful mandate to decide policy and determine policies in the public interest. Contrary to the impression given in the Daily Mail column and consultation paper, JR does not and cannot seek to diminish the Executive’s awesome power in this regard. Indeed in the UK, checks and balances on Executive power remain relatively restricted; for example the doctrine of parliamentary sovereignty ensures that our judges do not have the power to strike down primary legislation which is afforded to judiciaries across the common law world. Against this backdrop, the availability of judicial review to challenge unlawful actions of the State is a vital, but relatively modest, check on the misuse of Executive power. Judges are not able to substitute the Executive decisions with their own and do not seek to determine the correct course of action in public interest. Instead they are able to enquire as to whether a decision is illegal (not taken in accordance with the law that regulates it or beyond the powers of the body); irrational (for not taking account of all relevant factors or such that no reasonable person could have taken it); or procedurally unfair (not in accordance with natural justice or procedural rules). Likewise the judicial remedies available when a JR is successful are modest. The decision can be set aside, declared unlawful or a body can be enjoined or required to do something to address the illegality.

¹ *The Judicial Review System is not a promotional tool for countless Left-wing campaigners*, Chris Grayling, Daily Mail, 6th September 2013.

The proposals

7. The consultation paper sets out six areas for the reform of judicial review:

- Restrict the test for 'standing' so that only those with a direct interest may bring a JR;
- Restrict procedural irregularity or impropriety as a ground for JR;
- Remove JR as a remedy for breach of the Public Sector Equality Duty under section 149 of the Equality Act 2010;
- Sweeping changes to the costs framework;
- Making greater use of 'leapfrogging' orders to move cases more quickly to the Supreme Court;
- Changes to the rules for planning challenges.

8. These proposals must be view alongside the Government's parallel proposal to introduce a ban on legal aid for those who have not been resident in the country for 12 months, seriously undermining the ability of thousands of people to bring a JR.

9. The consultation paper is riddled with unsubstantiated assertions sitting awkwardly alongside broadsides against civil society groups "who seek nothing more than cheap headlines."² Liberty is gravely concerned about these proposals and puzzled as to why the Government continues to pursue reform in an area that on any reasonable and objective view has for years operated efficiently and usefully in keeping Government decisions and actions within the law.

10. The consultation paper does not acknowledge that preventing unlawful action by Government is of itself in the public interest. The view created in the paper is that JR is an unwelcome irritant that exists only to the extent that Government is prepared to tolerate it. On the contrary, decision-making according to law is a hallmark of a civilised and mature democracy; it likely leads to better substantive decisions and it protects the vulnerable from arbitrary abuses of state power.

² Judicial Review Proposals for Further Reform, Ministry of Justice, September 2013, Foreword.

11. However, in our complicated and nuanced constitutional settlement, the check provided by judicial review has been sustained over time as a result of the convention of Executive restraint. As constitutional law expert, Dr Mark Elliott, has observed about the consultation -

“the most concerning matter is the underlying – but very clearly implicit – assumption that the nature of the relationship between the government and the courts falls to be determined by the former (with the assistance of Parliament where necessary). It is the very fact that such lop-sidedness is hardwired into our existing constitutional arrangements that makes political restraint imperative; and it is precisely such restraint that is increasingly lacking.”³

12. The Government’s purported arguments for reform can be summarised in the following way – JR is used inappropriately as a campaigning tactic to cause delay, generate publicity and frustrate proper decision-making; JR is a tool of the left and furthers a left-wing vision of how society should be organised; JR hinders economic growth; the use of JR has and continues to grow in an unsustainable way. Before addressing the substantive proposals in turn we will address the various justifications put forward for the radical reforms suggested.

Use of JR to cause delay, generate publicity and frustrate proper decision-making?

13. In his opinion piece the Lord Chancellor argues that *“many [JRs]... are used by campaign groups as a legal delaying tactic for something they oppose”*. The consultation repeats this claim, saying *“The Government is concerned about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made.”⁴* No evidence in support of his view is cited.

14. This claim would suggest that an inordinate number of mischievous JRs are being brought by NGOs and other interest groups, knowing full well that their claims

³ *New Ministry of Justice consultation paper – Judicial Review: Proposals for Further Reform*, 6th September 2013, Dr Mark Elliott, published at - <http://publiclawforeveryone.wordpress.com/2013/09/06/new-ministry-of-justice-consultation-paper-judicial-review-proposals-for-further-reform/>.

⁴ *Judicial Review Proposals for Further Reform*, Foreword.

are spurious and without merit. However this fantasy collapses on a cursory examination of the statistics concerning this so-called phenomena –

“From Administrative Court records for cases lodged between 2007 – 2011 around 50 judicial reviews per year have been identified that appear to have been lodged by NGOs, charities, pressure groups and faith organisations, i.e. by claimants who may not have had a direct interest in the matter at hand”.⁵

50 claims out of a total of 12,400 per year means that 0.4% of JRs are brought by the interest groups that the Lord Chancellor suspects are abusing the system. Even more tellingly the consultation is further forced to acknowledge that –

The [NGO, interest groups etc] cases tended to be relatively successful compared to other JR cases; on average around 20 were granted permission per year, around 13 were heard at a final hearing with 6 being successful for the claimant.”

Perhaps the relative success of expert challenges to Government decision-making is the real cause of frustration? In any event the higher success rate for NGO JRs at permission and final disposal indicates that NGOs are not abusing the system as suggested.

15. Overall statistics on the number of total adjudicated decisions that were made in favour of the claimant at final hearing demonstrate that the system isn't generally being abused by individuals either – *“for cases lodged in 2011, around 40% of adjudicated decisions at the final hearings were made in favour of the claimant”.⁶* The high success rate for claimants is not surprising given the many safeguards against abuse. These include fulfilling the 'sufficient interest' test; requirement to obtain permission of the court; court discretion to grant permission in full or only in respect of limited or certain grounds; JR as a tool of last resort after other avenues of redress (such as internal complaints, appeals etc) have been exhausted; short limitation period; and the requirement to complete pre-action protocols that encourage early settlement.

