



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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**The implications for  
access to justice of the  
Government's  
proposals to reform  
judicial review**

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**Thirteenth Report of Session 2013–14**





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# The implications for access to justice of the Government's proposals to reform judicial review

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*Report, together with formal minutes*

*Ordered by the House of Lords*

*to be printed 9 April 2014*

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## The Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee is: Mike Hennessy (Commons Clerk), Megan Conway (Lords Clerk), Murray Hunt (Legal Adviser), Natalie Wease (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Holly Knowles (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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## Summary

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This Report follows on from our previous Report into the implications for access to justice of the Government's proposed reforms to legal aid, and assesses those implications with regard to the Government's proposals to reform judicial review.

Restrictions on access to justice are in principle capable of justification; discouraging weak applications and reducing unnecessary delay and expense, for example are clearly legitimate aims, and, where evidence shows a need for change exists, proportionate restrictions which serve those aims will be justifiable.

In our view, the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice which raises issues which should be considered by a number of parliamentary committees. We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice and of the consequent restructuring of departmental responsibilities between the Home Office and the Ministry of Justice.

We recognise that there has been a substantial increase recently in the number of judicial reviews but this has been largely because of the predictable and foreseen increase in the number of immigration cases being pursued by way of judicial review. Such cases have been transferred from the High Court to the Upper Tribunal since November 2013 and no assessment has been made since of whether the number of judicial review cases is still increasing. The number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We therefore do not consider the Government to have demonstrated by clear evidence that non-immigration related judicial review has "expanded massively" in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate.

### **Procedural defects and substantive outcomes**

We accept that it is a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law. However, lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied and therefore risks incompatibility with the right of practical and effective access to court, which the European Court of Human Rights recognises as an inherent part of the rule of law.

We are not persuaded that there needs to be any change to the way in which courts currently exercise their discretion to consider, at both the permission and the remedy stage, whether a procedural flaw in decision-making would have made any substantive difference to the outcome. We therefore recommend that clause 52 be deleted from the Criminal Justice and Courts Bill.

However, if Parliament prefers to retain clause 52, we recommend that it be amended so as to reflect the current approach of the courts. There is a case to be made for such

amendments in order to clarify the approach which the courts currently take to the issue of whether the correction of a procedural defect would make any difference to the outcome. The amendments we recommend would make clear that the High Court and the Upper Tribunal have the discretion to withhold both permission and a remedy if they are satisfied that the outcome for the applicant would inevitably have been no different even if the procedural defect complained of had not occurred.

### **Legal aid for judicial review cases**

We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. Instead it constitutes a potentially serious interference with access to justice, and sufficient evidence to demonstrate its necessity is currently lacking.

We regret the fact that the Government has chosen to bring forward by a negative resolution statutory instrument a measure with such potentially significant implications for effective access to justice. This should have been brought forward in primary legislation, to give both Houses an opportunity to scrutinise and debate the measure in full and to amend it if necessary.

We recommend that the Government withdraw the regulations it has laid to give effect to its proposal, and introduce instead an amendment to the Criminal Justice and Courts Bill to provide Parliament a proper opportunity to consider and debate in detail this controversial measure with such serious implications for effective access to the courts to hold the Government to account.

### **Interveners and costs**

We are concerned that the Bill will introduce a significant deterrent to interventions in judicial review cases, because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention, and recommend that the relevant sub-clauses be removed in order to restore the judicial discretion which currently exists.

### **Capping of costs (“Protective costs orders”)**

Restricting the availability of costs capping orders to cases in which permission to proceed has already been granted by the court is too great a restriction and will undermine effective access to justice. We recommend that the court should have the power to make a costs capping order at any stage of judicial review proceedings, including at the initial stage of applying for permission. We also recommend that the provision for cross-capping (which limits a defendant's liability for the claimant's costs) should be a presumption not a duty, which would preserve some judicial discretion in deciding the appropriate costs order to make in the circumstances of the particular case.

