GARDEN COURT CHAMBERS
CIVIL TEAM

Response to Consultation Paper :
Judicial Review: proposals for further reform

Introduction

1. This is a response to the Consultation paper on behalf of the Civil Team at Garden Court Chambers. The Civil Team has had the benefit of the sight of submissions made by our colleagues in our Housing Team, Immigration Team and Family team and the Civil Team endorses the responses made by those teams in particular reference to their client groups. The Civil Team has also had sight of the draft responses from the Community Law Partnership and Young Legal Aid Lawyers and endorse their submissions in addition to the points made in our submission.

2. The Civil Team at Garden Court Chambers is made up of a number of sub-teams each of which specialises in protecting and promoting civil liberties and Human Rights. Each sub-team contains leading practitioners who have appeared in numerous high profile cases successfully challenging the legality of state action via Judicial Review.

3. We have also read the briefing paper produced by the Public Law Project in October 2013 and endorse the submissions made there.

4. We have also read and concur with the research conducted and published by Professor Maurice Sunkind and Varda Bondy, *"How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform'"* UK Const. L Blog (26th October 2013) (at http://ukconstitutionallaw.org). The key conclusions are that the current evidence and research does not justify the Secretary of State's and the Government's view regarding the purported perception of the adverse impacts of judicial review.

5. We also refer to the speech of Baroness Hale, the Deputy President of the Supreme Court, "Who Guards the Guardians?" presented at the Public Law Project Conference on the 14 October 2013 which seems, in our view, to cast doubt on the need for the reforms proposed or indeed the necessity of any reform of Judicial Review.

Our key responses to the consultation:

- It is our response that we oppose the changes as set out in the consultation paper for the detailed reasons given below. It is our response that the proposals have the effect of making it more difficult if not impossible to challenge the actions of Government and/or Public Bodies.

- It is our response that the proposals if implemented will increase rather than save costs.

- There is no evidence or research base upon which the Government can properly justify these proposals.

- These proposals are of great constitutional significance as they represent a major constitutional change and limit access to the courts and access to justice. They would effectively remove the ability of individuals, charities, NGOs and interest groups to access judicial review. The effect would be to weaken judicial scrutiny of the executive and public bodies thereby insulating them from the effect of the rule of law and fundamentally as a consequence undermine the Sovereignty of Parliament as law maker and undermine the principle of Government according to Law. If this is the policy of the present Government then it represents a major departure from a democratic state valuing the liberty of the subject to an undemocratic authoritarian state.

- These proposals would undermine the effectiveness of ourcourts as they are clearly experienced in controlling intervention and clearly benefit from the expertise and value the evidence adduced by parties who intervene in judicial review claims including Government departments and expert groups (see: Yemshaw (Appellant) v London Borough of Hounslow (Respondent) & Secretary of State for Communities and Local Government & Womens' Aid (Interveners) [2011] UKSC 3 concerning the definition of "violence" for the purposes of homelessness). It is our view that only someone truly ignorant of the issue or importance of the issues would try and preclude such valuable interventions as a result of the new restrictions on misconceived notions of cost.

- We oppose the proposals on the discretionary framework in respect of payment of legal aid fees when permission is not obtained on the basis that they are unworkable and propose an alternative.

- We oppose the proposals on Protective Costs Order and see no merit in the financial rebalancing arguments presented by Government.

- In our view it is essential that legal aid should be continue to be made available for challenges brought under section 288/289 of the Town and Country Planning Act 1990 where the decision relates to the individual's home or occupation of land for residential purposes (whether in a building, caravan or some other form of structure). To remove such proceedings from the scope of legal aid would, in our view, be likely to result in injustice and breach the rights of Gypsies and Travellers protected by the European Convention on Human Rights.

- We do not see the need for a new Planning Chamber and consider that the Administrative Court Planning Fast Track will achieve the objective of providing for the swift determination of planning judicial reviews and challenges to decisions taken by the Secretary of State and his planning inspectors.

- It noteworthy that these reforms are proposed only for England and Wales and there are no proposals to extend these reforms to Scotland or Northern Ireland or to invite the devolved Governments in those countries to consider similar reforms. Further, the proposals do not take into account any devolution issues in respect of Wales and the constitutional issues this raises with the High Court based in Cardiff. It would seem therefore that the proposals are not an issue of national concern but a purely ideological and party political issue concerning England and Wales.