⁵ Judicial Review Proposals for Further Reform, paragraph 78.

⁶ Judicial Review Proposals for Further Reform, paragraph 15.

16. Further, the data shows that a large proportion of JR applications – 40% in 2012 – are withdrawn before consideration of permission by the court. The consultation paper accepts that while “*reasons for withdrawal are not recorded, there is some evidence that suggests that many of these cases may be settled on terms favourable the claimant.*”⁷ As is the case across the civil legal system, the potential for litigation is often sufficient to put right unlawful behaviour. Cases which attract an early settlement are likely to be amongst the strongest. The Government clearly finds this litigation dynamic difficult to accept, suggesting - “*whilst [pre permission stage settlement] may be because the applicant has a legitimate grievance, the Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve.*”⁸ It is difficult to imagine defendant public authorities routinely deciding to settle cases before the permission stage where they think their chances of success are strong. Across the legal system, early settlement occurs when the claimant has a high chance of success. Further, JR proceedings are not protracted and don't involve lengthy delays. It takes on average 83 days for an application for permission to be considered on the papers; 95 days for a permission decision following an oral hearing and 313 days for a final hearing.

Left-wing tool?

17. The Lord Chancellor robustly asserts that JR has become a tool of ‘left-wing campaigning groups’ pursuing political ends. This is an odd critique. Most charities, interest groups and trade associations that bring JRs have no party political affiliation whatsoever. Liberty, for example, has no party political affiliation and is a cross party, non-party, campaign for fundamental rights and freedoms. Throughout our 80 year history we have regularly challenged State abuses of power (whoever was in Government); by way of the earlier civil claim route and since the 1980s by way of JR. This has never been done for ‘political’ reasons but rather to hold State power to account and protect fundamental rights and freedoms. Indeed the present Coalition parties often supported our challenges to the last Government.

18. JR is of course also open to individuals and organisations who do have party political links, but as long as they meet the permission requirements and have an arguable case there is no reason of principle why they should be excluded from the

⁷ Judicial Review Proposals for Further Reform, paragraph 12.

⁸ Ibid.

general right to challenge the lawfulness of Executive conduct. And it is of course wildly inaccurate to characterise the use of JR by political individuals and organisations as a conspiracy of the Left. JRs have in recent times been brought by those not known for their left-wing leanings including the Countryside Alliance, the *Daily Mail*, the *Daily Telegraph*, sometime UKIP treasurer Stuart Wheeler, Conservative Peer Lord Rees Mogg and Conservative-run Councils. These applications have concerned decisions on matters as diverse as ratification of the Lisbon Treaty, the high-speed rail link, fox-hunting and anonymity for journalists giving evidence to an inquiry into press conduct and ethics.

19. The other odd aspect to the Lord Chancellor's critique is the implied suggestion that Government exercise of Executive power is apolitical and only ever in the public interest. While the civil society groups he criticises are invariably not politically partisan, he and his Executive colleagues are members of a political party. The Executive does of course rightly have a wide prerogative to determine policy as it sees fit in the public interest. But the reason for checks and balances on Executive power is a recognition that, whether by accident or design, the exercise of political power is vulnerable to arbitrariness and abuse.

Harmful to economic growth?

20. As with the previous JR consultation earlier this year, the Government continues to argue that JR has a detrimental effect on economic growth. This is a powerful and emotive claim to make in the current economic climate, yet the paper offers no evidence that economic growth is unduly hampered by JR. Instead this claim is supported by just one case-study of a planning JR that, while eventually allowed to proceed, was ultimately unsuccessful.

21. It is indeed the case that a properly functioning justice system will lead to the temporary suspension of activities while lawfulness is examined. That's the nature of justice. The Government's argument in this respect is similar to saying that the power of arrest needs to be curtailed because people are sometimes arrested, charged or prosecuted and not convicted. This is not evidence that the justice system is not working, but rather a necessary consequence of the fact that in a healthy and functioning legal system, not all legal action is going to succeed. Indeed if all JRs were successful the Government would no doubt be arguing that this was evidence of the need for even greater reform.

22. There is no statistical analysis which demonstrates any negative link between JR and economic growth. This is unsurprising given the small number of JRs that are brought each year and the even smaller number that relate to infrastructure projects. Very little JR litigation is economically significant, relating as it does to housing, education, community care, prisons, police, mental health, and local authority services that involve vulnerable and disadvantaged claimants. According to statistics published in the journal *Public Law*, in the years 2000-2005, 85% of local authorities only attracted one or two JR challenges per year, with over half of those concerning housing issues.⁹

23. The present consultation forms part of a wider and disturbing trend which, without justification, pitches basic due process and non-discrimination regulation as the enemy of economic growth. The Enterprise and Regulatory Reform Act 2012 contained provisions removing requirements on employers to complete equality questionnaires and abolishing the protection offered to individuals whose employer fails to protect them from harassment in the workplace.¹⁰ Liberty is troubled by this Government's willingness to conflate basic fairness and due process protections with unnecessary and overly-bureaucratic red tape.

Growth in judicial review?

24. As in the previous consultation, the Government continues to argue that JR has "expanded massively in recent years" and is therefore in need of radical reform. This is despite statistics which show that, in all but one area of decision-making, no such growth exists. In his *Daily Mail* column, the Lord Chancellor compares the number of JRs in the 1970s with the present day figure. In doing so he fails to mention that until the early 1980s, challenges to administrative decision making would be brought by way of ordinary civil proceedings as distinct from JR.¹¹ The number of challenges to the legality of Government decisions brought by way of ordinary civil proceedings before 1983 is unknown.

25. Turning to more recent history, the consultation paper presents data on numbers of JRs from 1998 to 2012. In that period JR applications have grown from 4,500 per year to 12,400 applications by 2012.¹² However, as the consultation paper

⁹ Maurice Sunkin etc al, *Public Law* (2007) 545, p. 550.

¹⁰ Sections 65 and 66 of the Enterprise and Regulatory Reform Act 2013.

¹¹ It wasn't until the case of *O'Reilly v Mackmann* [1983] 2 AC 237 that claimants were required to pursue public law matters through Judicial Review.