For the Lord Chancellor to have the power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings has serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power from the Lord

Chancellor.

### **Alternatives to the Government's judicial review reforms**

We welcome the Bingham Centre Report on streamlining judicial review in a manner consistent with the rule of law as an important contribution to the debate about possible reform of judicial review. In our view the Government could go some way towards achieving its aims of reducing unnecessary cost and delay by other reforms than those it has itself proposed which would make the process of judicial review more expeditious and therefore cheaper without compromising effective access to justice.

We recommend that the Government should invite the Civil Procedure Rule Committee to amend the Civil Procedure Rules so that the costs of oral permission hearings in judicial review proceedings should be recoverable from whichever is the unsuccessful party at that hearing, including the defendant, which would be a more even-handed way of reducing unnecessary cost and delay.

### **Judicial review and the Public Sector Equality Duty**

We welcome the unequivocal confirmation from the Chair of the Independent Review of the Public Sector Equality Duty ("PSED") that in his view the PSED should continue to be legally enforceable. It is clear to us that the legal enforceability of the PSED is crucial in ensuring the implementation of, and compliance with, equality law by public authorities. Quicker and more cost-effective mechanisms may be possible, but should retain the ultimate legal enforceability of the duty by judicial review, rather than be an alternative to it. The Government's overall objectives of reducing cost and delay in this area could be taken forward by the Equality and Human Rights Commission as part of their ongoing work to develop a statutory code of practice and further guidance on the PSED.



# 1 Introduction

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1. This Report is our second Report focusing on the implications for access to justice of certain legal reforms brought forward by the Ministry of Justice which affect people's ability to access the courts. In December 2013 we reported on the implications for access to justice of the Government's proposals to reform legal aid.<sup>1</sup>

2. Our legal aid inquiry initially focused also on the Government's proposal that providers of legal services in applications for judicial review against public bodies should only be paid for legal aid work done on the case if the Court grants permission for the application to proceed. On 6 September 2013, however, the Lord Chancellor and Secretary of State for Justice, the Rt Hon Chris Grayling MP, launched a separate consultation on proposals for reforming judicial review.<sup>2</sup>

3. The new consultation contained a modified proposal on legal aid in judicial review cases, but also put forward a number of other proposals for further reform of judicial review. We considered that a number of these proposals to reform judicial review had significant implications for the right of effective access to justice because they had the potential significantly to restrict effective access to judicial review. Since we were already considering access to justice in the context of our legal aid inquiry, in October 2013 we decided that we wanted to extend our inquiry to scrutinise the likely impact of certain of these proposals in practice on access to judicial review as a legal remedy, and the cogency of the justifications for them relied on by the Government.

4. The Government's consultation on its proposals for further reform of judicial review closed on 1 November 2013. On 7 November we announced that we were extending our access to justice inquiry to examine also some of the Government's proposals to reform judicial review and we called for evidence from anyone with an interest in the human rights issues raised by the following proposals in particular:

**Standing and third party interventions**—The proposed introduction of a narrower test for “standing” to apply for judicial review, so as to limit the range of people and groups who are entitled to invoke the procedure, and the proposed modification of the rules to discourage the involvement of interveners and third parties.

**Costs**—The proposed rebalancing of financial incentives so that providers are only paid for work carried out on judicial review cases where permission is granted, or exceptionally at the Legal Aid Agency's discretion; and the proposed restriction on the availability of “Protective Costs Orders” which can currently be made by courts to limit the possible costs exposure for a claimant in a case judged by the court to be brought in the public interest.

**Procedural as opposed to substantive defects in decisions**—The proposal to reduce the potential for delay by strengthening the courts' powers in cases where a procedural

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1 *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013–14, HL Paper 100/HC 766.