Preliminary issues

The announcement

6. The publication of the Consultation paper was preceded by an article published by the Secretary of State for Justice in the *Daily Mail* "The judicial review system is not a promotional tool for countless Left-wing campaigners" (http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html). In this article the Secretary of State appears to be stating (1) a concluded view in advance of the outcome of any consultation that change will occur to restrict the standing to bring a claim or intervene in judicial review claims; (2) a deeply political and ideological view which appears inconsistent with his oath as Lord Chancellor; (3) as these proposed changes would require an Act of Parliament itself rather than secondary legislation such an announcement should have been made in Parliament and not via the press; and (3) attempting to design a situation where the Government by the executive and other public bodies would be immune from challenge including the activities of MPs in Parliament itself.

7. The clear problem with the article in the *Daily Mail* is that it presents a concluded view of the Secretary of State on the core issues at a formative stage in the consultation process. As set out at paragraph 4(9) of the Constitutional and Administrative Law Bar Association's response to Transforming Legal Aid that such expressions of a concluded view a the "formative stage" of a consultation may render the consultation unlawful (R v Brent LBC ex p Gunning [1986] 84 LGR 168) (http://www.adminlaw.org.uk/events_consultations/consultation_papers.php).

8. Further, the Secretary of State cites the example of the litigation concerning the highly controversial HS2 rail scheme as a problem with Judicial Review and classifies it as part of a "left-wing" conspiracy. Unfortunately for the Secretary of State a large number of the Claimants in the case, including Buckinghamshire County Council, are Conservative run Councils and would probably balk at his description. In addition, the Secretary of State fails to note that the matter in the HS2 litigation has been heard in

the Supreme Court on an important principle of European Union Law which can affect a large number of developments and the approach taken by Government. It is unfortunate, that the Secretary of State chose to author such an article which was so misguided and misinformed as to its contents and targets as a preliminary to these fundamental proposals.

Relationship of the Executive to Parliament

9. The main thrust in the Consultation paper seems to be that policy issues are solely for Parliament to decide on and that the courts and members of the public especially charities and campaign groups have no business in the United Kingdom's democratic system - given the Sovereignty of Parliament to which the courts and judges are subservient. It is our view that this betrays some fundamental misconceptions on the relationship between Government (aka the Executive and Parliament) and the role of the court in ensuring that the Executive is held to account by enforcing the laws made by Parliament. There is a fundamental error throughout the Consultation paper which seems to make the Government (Executive) and Parliament one and the same. The role of the court in reviewing the acts of Government is to enable Parliament to enforce the rule of law and ensure that the Government acts lawfully and therefore ensure the Supremacy and Sovereignty of Parliament. It is our view that the proposals set out in the Consultation if enacted would significantly erode and damage this relationship: the proposed restrictions on access to the courts would undermine the rule of law and leave open the high probability that actions and unlawful policies of Government and Public Bodies would go unchallenged - thereby affecting and harming particularly vulnerable members of the public.

10. It noteworthy that these reforms are proposed only for England and Wales and there are no proposals to extend these reforms to Scotland or Northern Ireland or to invite the devolved Governments in those countries to consider similar reforms. Further it does not take into account any devolution issues in respect of Wales and the constitutional issues this raises with the High Court based in Cardiff.

The value and constitutional importance of Judicial Review

11. It is clear from the history of past recent Government's both Coalition and Labour that Senior Ministers do not like having their decisions or policies challenged and quashed by the courts and are often directly critical of judges. It is unclear on occasions why Senior Ministers including Prime Ministers react in this manner if they are committed democrats who value the rule of law. It is clearly evidenced that the process of judicial review is deemed a valuable tool in policy making (The Judge Over Your Shoulder: Published by the Treasury Solicitors Office).

12. The constitutional importance of judicial review is clearly identified many cases including Chaytor & Ors, R v (Rev 2) [2010] UKSC 52 where the Supreme Court exercised its Constitutional role in respect of the MPs expenses scandal and how Parliament works.