¹² Judicial Review Proposals for Further Reform, page 8, footnote 4.

accepts “*the main driver of growth in the overall number of judicial review applications has been an increase in the immigration and asylum applications, which more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012*”.¹³ The Chart on page 8 shows the number of JR applications by category between 2007 and 2012. While immigration and asylum JRs have increased significantly, the increase in criminal JRs is negligible and non-immigration civil JRs certainly not ‘massive’, rising from about 2000 in 2007 to around 2700 in 2012.

26. The Government has already introduced measures to deal with the growth of JR in immigration and asylum cases. Responsibility for dealing with these challenges has been transferred from the High Court to the First-tier Tribunal which will remove two thirds of the volume of JRs in the Administrative Court. The “massive expansion” of JR discussed and the corresponding proposals therefore are misdirected.

27. In fact, the number of non-immigration civil judicial reviews in England and Wales is surprisingly low or “infinitesimal”¹⁴ when compared with the scale of Government decision-making and the increased accumulation of power by the Executive. No one knows how many public decisions are made therefore it is impossible for the Government to say whether the miniscule growth in non-immigration civil JRs in the last ten years outstrips the scale of decision-making. It could well be that JRs have actually fallen in relative terms. This would certainly accord with the hyperactivity of the national Executive over the same period and the likely increase in public decision-making that has likely flowed from reams of new primary and secondary legislation. But on any objective analysis 2,700 civil JRs to central government, local authority and public body decision-making in 2012 is a low figure indeed. Furthermore, according to the Government’s own statistics, the number of full or substantive judicial review hearings heard by the courts is decreasing, with 2011 figures down by 14% from 2010.¹⁵

¹³ Judicial Review Proposals for Further Reform, paragraph 10.

¹⁴ Carol Harlow and Richard Rawlings, *Law and Administration* 3rd Ed, September 2009.

¹⁵ *Judicial and Court Statistics 2011*, Ministry of Justice: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-courts-stats-2011.pdf.

Standing

28. One of the Government's central proposals is to restrict "standing" – the legal capacity to apply for a JR of the legality of administrative legislation or Government policy or decision. The current standing test is contained in section 31(3) of the Senior Courts Act 1981 –

No application for judicial review shall be made unless 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.

29. The seminal case on the standing definition is *R v Inland Revenue Commissioners ex parte National Federation of Self-employed and Small Businesses Ltd*¹⁶ where a challenge was brought to a system of exempting casual print workers from investigations into annual tax losses. The judicial review was ultimately unsuccessful but in finding against the Federation, Lord Diplock said –

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 tax-payer...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."

30. Since then the courts have developed a broad standing test. In *R v HM Inspectorate of Pollution, ex parte Greenpeace (No2)*¹⁷ "associational standing" was upheld allowing Greenpeace to issue a claim on behalf of a local community that would be affected by a nuclear facility. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement*¹⁸ another pressure group was granted standing to challenge a government decision to fund a flawed overseas development project. In accepting that WDM had standing the Court stressed the –

"importance of vindicating the rule of law,...the importance of the issue raised,...the likely absence of any other challenger,...the nature of the breach of

¹⁶ [1982] AC 617.

¹⁷ [1994] All ER 329.

¹⁸ [1995] 1 WLR 386.

*duty against which relief was sought...and the prominent role of the applicants in giving advice, guidance and assistance with regard to the subject matter.*¹⁹

31. As it stands then, the standing test is a mixed question of fact and law that will include an assessment of the merits and degree of importance of the challenge, the relationship between the applicant and the matter to which the claim relates, the availability of other challengers, and other relevant factors. Importantly this has meant that on matters of crucial public importance where the State has misused and abused its power, effective challenges can be brought on behalf of disadvantaged or vulnerable members of the community. So for example, the (former) Equal Opportunities Commission was granted standing in relation to a matter concerning sex discrimination due to its “public importance” and ability to “affect a large section of the population.”²⁰ The Joint Council for the Welfare of Immigrants was granted standing to challenge the lawfulness of regulations which denied asylum seekers welfare benefits pending the outcome of asylum applications²¹ and peace activist, Maya Evans, was granted standing to challenge the Defence Secretary’s practice of transferring individuals to the Afghan authorities given concerns over their possible mistreatment.²² However the test is not insignificant and is applied sensibly. While a public spirited citizen without any direct legal interest may be granted standing in a case which presents a serious issue of public importance a ‘meddlesome busybody’ may not.²³ The courts regularly deny permission if they find that there is not sufficient interest.²⁴

32. Despite this, the Government now proposes to narrow the standing test. The consultation paper suggests a few different options –

¹⁹ Ibid and paragraphs 395-6.

²⁰ R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1.

²¹ R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants [1997] 1 WLR 275.

²² R (on the application of Maya Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin).

²³ R v Secretary of State for Foreign & Commonwealth Affairs, ex p Lord Rees Mogg [1994] QB 552.

²⁴ See for example *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors* [2010] EWHC 2312 (Admin) where Mr Justice Williams denied standing to Coedbach, a private limited company, seeking to challenge the grant of planning permission for a biomass-fuelled power station in the Gwendraeth Valley.

- the highly restrictive EU law test of “direct and individual concern”²⁵ which is so restrictive it prevented banana traders from challenging banana import regulations;
- the standing test under the Human Rights Act 1998²⁶ whereby a person may only bring a claim if they are or would be a victim of an alleged breach of human rights;
- the “person aggrieved”²⁷ test used in statutory planning challenges which generally requires prior participation in the decision-making process or a relevant interest in the land in question (e.g. ownership);
- the test for availability of civil public funding for JR which requires a direct interest by the applicant and “...the potential to produce a benefit for the individual, a member of the individual’s family or the environment”.²⁸

33. This proposal is entirely misconceived. Unlike statutory planning challenges and even human rights litigation, judicial review is not the exercise of a private claim. While it is often essential in vindicating individual rights, it is a public law mechanism that is at its heart concerned with correcting *public wrongs*. As Sedley J said in *ex parte Dixon*

*“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.”*²⁹

34. As Dr. Elliott has observed “...everyone, whether or not they are directly affected by an unlawful government decision, has an interest in securing the administrative adherence to rule of law principles.”³⁰ The incalculable public good that results from Government according to law and the vindication of individual rights

²⁵ Article 230 EC individuals may seek annulment of a Community legal act, provided that it is of direct and individual concern to them.