2 *Judicial review: Proposals for further reform* (Cm 8703, September 2013) <https://consult.justice.gov.uk/digital-communications/judicial-review>

defect has been established which would have made no difference to the outcome had the correct procedure been followed. The Government is considering lowering the probability threshold to include cases where it is not necessarily certain that the defect would have made no difference, and/or by bringing forward the point at which the “no difference” question is considered, so that applications for judicial review can be rejected on this basis at the permission stage.

**The Public Sector Equality Duty**—The request for views as to whether disputes relating to the Public Sector Equality Duty (the statutory duty imposed on public bodies by the Equality Act, to have due regard to the need to eliminate discrimination) could be better resolved by any mechanisms, other than judicial review, which would be quicker and more cost-effective.

5. We received 39 written submissions in response to our call for evidence. We are grateful to all those who submitted evidence.

6. We wrote to the Government on 6 November asking a number of detailed questions about the Government's proposals and received a substantive response from the Government on 11 December. The Lord Chancellor and Secretary of State for Justice also wrote to us on 16 January to provide “further examples of judicial reviews which have led to delays in infrastructure projects” of which the Government was aware before launching its consultation.

7. We held two evidence sessions in this short inquiry, focusing on the principal issues raised by the written evidence we had received. On 4 December we heard from Professor Sir Jeffrey Jowell QC, the Rt Hon Sir Stephen Sedley, Professor Maurice Sunkin, Michael Fordham QC, Feizal Hajat, Karen Ashton, Rob Hayward OBE, Helen Mountfield QC and Mark Hammond.<sup>3</sup> On 16 December we heard from the Lord Chancellor and Secretary of State for Justice, the Rt Hon Chris Grayling MP.<sup>4</sup> Transcripts of these evidence sessions are available on the Committee's website.

8. The Government response to its consultation was published on 5 February 2014.<sup>5</sup> The Government indicated that it would be bringing forward a package of reforms to judicial review.

9. Those of the Government's proposed reforms to judicial review which require primary legislation are contained in the Criminal Justice and Courts Bill, which was introduced in the House of Commons on 5 February 2014, completed its Committee Stage on 1 April and is currently awaiting a date for Report.<sup>6</sup> The relevant provisions in the Bill are considered at the appropriate points in this Report.

10. Other proposed reforms do not require primary legislation and will be brought forward by secondary legislation. Regulations on civil legal aid remuneration, giving effect to the Government's reforms on legal aid and judicial review, were laid on 14 March.

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3 <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4304>

4 <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4807>

5 *Judicial review—proposals for further reform: the Government response* (CM8811, February 2014) <https://www.gov.uk/government/publications/judicial-review-proposals-for-further-reform-the-government-response>

6 HC Bill 192 (as amended in Public Bill Committee), Part 4, clauses 52–58.

11. We welcome the Government's decision, following consultation, not to pursue certain reforms canvassed in its consultation paper. However, there remain a number of proposed reforms which have very significant implications for effective access to justice and we focus on those in this Report. The Government has decided that the better way to achieve its policy aim of limiting what it considers to be the misuse of judicial review is through a package of reforms which combines reform of the way the court deals with judicial reviews based on procedural defects along with a number of reforms to the financial incentives surrounding judicial review which are designed to deter weak claims from being brought or pursued. The following chapters consider these proposed reforms in detail.

## Judicial review and the rule of law

12. Judicial review is one of the most important means by which the Government and other public bodies are held legally accountable for the lawfulness of their decisions and actions, including their compatibility with the requirements of human rights law. As the President of the Supreme Court, Lord Neuberger, pointed out in a recent public lecture,<sup>7</sup> "the courts have no more important function than protecting citizens from the abuses and excesses of the executive", and this means that any proposals which would restrict the right to judicial review require particularly careful scrutiny, especially when they "come from the very body which is at the receiving end of JR". Like the Government's proposals to reform legal aid, such proposals call for close scrutiny because they affect the fundamental right of access to court and the ability of the courts to ensure good governance by upholding principles of good public administration.