Response to proposals

Standing: Paragraphs (67 – 90)

13. We reject the proposal for change in standing as it serves no meaningful purpose, will create additional highly technical satellite expensive litigation which the present test was designed to avoid and will prevent the court from actively engaging in the issue before it.

14. This concerns a change for test of standing to bring a claim for judicial review under section 31(1) of the Senior Courts Act 1981, that of a "sufficient interest". This is an established and careful test introduced to avoid highly technical litigation on standing. The Government's view is set out at paragraphs (79 – 80). The Government wants to limit the availability of judicial review to Claimants with "a direct and tangible interest" in the outcome and has proposed alternate definitions of standing. This would not affect the ability of NGOs and other groups to bring claims under the Aarhus Convention.

15. Our response is to reject this proposal as the current test has been in place and has worked well given that the court closely supervises the issue of who can bring a claim in judicial review. In summary our objections to changes in the rule in standing are: that is in the public interest that challenges with merit be brought to challenge Government decisions and that these be heard by the court and that highly technical rules on standing should not be used to insulate the Government and Public Bodies from such scrutiny by the courts.

16. It is acknowledged by the Government in the consultation (para 78) that judicial reviews brought by organisations or NGOs have a higher success rate than individuals. For example it is clear that the case involving the closure of Lewisham hospital brought by a pressure group was a valuable lesson for the Secretary of State for Health which may have been beset by technical rules on standing.

17. If there is not a low threshold for standing then some unlawful actions of Government and Public Bodies will be impossible to challenge if NGOs, charities, faith groups and campaigning organisations are effectively excluded from bringing judicial review claims. For example, only an NGO could effectively challenge the unlawfulness of a deportation policy of the Secretary of State for the Home Department (R (Medical Justice) v Secretary of State for the Home Department [2011] EWCA Civ 1710).

18. Further such public interest litigation can result in a saving to the public purse. If litigation is brought by a series of Claimants addressing an illegal policy of a Public Body then each Claimant may be bought off and the purpose of the attack on unlawful policy lost and the unlawful policy remains attracting more individual claims. Thus a public interest challenge by an NGO which determines the issue in one claim may

well results in a cost saving to both the Legal Aid Agency and the Public Body of dealing with multiple claims.

19. The Claimants in such claims are organisations such as the Child Poverty Action Group, Shelter, Medical Justice, the RSPCA and highly respected charities and organisations who have impeccable credentials for acting in the public interest. It cannot be rational, reasonable or in any way a credible policy for the Government to prohibit an organisation dedicated to abolishing Child Poverty or Homelessness in England and Wales from being able to bring a claim in judicial review.

20. The Government has produced no credible evidence and no credible impact assessment to justify the case for change. In particular the Government has produced no clear evidence that stands up to any form of reasonable scrutiny or rigour to support the bald assertion that judicial reviews are brought merely to get publicity or cause delay which adversely affect good administration. It is the very nature of judicial review that (1) it either attracts a publicity campaign or (2) the wide public interest in the issues at hand in a judicial review campaign naturally attracts publicity given that it enable a citizen to hold Government to account often in a very effective way as evidenced by the litigation associated with the closure of Lewisham hospital and what many would say the education of the Secretary of State for Health as to his lawful powers as a consequence.

21. We refer to the evidence as summarised in the Public Law Project briefing paper at page 5 as to the Government's unfounded allegations of abuse of the system and the research and report carried out by Sunkind and Bondy above.

22. It is unclear from the proposals what organisations will be prevented from bringing claims and why. It is likely given the lack of clarity and confused policy making that there will be considerable litigation around any reform of standing which will still be informed by previous case-law.

23. It is our view that the reference to other forms of standing proposed are particularly unhelpful as the policy reasons behind such restrictions of standing are linked to the particular statutory schemes and are inapplicable. Further, the victim test applied to judicial review claims in Human Rights cases leads to a narrow interpretation of standing in any event under the Human Rights Act 1998.

24. As a matter of European Union law the Government cannot limit standing in environmental law cases under the Aarhaus convention and no clear, rational or principled policy or reason has been given for narrowing standing in other judicial review claims other than a purely party political or misguided ideological stance.