²⁶ Section 7(1) Human Rights Act 1998.

²⁷ Section 288 of the Town and Country Planning Act 1990.

²⁸ Paragraph 19(3) of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

²⁹ *R v Somerset County Council, ex p Dixon* [1998] Env LR 111.

³⁰ *Standing and judicial review: why we all have a ‘direct interest’ in government according to law*, Dr. Mark Elliott, Reader in Public Law at the University of Cambridge, published at www.publiclawforeveryone.wordpress.com.

should barely need stating. As everyone has an important interest in public administration according to the Rule of Law, it follows that the test for standing should be broadly framed allowing (as it presently does) wide judicial discretion to assess among other things the importance and strength of the challenge.

35. The present standing test is also an eminently sensible and practical model for allowing unlawful Government decisions and actions to be effectively challenged. This is because it is often beyond the means of individuals and small business to apply for a JR. As such it is frequently trade associations and other umbrella bodies which bring challenges on their behalf. David Allen Green has noted –

*The case reports are packed with examples of trade associations bringing judicial reviews of muddled but commercially sensitive decision and rule making...the United Kingdom Association of Fish Producer Organisations, the Scotch Whiskey Association, the Hackney Drivers Association, the Infant and Dietetic Foods Association, the Federation of Tour Operators, the British Beer and Pub Association, the National Federation of Fisherman's Organisations, the Association of Plumbing and Heating Contractors and even the National Association of Memorial Masons.*³¹

36. Further, as has been judicially recognised, experienced and expert NGOs and interest groups are often better placed to bring judicial reviews than affected persons. Far from 'overcomplicating things' civil society evidence and expert knowledge typically assists the court and makes litigation less complicated and time consuming. As Otton J observed in granting standing in *ex parte Greenpeace (No 2)* denying standing to a well respected and expert NGO may mean "a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties." This reasoning is supported by the Government's own statistics which record relatively higher success rates for NGOs than individual challengers. Of the estimated 50 judicial review applications submitted by NGOs annually, on average 20 are granted permission per year of which 13 reach final hearing and 6 being successful for the claimant.

³¹ Why Judicial Review Matters and why Grayling's attack on it is wrong-headed" *Financial Times*, 16th September 2013.

37. The purported rationale for this reform is incoherent and appears to be based on a basic misunderstanding about the law and function of JR. The consultation paper argues that Government “*concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest*”.³² This confuses the purpose of judicial review which is not concerned with substantive policy-making but rather the legality of Government decisions. Surely the Government agrees that illegality is never in the public interest? The consultation paper is also badly hampered by an apparent obsession with the supposed ‘political’ aims of certain individuals and NGOs, explicitly seeking “*to exclude persons who had only a political or theoretical interest, such as campaigning groups*.”³³ This is a dangerous view that sits more comfortably with autocratic regimes around the world where NGOs and civil society groups committed to working in the public interest are accused of ‘political’ activity. To deny that civil society groups may legitimately seek to further the public interest by holding the Government accountable to the law is to take a disturbingly narrow view of democratic participation. It doesn't sit easily with our mature and liberal democracy.

38. The proposed standing reform appears to be aimed exclusively at reducing the number of successful JRs brought by civil society and trade associations. It will not have any impact on the numbers of immigration and asylum JRs, the vast majority of which relate to decisions made in respect of individuals who will still be covered by a direct link test.

39. Taken on its own, the likely effect would be that groups who may otherwise have brought a JR will instead find and support an individual affected by a challengeable policy or decision. However, taken with the proposals on funding outlined at Chapter 7, individuals directly affected by Government action will – in all but the most exceptional cases – be prohibited financially from bringing a JR. The cumulative effect of these reforms will be to shut down the availability of judicial review to all – NGOs and individuals.

Third party interventions

40. The consultation paper further proposes that “*if a tighter test for standing were taken forward, the related question of third party involvement in judicial reviews*

³² Judicial Review Proposals for Further Reform, paragraph 80.

³³ Ibid.

*would need to be considered.” Recognising that a tighter standing test would “increase involvement of third parties who could not bring the case on their own accord” the Government says it is seeking views on “whether if it were to move forward with a narrower test for standing, it would also need to modify the rules concerning interveners and interested parties”.*³⁴

41. The Government has not produced evidence to support its proposal to restrict the standing test. It similarly does not produce evidence in support of amending the rules on third party interventions. The fleeting paragraph that deals with this in the consultation paper doesn't even advance arguments as to why this may be a desired course of action, save for recognising that more applications to intervene in cases would likely arise if the standing test were reformed. It is unsurprising that the Government has been unable to produce arguments and evidence in this way. The role of interveners is to assist the court and interveners already require permission (or exceptionally can be invited by the court) to intervene. The courts do not entertain unnecessary interventions. For permission to be granted they need to demonstrate that they will add something material to the legal argument.

42. It is widely recognised that third party interventions – under the present legal framework - can greatly assist the court. Examples of this abound. Liberty regularly intervenes in cases providing expert evidence to assist the court in complicated areas of law, policy and ethics. We intervened in the case regarding DNA collection and blanket retention on arrest under section 64 PACE. In assessing the distinction between DNA samples and DNA profiles in the Court of Appeal Sedley LJ took this view of Liberty's submission -

“This is why I have found Liberty's written submission of great assistance. It avoids the polar positions adopted, as tends to happen in litigation, by the parties and instead reasons by degrees. The distinction which Liberty draws between DNA profiles and the bodily samples from which the profiles are derived is in my judgment crucial to what we have to decide. So too are the evidence and written argument submitted in response by the Home Secretary after the close of oral argument, pursuant to the court's direction. But the true parameter of the debate is in my judgment that addressed by Liberty: not what is currently done under

³⁴ Judicial Review Proposals for Further Reform, paragraph 90.