13. The significance of judicial review to the rule of law is acknowledged by the Government's Consultation Paper itself, which variously describes judicial review as "the rule of law in action", "a critical check to ensure lawful public administration", "a crucial means of holding Government to account" and "a critical check on the power of the State." The Lord Chancellor and Secretary of State in his oral evidence to us also acknowledged the importance of judicial review to maintaining the rule of law, including by holding Government to account for the legality of its actions. One of the important functions of judicial review is that it provides a means for ensuring that Parliament's will, as expressed in statute, is enforced, by keeping decision-makers exercising powers delegated by Parliament within the scope of those powers.

14. Many of the submissions that we received, however, complained that aspects of the Government's proposed judicial review reforms contravene or undermine the rule of law. Witnesses in our inquiry, in particular Professor Sir Jeffrey Jowell QC, the Rt Hon Sir Stephen Sedley and the Bingham Centre for the Rule of Law, sought to explain what the abstract ideal of the rule of law means in practical terms, and why aspects of the Government's proposals have significant implications for the rule of law.

15. The Bingham Centre, along with many other respondents to our call for evidence, argued that to appreciate fully the effects of the Government's proposals on access to justice and the rule of law, they must be considered alongside the Government's proposed reforms to legal aid:

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7 "justice in an Age of Austerity", Tom Sargent Memorial Lecture 2013, 15 October 2013  
<http://supremecourt.uk/docs/speech-131015.pdf>

The relationship between the judicial review and legal aid proposals is important because it goes to the right of access to justice, which is a key element of the rule of law<sup>8</sup> and which is acknowledged both at common law, as a constitutional right,<sup>9</sup> and by the European Convention on Human Rights.<sup>10</sup> It is well-recognised that the right of access to justice is capable of being curtailed or infringed not only directly, but also by placing recourse to litigation beyond individuals' financial means. It is equally axiomatic that whatever other valuable mechanisms may exist for protecting the rights and interests of individuals, it is independent courts of law, in a democracy founded upon the rule of law, that stand as the ultimate guarantors of basic legal rights.

16. Much of the evidence we received also expressed particular concern about the impact of the proposed judicial review changes on the ability of vulnerable groups to secure the legal protection they often require: children;<sup>11</sup> refugees, asylum-seekers and irregular migrants;<sup>12</sup> people with disabilities;<sup>13</sup> Gypsies and Travellers;<sup>14</sup> women victims of domestic violence;<sup>15</sup> prisoners;<sup>16</sup> and people who are mentally ill;<sup>17</sup> poor<sup>18</sup> or homeless.<sup>19</sup>

**17. Restrictions on access to justice are in principle capable of justification. As Lord Neuberger pointed out in his lecture, the Government is obviously entitled to look at the way judicial review is operating in practice and propose improvements. Discouraging weak applications and reducing unnecessary delay and expense, for example, are clearly legitimate aims, and, to the extent that evidence shows that there exists a need to introduce changes to law and practice to serve those aims, proportionate restrictions which serve those ends will be justifiable.**

## The Lord Chancellor's role

18. During our inquiry we heard arguments that by bringing forward these proposals for reforming judicial review, and in particular in his statement of the rationale for them, the Lord Chancellor is in breach of his statutory duties to respect the rule of law and defend the independence of the judiciary.<sup>20</sup> Sir Stephen Sedley in particular said he did not think the two functions of Lord Chancellor and Secretary of State for Justice are compatible.<sup>21</sup> The Secretary of State for Justice is a political minister in a Government which has collective

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

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

10 Article 6.

11 National Association for Youth Justice; Coram Children's Legal Centre.

12 Refugee Action; Bail for Immigration Detainees; Detention Action; Immigration Law Practitioners Association.

13 Disabled People against Cuts; Scope; Disability Law Service.

14 Community Law Partnership; Traveller Law Reform Project.

15 Women's Aid.

16 Prisoners Advice Service; Association of Prison Lawyers; Howard League for Penal Reform; Prison Reform Trust..

17 Mind.

18 Citizens Advice.

19 Shelter.

20 See e.g. the evidence of the Public Law Project.

21 Q4, 4 December 2013

responsibility for its political views, while the Lord Chancellor, historically, had the different role of standing up within Government for the interests of the justice system. Sir Stephen Sedley saw the Secretary of State for Justice's proposals as, in large part, proposals that an independent Lord Chancellor would have stood up against.