25. The proposals disclose a fundamental and worrying misunderstanding of the role of the Administrative Court. In R v Inland Revenue Commissioners, ex p National

Federation of Self Employed Small Businesses Limited [1982] AC 617 Lord Diplock in the House of Lords warned of the need to avoid the:

> "grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter the attention of the court to vindicate the rule of law and get the unlawful conduct stopped".

26. There is a history of effective use of this rule by those who would pursue what some might classify as "right wing challenges" but at their heart looking to vindicate the rule of law.

27. Clearly in our view these reforms fly in the face of Lord Diplock's warnings. The only purpose of the reforms proposed by the Government is to insulate itself and Public Bodies from the rule of law and such actions are clearly an affront to democracy and the Sovereignty of Parliament and appear clearly contrary to the oath of office taken by the Secretary of State for Justice in his role as Lord Chancellor and the democratic traditions of the UK.

28. Further it is implicit in this proposal that the Government distrusts the expertise of the judiciary in effectively managing litigation.

Third Party interventions (paragraphs 167 – 179)

29. We disagree with the Government's proposals.

30. The concern raised by the Government is that interventions by third parties add to costs for both Claimant and Defendant and that the intervener should be liable for such costs (para 177).

31. The Government fails to identify that Government Departments often intervene in Judicial Review cases, for example the case of Yemshaw cited above. The Government has failed to consider this in its analysis.

32. There is no evidence presented that an intervention adds much if at all to the costs of a claim and in our view an intervention may actually reduce costs by forcing the parties to address the key issues by the expertise that an intervener brings and by bringing evidence and arguments to the case which the parties may otherwise have to obtain or make with the assistance of legal aid.

33. Courts have a wide discretion as to how they permit intervention and it is clear that the court controls this effectively. This can be limited merely to the submission of evidence, submissions in writing and only when the court really wants to hear from the intervener does it allow oral submissions. Interveners bear their own costs.

34. This proposal would deprive the courts from hearing from experts who can contribute meaningfully to the case and dissuade expert intervention because of consideration of costs.

35. This proposal would deprive the court of expertise from Government Departments.

36. This proposal is misconceived and shows a fundamental misunderstanding of the Constitutional role of the Administrative Court in determining the legality or otherwise of Administrative action. The court would be deprived of expert evidence which would lead to decisions which may be wrong or undermine the rule of law.

37. This proposal is misconceived as it presumes charities are allowed to spend money recklessly on litigation. The truth is they have limited funds and are wary of intervention and the costs it may entail.

38. This proposal appears designed to favour the intervention of wealthy organisations over those with limited resources rather than enabling the intervention by those with necessary expertise which can assist the court.

39. This proposal suggests that the Government distrusts the judiciary and its decision making.

<u>Funding of judicial review claims: legal aid – at risk</u>

40. We disagree with the proposals presented in the Consultation paper.

41. The Consultation paper essentially makes some minor concessions on Legal Aid payment in the absence of obtaining permission for judicial review from the court. In essence the Government identifies the need for payment in circumstances where interim relief is obtained and proposes that in the absence of recovery of costs from the Defendant in a settlement or certain other circumstances the Legal Aid Agency retains a discretion as set out in paragraph 125 of the Consultation paper to pay counsel according to the defined set of criteria set out. The Consultation paper re-iterates however that in the absence of an order granting permission there will be no payment in respect of a “rolled-up” hearing.

42. It is unclear if the discretionary payments referred to under paragraph 125 also attract enhancements under the new rates proposed for counsel and whether such claims can be made when the court declares an application is totally without merit given that the threshold proposed is one of the grant of permission.

43. The payment under legal aid is "at risk" post issue but pre-issue costs are paid and the lay client retains the cost protection afforded.

44. We remain of the view that the test applied - of the grant of permission - is misconceived for the reasons we set out in our submission on Transforming Legal Aid and is arguably unlawful. We also note and endorse the views of Sir Henry Brooke in his submission on this issue which demonstrate the problems associated with inexperienced judges determining this complex issue (published in Judicial Review 18 [2013] 288 – 294) where he is deeply critical of this test and the Note of Michael Fordham QC (at pages 296 – 302 of the same publication).

45. Further the proposal has a false foundation which is set out at paragraph 150 of the Consultation paper. Contrary to the Government's misguided assertion it is the Defendant rather than the Claimant who is in the best position to assess merits given they have access to all documentation and the decision making process.