*section 64 (to which much of the Home Secretary's evidence goes) but what section 64 permits.*³⁵

43. Far from overcomplicating matters, third party interventions can help to untangle difficult areas of domestic legislation, regulation and case law. As Lord Neuberger (then Master of the Rolls) observed in *Ladele v Islington London Borough Council (Liberty, intervening)*³⁶ in the Court of Appeal approving our approach -

*“Liberty's argument is simple, and is based purely on the natural meaning of the 2007 Regulations, and it has three stages. The first stage is an assertion that a refusal to perform civil partnerships, on the part of someone who is quite prepared to perform marriages, amounts to discrimination as defined in reg 3(1) and (3)... The second stage involves the contention that officiating at marriages and civil partnerships involves 'the provision to the public or a section of the public of ... services' within reg 4(1)... I find it hard to see any logical flaw in those two stages of the argument, at least once Ms Ladele had been designated a civil partnership registrar. The third, and final, stage in Liberty's argument is that, even if Ms Ladele had succeeded in establishing that Islington would not otherwise have been entitled to require her to perform civil partnerships, the effect of this analysis of the impact of the 2007 Regulations means that, at least once Ms Ladele was designated a civil partnership registrar, Islington were not merely entitled, but obliged, to require her to do so.”*³⁷

44. In *R (on the application of Suppiah) v Secretary of State for the Home Department*³⁸ concerning the application of the Home Office policy on the immigration detention of families, Liberty intervened to provide an extensive treatise of the law in this area and furnished the court with details of Bail for Immigration Detainee's casework and research findings. The court subsequently held that the UKBA had failed to apply the policy properly and its operation was therefore unlawful.

45. In another, very recent, example of the value of third party interventions in important JRs, in *HC v Secretary of State for the Home Department and Metropolitan Police*³⁹ the High Court considered whether the Home Secretary had acted

³⁵ *R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275 paragraph 72

³⁶ [2009] EWCA Civ 1357.

³⁷ *Ibid* from paragraph 68.

³⁸ [2011] EWHC 2 (Admin).

³⁹ [2013] EWHC 982 (Admin)

irrationally in refusing to change the rule that 17 year olds should be treated as adults for the purposes of criminal custody. This followed two tragic cases of suicide following the separate arrest and detention of two 17 year old boys. The High Court found that the Home Secretary's refusal to treat 17 year olds as children for the purposes of custody breached Article 8 of the *Human Rights Act 1998*. In Annex B to the judgment the Court said -

“Much of the substantial material with which the court was provided came as a result of the submissions of the two interveners. A single judge, who it was not intended should sit on the application, gave permission for Coram Children’s League Centre and the Howard League to intervene in writing.... Many of the important arguments were not contained in the claimant’s submissions but rather emerged, if one delved into the interstices, within the intervener’s submissions.”

46. Indeed it would be odd for the UK Government to act to restrict third party public interest interventions given it has made such interventions itself in court cases in other jurisdictions including in the US Supreme Court and the European Court of Human Rights. In *Kiobel v Royal Dutch Petroleum and Shell Petroleum*⁴⁰ the US Supreme Court considered whether corporations can be held liable under the US Alien Tort Statute for aiding and abetting torture as it was alleged RDP and Shell had done in assisting the Nigerian military dictatorship from 1992 to 1995. The companies were accused of assisting the Nigerian Government in torturing and executing Ogoni activists including allegations that the military and police killed raped and detained Ogoni activists with the logistical and financial support of RDP. The UK Government successfully intervened alongside the Dutch Government to argue against the extraterritorial liability of corporations under the legislation, arguing that prohibitions on such conduct only apply to natural persons. In *Saadi v Italy*⁴¹ the UK Government intervened in the Court of Human Rights in Strasbourg to unsuccessfully argue that the absolute prohibition on torture should be diluted in respect of the deportation of foreign nationals so that any perceived threat posed by an individual could be weighed into the balance before determining whether removal should take place. The UK also argued for the standard of proof that an individual faced a risk of ill treatment to be lowered. In *Scoppola v Italy*⁴², the UK Government intervened again in the Court of Human Rights to argue that a blanket ban on prisoners voting fell within the

⁴⁰ *Kiobel v Royal Dutch Petroleum, Shell Transport and Trading Co and Shell Petroleum Development Company of Nigeria Ltd* (Shell Transport and Trading Co is a subsidiary of RDP).

⁴¹ *Saadi v Italy*, (Application no. [37201/06](#)), 2008.

⁴² *Scoppola v Italy* (No 3) Application no. [126/05](#), 2012.

margin of appreciation afforded to States and the disenfranchisement of an entire category of people could not therefore be regarded as manifestly arbitrary. Given the UK Government's recent enthusiasm for third party interventions in pursuing matters that it deems in the public interest we urge it to continue to allow others to do the same domestically in regards to judicial review.

Procedural Defects

47. Chapter 5 of the consultation proposes reform where JRs are sought on the basis of procedural defects. The courts have established a 'no difference principle' so that when a court is satisfied that the outcome of a decision would inevitably have been the same if the procedural defect had not occurred, it can refuse the remedy sought.⁴³ The courts have rightly approached this principle with great caution. The separation of powers doctrine demands that, where considering applications for judicial review, judges do not seek to put themselves in the decision-maker's position and substitute Executive with judicial decision-making.

48. The Government now proposes either (a) bringing forward the point at which 'no difference' arguments can be considered or (b) lowering the threshold by introducing a new statutory threshold that replaces the present requirement of inevitability that the same conclusion would have been reached to one which required it was only 'reasonably clear' that the flaw would not or could not make a difference.

49. Option (a) is unnecessary. It is already open to the defendant to argue that an alleged flaw would have made 'no difference' at any stage of the process, including in the Acknowledgement of Service. It is also the case that the court is unlikely to be able to give meaningful consideration to this argument at the permission stage as it necessarily involves an examination of the nature of the flaw and the wider factual context in which it took place. The consultation accepts that for this argument to be considered earlier "*oral argument may be needed, supported by fuller documentation*" and further accepts that "*there is a risk that this may add to the length and complexity of the permission stage and consequently the whole proceedings if permission is granted.*"⁴⁴ This seems to work against all the

⁴³ R (Cotton) v Chief Constable of Thames Valley ex parte Cotton [1990] IRLR 344.