19. The Lord Chancellor and Secretary of State disagreed. He told us that he takes his role of Lord Chancellor very seriously and would never criticise judges for taking decisions that they believe to be appropriate, except "if I am directly involved in a case, I disagree with the judge and plan to appeal it".<sup>22</sup> He accepted that it is the duty of the Lord Chancellor to uphold the independence of the judiciary and to ensure the rule of law, but he did not consider it to be the responsibility of the Lord Chancellor to "argue that all people should be given access to the courts in all circumstances to bring anything that they might want before the courts".<sup>23</sup> The Government was not seeking to abolish judicial review, but to avoid it being used for trivialities and technicalities in a way that causes cost to the public purse<sup>24</sup>.

20. The Constitutional Reform Act 2005 refers in s. 1 to "the existing constitutional principle of the rule of law", and "the Lord Chancellor's existing constitutional role in relation to that principle." The Lord Chancellor has a statutory duty to "uphold the continued independence of the judiciary"<sup>25</sup> and must have regard to the need to defend that independence.<sup>26</sup> By his oath of office the Lord Chancellor swears "that I will [...] respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible."<sup>27</sup>

21. In an article in *The Daily Mail* on 6 September 2013, the day on which the Government's judicial review consultation was launched, the Lord Chancellor suggested that the rationale for the Government's proposed reforms is that judicial review is being used as "a promotional tool by countless Left wing campaigners." Such politically partisan reasons for restricting access to judicial review, in order to reduce the scope for it to be used by the Government's political opponents, do not qualify as a legitimate aim recognised by human rights law as capable of justifying restrictions on access to justice, nor are they easy to reconcile with the Lord Chancellor's statutory duties in relation to the rule of law.

22. We recognise and accept that the Government has an entirely legitimate interest in ensuring that judicial review is not abused in a way which incurs unnecessary expense to the public purse and causes unwarranted delay to the implementation of decisions for which elected authorities have an electoral mandate. Nevertheless, the Lord Chancellor's energetic pursuit of reforms which place direct limits on the ability of the courts to hold the executive to account is unavoidably problematic from the point of view of the rule of law. Providing independent judges with the means to deal adequately with possible abuses is an

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22 Q41, 18 December 2013.

23 Q46, 18 December 2013.

24 Q42, 18 December 2013.

25 Section 3(1) Constitutional Reform Act 2005.

26 Section 3(6) Constitutional Reform Act 2005.

27 Section 17 Constitutional Reform Act 2005.

important part of the constitutional arrangements. It is vital that the Lord Chancellor always demonstrates his awareness of the conflict inherent in his dual roles as a political minister and as the head of the judiciary with a constitutional responsibility for upholding the rule of law.

**23. In our view, the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice. This raises issues which should be considered by a number of parliamentary committees, including the Commons Justice Committee and the Lords Constitution Committee. We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice, and of the restructuring of departmental responsibilities between the Home Office and the Ministry of Justice that followed the creation of the new merged office.**

### The evidence base

24. The premise of the Government's Consultation Paper is that "the use of judicial review has expanded massively in recent years and it is open to abuse."<sup>28</sup> Many of the submissions we received questioned this premise. Professor Maurice Sunkin's evidence in particular was that "the statistics do not justify the claim that judicial review is being abused or that it is increasing".<sup>29</sup> The Rt Hon Sir Stephen Sedley accepted that there will always be attempts to abuse the system of judicial review, but said he was not conscious of ever having had to put up with an abuse which he did not have the power to deal with.<sup>30</sup>