46. This proposal does nothing to reduce the uncertainty presented to legal aid practitioners.

47. The process which is described is complex, time-consuming and likely to attract high administrative costs for both practitioners and the Legal Aid Agency.

48. It is a process which is likely to foster much more satellite litigation adding to cost, given the focus on recovery of costs from the Defendant.

49. The assessment which the Legal Aid Agency caseworker will have to make is essentially judicial in nature and the expertise in making such assessments lies with the independent judiciary. It is our view that the judiciary are best placed to make these assessments and not the Legal Aid Agency.

50. If there is to be a cut off in payment it is our view that the cut off in payment should be rationally justified by a declaration by the court that an application is totally without merit and not rely on the permission test, as proposed, for payment. This simplifies the system and uses the expertise provided by the court in the assessment of the merits of an application. This, in our view, will be cost effective and deal with any issue of practitioners bringing unmeritorious claims which are certified and identified as such by the independent judiciary.

51. The proposals fail to deal adequately with "rolled up" hearings. Such hearings are ordered and directed by the court to deal with a case where it is urgent and the merits of the case are such that it requires investigation quickly by the court and a rolled up hearing is an effective use of court time. The proposals fail to deal with this procedure and it is clear the proposals are misconceived on this point.

52. It is unclear how payment will be made in respect of obtaining interim relief separate from permission as all steps required to obtain and maintain interim relief involve the drafting and issue of claim which leads to a permission decision.

53. The Government refuses to engage with one way cost shifting proposals put forward in the Jackson review. It is our view that implementation of these reforms are a necessary parallel to a cut off in Legal Aid payment. Without this parallel reform the proposal creates a clear inequality of arms and is unfair to Claimants and their representatives.

54. The proposal as it stands creates an ethical conflict for Claimant lawyers and their clients. If the lawyer advises the client on merits and the client meets the merits test such that a legal aid certificate is granted then the Legal Aid Agency is accepting the merits of the claim such as to allow the issue of a claim. In these circumstances all issues will have been addressed and the Claimant lawyer will be obliged, when instructed, to issue and their financial interests in the outcome of the case will be irrelevant for the purposes of Codes of Practice. The proposal create a professional ethical conflict which the Government fails to address.

55. The Government has failed to make any rational case on savings or merits. The case proposed is highly speculative.

56. It is likely this will impact disproportionately on vulnerable clients for which Legal Aid is designed as there is a considerable likelihood that solicitors will not be prepared to take this risk on funding.

<u>Legal aid and planning applications (paragraphs 63 – 66)</u>

57. Garden Court Chambers has a dedicated Romani Gypsy and Traveller Rights Team and members of the Team are regularly instructed to represent Gypsies and Travellers in planning and enforcement notice appeals, High Court cases brought under s288 and 289 Town and Country Planning Act (TCPA) 1990 and judicial reviews brought by Gypsies and Travellers seeking to challenge decisions taken by public bodies.

58. Romani Gypsies have been recognised as a separate ethnic group since 1983 and the ethnicity of Irish Travellers has been recognised since 2000. As such ethnic Gypsies and Travellers are entitled to protection under the Equality Act 2010.

59. In addition Romani Gypsies and Irish Travellers are entitled to respect for the traditional way of life, an integral part of which involves living in caravans: see *Chapman v UK* (2001). In the same case the European Court of Human Rights made it clear that the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases and that to that extent the State has a positive obligation to facilitate the Gypsy way of life.

60. We endorse the points made by the Community Law Partnership in its response to the Consultation paper on this issue and the disproportionate impact that the proposal would have on Gypsies and Travellers. In our view it is essential that legal aid should be continue to be made available for challenges brought under section 288/289 TCPA 1990 where the decision relates to the individual's home or occupation of land for residential purposes (whether in a building, caravan or some other form of structure). To remove such proceedings from the scope of legal aid would, in our view, be likely to result in injustice and breach the rights of Gypsies and Travellers protected by the European Convention on Human Rights.

Costs principles at permission hearings (paragraph 135 – 140)

61. We oppose this proposal.

62. At present the rule is that costs are restricted to preparation of the Acknowledgement of Service with a discretion available to the court to award reasonable costs in any event should the application for permission fail. Costs do normally follow the event.