⁴⁴ Judicial Review Proposals for Further Reform, paragraph 101.

Government is seeking to achieve. Given that there is already judicial discretion to hear this argument at any stage, reform is unnecessary.

50. Option (b) is similarly unnecessary and unwelcome. Lowering the threshold for procedural irregularity to be deemed to make ‘no difference’ necessarily draws the judiciary into a much greater merits assessment and into the role of decision-maker. Instead of refusing a remedy where it is inevitable that the same decision would have been reached, a lowered threshold would require the judiciary to second-guess the Executive in a much wider category of cases where a range of factual circumstances may arguably have led to a different decision being reached. This is constitutionally inappropriate and demonstrates a lack of regard for the separation of powers and the critical importance of holding decision makers to account for following the requirements of law in their decision-making.

The Public Sector Equality Duty and Judicial Review

51. Chapter 6 of the consultation discusses the Public Sector Equality Duty⁴⁵ and proposes making it non-justiciable. Currently a breach of the PSED can be challenged by way of JR. Liberty is concerned that the Government is seeking to remove the mechanism for enforcing an important equality protection. We are further concerned that the Government appears to be seeking to do so without a satisfactory understanding of how the PSED works in practice. Despite commissioning a Steering Group review of the PSED in May 2012, the present consultation asks “*Do you have evidence regarding the volume and nature of PSED-related challenges? If so could you please provide it.*”⁴⁶

52. In another example of Government confusion over the function of JR the consultation states that “*The [Steering Group] review found that, even where a court has ruled that a public body has failed to comply with the PSED, often it only orders that body to re-take the decision.*”⁴⁷ This is indeed one of the remedies available to a court in granting a JR application in light of the fact that the courts do not have the power to re-take decisions or say what they think the outcome of a decision should be. It has long been believed that there is inherent value in insisting that public

⁴⁵ Under the Equality Act 2010 the PSED requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different groups.

⁴⁶ Judicial Review Proposals for Further Reform, page 30.

⁴⁷ Judicial Review Proposals for Further Reform, paragraph 108.

bodies comply with the requirements of law in reaching their decisions and that when they don't the decision must be re-taken even if the outcome of a new lawful decision would be the same. This encourages better decision-making in future and is especially important in relation to a duty that is intended to make public servants consider the impact of their decisions on those from marginalised groups or groups that have been historically overlooked in public administration processes.

53. The Government's proposed reform also entirely overlooks the impact of the PSED before a matter even reaches the courts. As we have discussed elsewhere, it is Liberty's experience that potential for litigation is frequently sufficient to persuade a public authority to rectify an unlawful action or practice. Removing the legal enforcement mechanism for the PSED will render the duty meaningless and unenforceable in practice.

Rebalancing Financial Incentives

Payment for permission work

54. Proposals to change the way permission work is funded in judicial review claims were originally brought forward in the Government's consultation on reform of the legal aid system.⁴⁸ Originally, the Government argued that representatives should only receive payment for permission work on a claim if a judge finds the case "arguable" and ultimately grants permission to proceed. Permission work, while excluding initial advice taken before a claim, court fees and other disbursements, includes drafting grounds of claim, preparing claim forms for submission and collating bundles of documents; all of which takes considerable time and expertise. The original proposal is tempered slightly in the present consultation document, which proposes the retention of a discretion allowing the Legal Aid Agency (the LAA) to pay providers for permission work in certain cases which conclude before a permission decision and in which no costs order or agreement has been secured. The consultation paper sets out an exhaustive list of factors to be considered by the LAA in determining whether to grant discretionary legal aid, namely (i) the reason for not obtaining a costs agreement or costs order, including consideration of the conduct of the claimant representative; (ii) the extent to which the claimant obtained any redress or remedy sought; (iii) the reason why the claimant succeeded in securing redress;

⁴⁸ 'Transforming legal aid: delivering a more credible and efficient system', para 3.69.

and (iv) the likelihood of permission ultimately having been granted if the application had been considered (either based on the LAA's assessment of the strength of the claim, or on the basis of an indication given by the Court).⁴⁹

55. This concession is an improvement on the original proposals to make permission costs irrecoverable for all cases resolved before permission could be granted. Liberty and countless other organisations with experience of judicial review proceedings made clear that cases frequently settle before the permission stage because a public authority acknowledges wrong-doing and agrees to change its behaviour or to provide redress. It seems that this concession is an attempt to respond to these concerns, but it is at best a partial response, which will leave a great deal of practical uncertainty for practitioners and claimants.

56. It is not clear how the proposed criteria would be applied in practice, forcing representatives to take unsustainable financial risks. In particular, the requirement that the LAA should consider what would have happened had the case proceeded to permission stage is a difficult assessment ill-suited to a non-judicial body and liable to lead to satellite litigation. Under these proposals funding for permission work would remain fundamentally uncertain, placing prohibitive cost risks on claimant solicitors.

57. The concession set out in the latest consultation further does nothing to deal with the concerns around those cases which may be refused permission, not because they are unmeritorious, but because there are myriad factors which impact on the likelihood of a case succeeding at permission stage. In Liberty's experience it is not unusual for defendants to fail to seriously engage with a claim during its very early stages, only producing important evidence or making key arguments when a case comes before the courts. In these cases it is very difficult for a claimant representative to accurately assess the merits of a claim at the outset. In other cases, the law may have moved on by the time a case reaches the permission stage; again the kind of eventuality that is an unavoidable feature of a working justice system.