25. The Lord Chancellor and Secretary of State was of the view that judicial review was being abused by campaigning groups, who were bringing cases for purposes of publicity or delay only, and often on the basis of a technicality rather than any substantive complaint. Feizal Hajat, Head of Legal Services at Birmingham City Council and thus an experienced head of legal services at the UK's largest local authority, could not give us any specific examples of cases where the judicial review was used as a delaying tactic or campaigning tool, but told us about "issue farming [...] where solicitors, barristers and groups get together and look at what issues that are relevant to those parties and their interests should be challenged and which authority".<sup>31</sup>

26. Other witnesses, however, saw no abuse in the practice described by Mr. Hajat, and no evidence of abuse taking place: Michael Fordham QC emphasised the judicial safeguards which already exist against abuse of the process,<sup>32</sup> and Karen Ashton observed that it is in everyone's interests, where there is a general issue that needs to be decided by a court, that it is brought by way of a lead case rather than numerous cases being brought separately.<sup>33</sup>

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28 *Judicial Review—Proposals for further reform, Foreword by the Lord Chancellor and Secretary of State for Justice*, p 3.

29 Q8, 4 December 2013.

30 Q10, 4 December 2013.

31 Q21, 4 December 2013.

32 Q22, 4 December 2013.

33 *Ibid.*

27. The Government is concerned that there has been “significant growth” in the use of judicial review.<sup>34</sup> It points to the number of judicial reviews lodged having risen nearly threefold between 2000 and 2012, from 4,300 to 12,600, and to the trend continuing in 2013, with 12,800 judicial reviews lodged in the first 9 months alone. The Government acknowledges<sup>35</sup> that the main driver of this growth in the overall number of judicial review applications has been an increase in immigration and asylum applications, which more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012. This was the predictable result of the restriction of appeal rights in this context. It also acknowledges that the number of judicial reviews in cases other than asylum and immigration has increased over the same period “at a much slower rate.” However, it still considers the increase of approximately 21% in the number of non-immigration and asylum judicial reviews between 2000 and 2012 to be significant.<sup>36</sup> Other witnesses queried whether a total increase of 366 applications over a 12 year period constituted a “significant” increase. Professor Sunkin, for example, said:<sup>37</sup>

“if one leaves aside the immigration case load, the evidence does not show that there has been a substantial increase in the use of judicial review. In fact, the official statistics [...] reveal that, in non-immigration civil judicial reviews over the last 15 years or so, case numbers have remained fairly constant at just over 2,000 a year. [...] By any measure, that is not a large number compared with the number of decisions taken by Government annually.”

28. The Government is concerned, not just about the growth of judicial review, but about “the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision-making.”<sup>38</sup> Although it has not offered firm statistics about the number of such cases occurring annually, it suggests that the number is “significant”.<sup>39</sup> The evidence about the precise proportion of applications which are unmeritorious or abusive, however, is unclear. The Government’s presentation of the statistics has sometimes come close to inviting the inference that all or most applications which are issued but not subsequently granted permission should be presumed to be lacking merit or abusive. This is not a safe assumption, however, as the senior judiciary pointed out in its consultation response:<sup>40</sup>

“Meritorious cases may well settle before a permission hearing. The statistics set out in the consultation paper [...] do not include the proportion of cases which are withdrawn because the respondent concedes the merits of the case against them. The percentage may be high. If it is, this has important implications for the government’s proposals: it undermines the suggestions that a large number of weak

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34 *Judicial Review—Proposals for further reform*, para. 6; *Judicial Review – proposals for further reform: the Government response*, para. 7.

35 *Judicial Review—Proposals for further reform*, para. 10.

36 The number of such judicial reviews increased from 1,752 in 2000 to 2,118 in 2012: see oral evidence of the Lord Chancellor, Q47.