63. At present there is no rule that if the Defendant loses at such a hearing when resisting permission or on the papers that the Defendant should pay the Claimant's costs at this point. The question is why should the Defendant not make such payments when in these circumstances they should rightly have conceded permission?

64. The proposal seems to be based on a presumption of payment of "full" costs. The court has adequate powers already in deciding costs issues and these proposals add nothing of value.

65. Again this proposal seems designed to unjustly try and intimidate Claimants for no reason or purpose and to try and prevent them from bringing legitimate claims so as to insulate the Government and Public Bodies.

66. Again the court has carefully developed rules and procedures on costs issues and this proposal merely suggests the Government does not trust the judiciary.

Procedural defects (paragraphs 91 – 105)

67. We disagree with this proposal.

68. Presently when a procedural flaw in decision making is identified the judge will then go on to decide whether a remedy should be granted - as the grant of a remedy is discretionary. If the judge concludes that the flaw would have made "no difference" then the judge will be unlikely to grant a remedy to quash or remit it back for a fresh consideration.

69. The Government's proposal is to either (1) advance the "no difference" test to the permission stage or (2) lower the threshold of the application of the "no difference" test.

70. The Government has provided no evidence that the current test and the approach taken by the court is at all problematic or does not strike the right balance.

71. It is clear that there are well established public policy reasons for maintaining the high threshold for the withholding of a quashing order. This is set out in Smith v North East Derbyshire PCT [2006] EWCA Civ 1291 at paragraph 10 and the "forbidden territory". Also the proposal suggests that the court should now be invited to assess the merits of the case in circumstances where the court may not have sufficient evidence to do so and the proposal flies in the face of the principles underpinning the operation of the Administrative court

72. Also it fails to identify the value of other remedies which are available such as a declaration or indeed, to place any value on the court's role in identifying where decision makers that they have got the law wrong and in giving them an indication or steer as to how they might reach a lawful decision in the future.. The filter at the permission stage would remove this steer and would not work as the court would not be seized of all of the evidence.

73. The proposal is contrary to the public interest in promoting good lawful decision making and provides an incentive for poor decision making. This is likely to lead to additional cost in the long term and a loss of confidence in decision making by public bodies and undermine public and international confidence in the UK.

74. It is likely this proposal will lead to further oral hearings if the threshold is lower, thereby adding to costs.

75. Again this proposal suggests the Government distrusts the judiciary.

Protective Costs Orders (paragraph 154 – 166)

76. We disagree with these proposals. In summary no evidence is presented to support the Government's case and what is proposed is fundamentally irrational.

77. The research of Suskind and Bondy clearly challenges the Government's bald assertion and gives examples of the grant of Protective Costs Orders (PCOs) and the cases in which they are granted. It identified that over 20 months the numbers granted in environmental cases which would be unaffected and the very small number granted overall. The conclusion is that the Government's case presented at paras 156 – 159 of the consultation paper is clearly unfounded, exaggerated and disproportionate.

78. The courts have recognised the value of PCOs and their value in promoting the public interest when cases would not be brought because of cost risk.

79. Also when granted PCOs there is a parallel cost limiting order which limits the liability for costs for the Defendant, this seems to be forgotten by the Government.

80. A body of case-law has been carefully developed. The judicial consensus is that a private interest is a factor to take into account in making a PCO but on its own is not enough to stop it being granted. The Consultation paper fails to provide a proper analysis of the impact of the proposal to prohibit the grant of a PCO where one of the factors is a private interest (and particularly the consequential impact on the public interest and additional costs which may flow as a result).

81. The private interest test proposed to be introduced has been widely criticised already (see Goodson v HM Coroner for Bedfordshire [2005] EWCA Civ 1172).

82. The proposal would place NGOs is an impossible situations in the light of any proposed change in standing. The changes in standing would mean that the NGOs would only be able to litigate if they had a private interest and then PCOs would be unavailable to them. So who can obtain a PCO under the proposed test for standing other than in Environmental Cases? This point demonstrates the low quality of the policy making here as it is clearly nonsense.