58. Present requirements placed on representatives to determine whether the likely costs of proceeding with a case are proportionate and to assess the prospects

⁴⁹ MoJ consultation, '*Judicial Review – Proposals for further reform*', September 2013, para 125. This also applies to cases dealt with under the Upper Tribunal's judicial review jurisdiction.

of success to the satisfaction of the LAA provide substantive protection against unmeritorious or disproportionately costly litigation. Liberty believes the prospect of irrecoverable costs will place an unsustainable burden on claimant lawyers, making it simply too risky to pursue legal aid claims, particularly those in which the law may be uncertain or untested, or in cases where the defendant exhibits a reluctance to disclose relevant material or make its legal arguments at an early stage. This problem is only intensified by the fact that, where costs are in dispute, claimants will frequently have no choice but to prepare submissions for further contested proceedings. If the claimant fails, her lawyer will have to bear the additional costs burden of preparation for this hearing.

Costs of oral permission hearings

59. The consultation paper proposes to increase the cost implications for a claimant should a court decide not to grant permission at an oral hearing. At present it is for a judge to determine costs in these circumstances. This move is part of a concerted effort by Government to place ever increasing financial hurdles in the path of those individuals who seek to challenge public authority decision making. The cumulative effect of the Government's consultation proposals will be to impose unsustainable cost consequences which will have a chilling effect on claims which impugn the actions of Government and other public authorities.

Wasted costs orders

60. Wasted costs orders are a useful tool, helping to protect parties to litigation against the costs of improper, unreasonable or negligent conduct by their opponent.⁵⁰ It is in the interests of justice that litigation is conducted properly and professionally and the prospect of costs implications where serious failures occur is an important preventative and compensatory measure. The Courts have rightly recognised that wasted costs orders should be confined to conduct which is plainly unjustifiable⁵¹ and should be used to appropriately compensate a party which has been subject to unreasonable expenditure.⁵² Liberty believes that the system as currently formulated works well. We are concerned at comments made in the consultation document which appear to anticipate an extension in the range of conduct for which wasted

⁵⁰ As provided for in the Senior Courts Act, section 51(6) and (7).

⁵¹ *Ridehalgh v Horsefield* [1994] CH 205 CA.

⁵² *Harrison v Harrison* [2009] EWHC 428 QB.

costs orders can be granted and measures which would make it more difficult for a party to effectively challenge the decision to make an order, for example by making it harder for parties to contest an order at an oral hearing and by the imposition of a fee on those who seek to argue their case against wasted costs before the courts. Whilst wasted costs orders are a useful and legitimate means of reaching a fair financial settlement, these proposals risk undermining procedural protections designed to ensure that the serious financial implications which accompany such an order have been properly and fairly imposed.

61. We further reject the apparent premise on which reforms in this area are proposed. The consultation paper suggests that the fact that wasted costs orders are rarely made indicates that the scheme is under-inclusive. We believe that the orders are properly circumscribed, but rarely used because improper conduct which carries unreasonable cost implications for another party is a rarity. This section of the consultation paper develops a Government narrative based on an unsubstantiated claim that litigation is being continued improperly or brought unnecessarily. It at best reveals a worrying lack of insight and is at worst purposefully misleading for the Government to suggest that claimants are routinely bringing hopeless litigation. There are already strong financial disincentives against such an approach, not least the ordinary application of costs. In the case of legally aided claimants, the LAA only provides funding after it has approved an assessment of merits as well as the means of the individual.

Protective Costs Orders

62. In a case between a public authority and a private individual or small NGO, there will ordinarily be a very significant disparity in resources. Save for those people who are of extremely limited means and qualify for legal aid support (an ever dwindling number thanks to brutal cuts to the system) or extremely wealthy and can fund litigation privately, most people could not afford to take on the Government or a public authority if they were potentially liable for all of the costs of a case. In recognition of the chilling effect of costs liability on public law challenges, the courts developed the Protective Costs Order (PCO). PCOs can be made at an early state in litigation and place a cap on the claimant's liability for the costs of the case, making legal challenge a viable option. They are designed to facilitate cases of significant

public importance, which involve issues that should be resolved in the public interest.⁵³

63. The approach of the courts to ordering protective costs has reflected a resolve to promote the interests of justice and reach a fair resolution between the parties. For example one factor taken into consideration is whether those acting for the claimant are providing their services for free; in these circumstances the courts are likely to consider an application more favourably.⁵⁴ The Courts have frequently been cautious in the types of order they impose. For example, an Order may specify that neither side may recover the other's costs regardless of the outcome of the case, or it may cap the claimant's liability for the defendant's costs, but at a high level.⁵⁵ Elsewhere,⁵⁶ the Courts have been willing to grant a PCO, but subject to the requirement that the claimant seek pledges of financial support from the community in relation to a claim about the closure of a local hospital.⁵⁶

64. In the case of *R (Corner House & Campaign Against Arms Trade) v Director of the Serious Fraud Office*⁵⁷ in which rules on PCOs were illucidated, the Court of Appeal made very clear that those who benefit from a PCO can only expect to recover modest costs of legal representation, an approach adopted in the cases which have followed. The rigorous and limited approach taken by the Courts to the award of PCOs means that few such orders have been made. For example, even where a case raises issues which fall four-square within the public interest, where other litigation is proceeding which addresses substantially the same issue, the Courts have declined to make a PCO.⁵⁸ In those few cases where Orders have been made, the court has taken a cautious approach, which is sensitive to the demands of the public interest and the interests of justice in a particular case. It is also important to note that, where justice demands it, the Courts have held that it would be possible for a defendant to obtain a PCO. Notwithstanding the grant of a PCO, claimants will still normally be exposed to some financial risks of litigation.

⁵³ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] ECWA Civ 192, *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749.

⁵⁴ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] ECWA Civ 192.

⁵⁵ See for example the orders made in *R (Refugee Law Centre) v SSHD* [2004] EWCA Civ 1296 and *Campaign for Nuclear Disarmament v Prime Minister & others* [2002] EWHC 2777 (Admin).

⁵⁶ *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749.

⁵⁷ [2008] 3 WLR 568.

⁵⁸ *R (Goodson) v Bedfordshire and Luton Coroner* [EWCA] Civ 1172.