37 Q8.

38 *Judicial Review—Proposals for further reform*, para. 1.

39 See eg. *Judicial Review—proposals for further reform: the Government response*, para. 45: “The Government remains of the view that the taxpayer should not be paying for a significant number of weak judicial review cases which issue but are not granted permission by the court.”

40 Response of the senior judiciary, para. 5.

claims are being issued, and indicates that the current procedures allow meritorious cases to be brought swiftly to a conclusion.”

29. The Government acknowledges that there is some evidence that suggests that many cases which are withdrawn before permission is considered by the court may be settled on terms favourable to the claimant.<sup>41</sup> It appears that official data on the reasons why judicial review applications are withdrawn before a permission decision is made are not recorded, and, in the absence of such information, statistics about the proportion of cases in which permission is granted cannot tell us anything reliable about the scale of abuse of judicial review.

**30. We recognise that there has been a substantial increase in the number of judicial reviews in recent years, but this has been largely because of the predictable and foreseen increase in the number of immigration cases being pursued by way of judicial review. Such cases, however, have been transferred from the High Court to the Upper Tribunal since November 2013. We note that the number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We also note that there has not been sufficient time since the transfer of immigration cases to the Upper Tribunal for any assessment to be made of whether the numbers of judicial review cases is still growing. We therefore do not consider the Government to have demonstrated by clear evidence that judicial review has “expanded massively” in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate.**

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<sup>41</sup> *Judicial Review—Proposals for further reform*, para. 12, citing V. Bondy & M. Sunkin, “The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing” (2009).

## 2 Procedural defects and substantive outcomes

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### The proposal consulted on

31. The Government in its consultation paper considered that challenges which relate only to procedural issues could be determined more quickly and with fewer resources than at present. In particular the Government was considering proposals for cases which succeed in relation to procedural breaches, but where the court is satisfied that even without that particular breach there would have been “no difference” to the outcome of the decision. There were two proposals being considered: to bring forward consideration of the test to the permission stage, or to lower the test, for example, from inevitability to high likelihood.

### The Government response

32. Although the Government response to the consultation does not draw attention to the fact, the consultation revealed that the Government's initial proposals on this point rested on a misapprehension: that under the present law the courts only consider whether the outcome for the applicant would be different at the stage of deciding whether or not to withhold relief, at the end of the proceedings, as opposed to at the outset of the proceedings when deciding whether or not to grant permission. One of the proposed changes was therefore to bring forward consideration of the test to the permission stage.

33. In fact, as responses to the consultation made clear, it is already the case that courts in judicial review cases do consider this question at the permission stage. As the senior judiciary said in its response:<sup>42</sup>

“Under the current law the court may already refuse an application at the permission stage on the basis that an alleged procedural flaw in making the decision can have made no difference to the outcome. When a defendant raises an argument on the acknowledgment of service, the court will necessarily consider that argument when considering whether or not to give permission.”

34. Notwithstanding the lack of support for the Government's proposal, and the strength of the opposition to it in many quarters, including from the courts and from public authorities who are often on the receiving end of judicial review applications, the Government maintained its view that judicial reviews based on failures “highly unlikely to have made a difference” to the outcome are not a good use of time and money.<sup>43</sup>

35. The Criminal Justice and Courts Bill makes provision which would give effect to the Government's proposal. Clause 52 amends the relevant statutory framework governing judicial review by the High Court and the Upper Tribunal. The new law would require both the High Court and the Tribunal to refuse permission to apply for judicial review, and to withhold a remedy, if it considers it “highly likely” that the outcome for the applicant

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<sup>42</sup> Response of the senior judiciary to the Ministry of Justice's consultation entitled “Judicial Review: Proposals for Further Reform”, 1 November 2013.

<sup>43</sup> Government response to consultation para. 38.

would not have been substantially different if the conduct complained of in the judicial review had not occurred.