<u>Wasted Costs order (paragraph 141 – 153)</u>

83. We disagree with these proposals

84. It is unclear from the proposals why there is a need for reform of the current system on Wasted Costs Orders and no evidence is presented to justify the Government's bald assertions. These orders already penalise legal representatives for improper, negligent or unreasonable conduct and such orders are made (see paragraph 147).

85. The courts have already established that pursuing a weak case should never result in such an order for public policy reasons (see Ridehalgh v Horsefield [1994] Ch 205 and the judgment of Sir Thomas Bingham MR sets out those reasons).

86. The proposal seems solely aimed at Claimant lawyers. There seems no proposal for example that Ministers of State should be subject to Wasted Costs Orders for their improper, negligent or unreasonable conduct in pursuing litigation which is a weak case.

87. The impact is designed to intimidate vulnerable clients and will create ethical issues and conflicts between lawyers and their clients.

Rebalancing financial incentives (paragraphs 149)

88. As stated above we oppose these proposals but summarise the point in response.

89. It is clear that judicial review applications require special costs rules as the court is adopting a unique role in determining the lawfulness of the actions of Government and Public Bodies and assisting with promoting the public interest of good and lawful administration and restricting abuses of power. There is clear public interest in the court hearing such claims both for Claimants and for Parliament to ensure compliance with the rule of law.

90. No evidence has been provided to support the Government's case for changing the rules in favour of the Defendants. The special rules were carefully reviewed by Lord Justice Jackson who made recommendations to protect Claimants bringing good claims from the risk of paying excessive costs if the case is lost. The Government's proposal runs counter to Lord Justice Jackson's report and provides no evidence to go behind such recommendations.

91. There has already been a rebalance in April 2013 with the introduction of new fees and the totally without merit test restricting the right to oral renewal. The effect of the existing changes have yet to be assessed.

92. In our view these new proposals are themselves totally without merit.

Infrastructure projects (paragraphs 53 – 62)

93. We oppose this proposal.

94. It is unclear why the Government considers this proposal to be worthwhile. . It will place an unjustified fetter on the ability of Local Authorities to comply with their own statutory duties and where necessary, hold the Government to account.

95. We refer by way of example to the HS2 rail litigation. It has gone to the Supreme Court from a split decision in the Court of Appeal on an important point of law. It is clear that this is an important piece of litigation and engages the statutory duties of Local Authorities.

a. Issue

1. The proper interpretation of 'set the framework for development consent' in art. 3(2)(a) of the Strategic Environmental Assessment Directive (SEAD);

2. Whether plans that may influence the Parliamentary consent process should be effectively excluded from the requirements of strategic environmental assessment by an unduly restrictive interpretation or application of the SEAD;

3. Whether on the facts the Secretary of State's 'Decisions and Next Steps' (DNS) paper would have a sufficient influence on Parliament to engaged the SEAD and whether its very potential to influence Parliament is a compelling factor since, by the time the Bill process is underway, it will too late to challenge the decision in the DNS and provide proof of actual influence;

4. Whether the issues are *acte clair* or should be referred to the C.J.E.U.;

5. Whether, if the Court of Appeal majority's interpretation is correct, art. 3(2)(a) SEAD is inconsistent with art. 7 of the Aarhus Convention to which the E.U. is a signatory and is therefore invalid (which if arguable would itself require a reference to the C.J.E.U.).

b. Facts

The Secretary of State issued a paper titled 'High Speed Rail: Investing in Britain's Future—Decisions and Next Steps' (DNS) setting out the government's strategy a new national high speed rail network called High Speed Two (HS2) from London to Birmingham, Manchester, and Leeds. The appellants contend that the DNS is a 'plan or program' that is 'required by administrative provisions' and 'sets the framework for development consent' of HS2 and falls within articles 2 and 3 of Directive 2001/42/EC (the SEAD) as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004. Ouseley J. found that the consultation process in respect of the compensation decision was so unfair as to be unlawful. On all other grounds, however, he dismissed the claims, as did the Court of Appeal.

96. This is clearly an important legal issue for resolution by the court; it has merits and represents the proper discharge of the Local Authorities' statutory duty. It is clear the

HS2 scheme is highly controversial and the Government is being challenged on all sides.