65. The strong judicial guidance on the limited application of PCOs reflects their role in the system; to ensure that important cases, which require resolution in the interests of the public can proceed, notwithstanding the limited financial means of the claimant. The consultation paper suggests that the judicial approach to the grant of PCOs is becoming too expansive, but the analysis provided is sketchy and at points contradictory. Specific reference is made to cases where the claimant is bringing a judicial review for *'his or her own benefit'*, the suggestion being that such cases should not benefit from PCOs no matter how compelling the public interest in litigation may be.⁵⁹ In the very next paragraph, the concern of the Government appears to be that campaigning groups can avail themselves of PCOs in cases where they have *'no tangible interest in the case'*.⁶⁰ It is not clear whether the Government objects to the availability of costs protection because an individual may have an interest in the case, or a campaigning organisation does not have such a direct personal interest. The fact that the nature of the objection is so obscure, even contradictory, is a good indication that the Government's opposition is actually to a tool which allows it to face challenge in the Courts regardless of the identity of the claimant. The consultation document appears to anticipate the effective abolition of the PCO as an approach to litigation costs by attacking its use both by organisations and individuals.

66. Liberty strongly opposes an approach based on categorically restricting access to PCOs where there is a private interest, regardless of the gravity of the public interest issues at stake. The PCO developed as a means of ensuring that public authority decision-making with an impact on the wider community, or on society at large, can be challenged through the Courts. This approach benefits all in society and helps to ensure that Government, in all its manifestations, is not able to act with impunity. The fact that a case of this nature may also carry some parallel benefit for the claimant in no way undermines the validity of this approach. A strict requirement that any sort of private interest, however incidental, bars access to the PCO regime, would act as a bar to the courts for many, very important, public interest claims. Liberty further opposes any attempt to remove access to PCOs for organisations which seek to challenge public authority decision making in the public interest. These organisations are often best placed to make the case on issue of great importance to many people and to help ensure that public authorities act within the law.

⁵⁹ *Judicial Review – Proposals for further reform*, paragraph 158.

⁶⁰ *Ibid.* paragraph 159.

67. Whilst preferable to an all-out assault on access to PCOs, Liberty also has concerns about alternative proposals which would require claimants to give details about funding before they can access a PCO. Whilst the means or capital resources of a claimant are extremely relevant to the decision about whether a PCO should be granted, it is hard to imagine why the Government considers the source of a claimant's funding to be a pertinent consideration. A requirement to disclose this type of information would place a heavy burden on claimants and possibly spawn satellite litigation about the extent of disclosure required and conflicting obligations of confidentiality. Further, proposals based on a presumption in favour of placing a cap on the defendant's cost liability where a PCO is granted to the claimant ignore the fact that the protective costs system has been developed to ensure that defendants are only liable for the claimant's reasonable costs. This is a thread running through all the case law on this issue and it is disappointing that this reality is not reflected in the consultation questions. Whilst it may be appropriate to definitively limit the defendant's cost liability as part of a PCO, this is a decision which must reflect the unique factual matrix of the case. We have similar concerns about the suggestion that there be a blanket fixed limit on both claimants' and defendants' costs where a PCO is sought. While Liberty recognises that it will often be useful for specific cost caps to be set in individual cases, an abstract limit would interfere with the ability of courts to do justice in the particular circumstances of a case. PCOs achieve just outcomes because the courts are sensitive to the requirements of justice in all the circumstances of the case; a one size fits all approach is liable to frustrate practical justice and lead to real unfairness in practice.

Costs of third party interveners

68. At the same time as seeking to restrict access to PCOs for cases involving some personal interest for clients, the consultation paper attacks the role of third party interveners both in terms of their participation in proceedings (as discussed at paragraphs 41-47 above) and in terms of the costs regime. Third party interveners provide principled, expert input notwithstanding the fact that they will not receive a personal gain from litigation. At present, the court decides who should bear the cost of a third party intervention. There is further, in the Supreme Court, a rule that third party interveners should not normally be the subject of an order for costs, save where the interests of justice provide otherwise, presumably in recognition of the value

these parties add to the judicial process.⁶¹ The consultation paper suggestions creating a presumption that third parties cover their own costs of intervening and also any costs for the other parties which arise as a result of the intervention. The Government appears to see third party intervention as a process which generates costs without reference to the benefits such inputs bring in terms of the just resolution of cases which are often of intense public interest. Aside from the benefits for justice, as discussed at paragraph 44 above, third party interventions often provide the kind of clarity and insight which assists the fair and efficient conclusion of a case. Under current proposals a third party which assists the court significantly with its expertise, raising pertinent issues which require a response from the defendant, will face presumptive cost liability for a proportion of the defendant's costs, even where the claimant ultimately succeeds.

69. Third parties are only given permission to intervene where their interventions will assist the deliberations of the Court, the Courts can further provide for intervention in a very limited form which will not generate significant costs implications for any party, for example the High Court will often limit third party interveners to providing paper, as opposed to oral representations. In Liberty's experience, it is further a matter of course for third parties to face restrictions on the issues they may address in their submissions and the length of submissions. The Government's proposals on third party costs appear to be another attempt to prevent the full and thorough litigation of matters of great significance, which involve the Government or another public authority as defendant. Raising the prospect of potentially significant financial liability for third parties will mean that the court will be less likely to benefit from the input of experts and justice will suffer as a result. Such a move will also erode the ability of judges to respond to the particular circumstances of a case and make an order for costs which reflects the interests of justice with reference to the position and behaviour of all those involved in the litigation.

Conclusion

70. JR performs a profoundly important constitutional role, allowing individuals and organisations to hold Government to account and ensuring that agencies of the state act rationally and in accordance with the law. Judicial oversight of executive decision making is part of the delicate system of checks and balances which is

⁶¹ *The Supreme Court Rules 2009* No. 1603 (L. 17), Rule 46(3).

critical to the health of our democracy. If these proposals are implemented, we can expect to see administrative failings increase as agencies of the state become freer to act with impunity. Public interest cases will fall away and individuals will be left without the means to challenge Government error or illegality. The short term impunity that will result from these proposals will likely lead to a backlash in the long-run. It will not escape public attention that the quality of Government decision making is deteriorating and avenues of redress disappearing.

Rachel Robinson
Isabella Sankey