97. Local Authorities have clear statutory duties which they have to discharge, especially on environmental issues and planning issues, and this may involve challenging the legality of a Government decision.

98. The proposal seems to be aimed at permitting Government to act in an unlawful and arbitrary manner when it so chooses.

Public sector equality duty (paragraphs 106 -109)

99. We oppose this proposal.

100. It is unclear what the Government is actually proposing here and why. Logically disputes concerning the Public Sector Equality Duty (PSED) should continue to be considered in the Administrative Court along with other public law arguments that are usually advanced in tandem in judicial review cases. If PSED disputes were to be determined in an alternative forum or by another means then that will add to cost and an extra layer in the court system which in our view cannot be justified.

New planning chamber (paragraphs 34 – 52)

101. Given the transfer of Asylum and Immigration cases to the Upper Tribunal and the adoption of the Planning Fast Track by the Administrative Court we see no advantage in the creation of a specialist Land and Planning Chamber. Our experience since July 2013 is that planning cases in the Administrative Court are being heard swiftly by experienced judges.

Leapfrogging to the Supreme Court (paragraphs 180 – 202)

102. In principle we support these proposals, though we consider that there needs to be thorough consultation on leapfrogging arrangements before they are introduced.

Summary of our responses to the questions posed

Our answers to the questions posed are set out below and should be read in conjunction with the points we have made above:

103. Q1 – No.

104. Q2 – Not relevant given our answer above.

105. Q3 – No. We consider that the introduction of a permission stage is only likely to delay the determination of statutory challenges brought against planning appeals.

106. Q4 – No.

107. Q5 – No. The time limits for judicial review and statutory challenges are already very tight and any further reduction in those limits or additional restrictions on the ability of Claimants to bring such claims is likely in our view to lead to injustice.

108. Q6 – No.

109. Q7 – No.

110. Q8 – Yes, see above.

111. Q9 – No.

112. Q10 - No.

113. Q11 – No.

114. Q12 – No.

115. Q13 - Not relevant given our answer above.

116. Q14 – No.

117. Q15 – No.

118. Q16 – No.

119. Q17 – No.

120. Q18 – No.

121. Q19 – No.

122. Q20 – No.

123. Q21 – No.

124. Q22 – It should not be modified for the reasons given above.

125. Q23 – Not relevant, given the answer above.

126. Q24 – No.

127. Q25 – Not relevant given the answer above.

128. Q26 – The proposal should not be adopted for the reasons given above.

129. Q27 – They should not be modified for the reasons given above.

130. Q28 – There is no need for the proposal to be adopted.

131. Q29 – No.

132. Q30 – No.

133. Q31 – No.

134. Q32 – No.

135. Q33 – No.

136. Q34 – No.

137. Q35 – Yes, though this proposal should eb subject to further consultation.

138. Q36 – No.

139. Q37 – No.

140. Q38 – Not relevant given the answer above.

141. Q39 – Yes.

142. Q40 – They should be subject to the same criteria which should itself be the subject of further consultation.

143. Q41 – Yes.

144. Q42 – No. The proposals will have a devastating effect on small firms of solicitors who provide legal aid advice and assistance.

145. Q43 – The proposals are likely to have a significant negative impact on some of the most vulnerable people in our society. Romani Gypsies and Irish Travellers will be disproportionately affected by the proposals relating to the provision of legal aid in planning cases.

Conclusion

146. For our reasons set out above we oppose the Government's proposals

147. Our view is that these proposals will undermine the rule of law and undermine the independence of the courts. These changes appear designed solely to insulate the Government and Public Bodies from effective scrutiny by the court and thereby undermine Parliament in turn which relies on this check against abuse of power.

148. These reforms will permit the Government and Public Bodies to act unlawfully of to the detriment of many vulnerable individuals, especially those who require the assistance of Legal Aid to bring a case.

149. It is clear these proposed reforms will affect vulnerable and marginalised groups disproportionately in our view and whether this is by design or indifference it will be highly discriminatory.

150. Our view of the vast majority of the proposals is that they are totally without merit. The Government has failed to provide any or any adequate evidence to justify the proposed reforms and if enacted we consider they would cause profound harm to the rule of law in the UK and damage its reputation abroad.

1st November 2013