## Evidence

36. The Lord Chancellor and Secretary of State explained in his oral evidence to us that he is particularly concerned that too many cases are brought on the basis of a technicality, where the technical flaw in a consultation, for example, causes significant delay to important infrastructure projects, even though the flaw could not have made any difference to the outcome of the decision.

37. Michael Fordham QC, on the other hand, considered that the courts already had well developed safeguards against such abuse in place, including the power to withhold a remedy in the court's discretion where it would make no difference in practice. We also heard that many organisations are concerned that changing the threshold for materiality will require the judiciary to stray into reviewing the merits of a decision. Feizal Hajat was not persuaded that considering the "no difference" question earlier in the process, at the permission stage, would lead to any savings in terms of costs or delay, because for the court to be able to make that determination "would inevitably result in a full day's hearing or more"<sup>44</sup>.

## Analysis

38. In light of the evidence we have heard we are concerned by three aspects of the proposal which is now contained in clause 52 of the Criminal Justice and Courts Bill.

### ***Lowering the threshold from "inevitable" to "highly likely"***

39. Clause 52 of the Bill would lower the probability threshold which courts currently apply when deciding whether or not to refuse permission or withhold a remedy on the ground that the procedural defect relied on would not have made a difference in substance to the original outcome. The Government is satisfied that the new lower threshold test is a reasonable one, "given that where there is anything more than minor doubt as to whether there would have been a difference the courts would still be able to grant permission or a remedy."

40. However, we have concerns about the proposed lowering of the threshold from "inevitable" to "highly likely": first, concerns of principle, and, second, a concern more practical in nature.

### ***Concerns of principle***

41. Our first concern of principle about this proposal is that there are sound constitutional reasons underpinning the courts' settled position, arrived at after many years of experience operating the common law system of judicial review, that permission or a remedy should be refused on "no difference" grounds only if a high threshold test of "inevitability" has been satisfied. These reasons are to be found in the relevant judgments which set out and

explain the courts' approach to this age-old conundrum in the law of judicial review. The essence of one of them is captured most memorably in the famous dictum of Megarry J. In the case of *John v Rees*:

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”

42. Another reason underpinning the courts' current position is that courts should not condone unlawful decision-making where there is a possibility of a different outcome if the decision had been taken lawfully. As the consultation response of the senior judiciary points out, there is an issue of constitutional principle at stake here:<sup>45</sup>

“A lower threshold than inevitability for the application of the ‘no difference’ principle envisages judges refusing relief where there has been a proved error of law and the decision under challenge might have been different absent that error. The propriety of a different outcome being forestalled by the court's no difference ruling should be closely considered.”

43. We note that Lord Pannick,<sup>46</sup> the Bingham Centre for the Rule of Law<sup>47</sup> and Tom Hickman and Ben Jaffey,<sup>48</sup> are all of the view that the proposed reform in clause 52 of the Criminal Justice and Courts Bill is objectionable for constitutional reasons, because it instructs courts to ignore unlawful conduct by public authorities, even where that unlawfulness is material in the sense that it might have made a difference to the outcome. We agree with this view: it is in the public interest for public bodies to make lawful decisions.

44. Our second, related, concern of principle is that the proposed lowering of the threshold may give rise to breaches of the right of access to court in Article 6(1) ECHR, a right which, in order to be practical and effective rather than theoretical and illusory, includes the right of access to a legally enforceable remedy. The issue of constitutional principle raised by the senior judiciary is in substance the same as the issue of Convention compatibility considered by the Government's ECHR Memorandum.<sup>49</sup> That memorandum considers whether a power to refuse permission to apply for judicial review on the ground that it seems to the court to be highly likely that the outcome would not have been substantially different, is compatible with the right of effective access to court which has been found to be implicit in Article 6(1) ECHR. The Government acknowledges that refusing permission on that basis constitutes a restriction on the right of access to court, but argues that the high threshold of “highly likely” means that the interference is still proportionate, because judicial reviews based on alleged flaws which would have affected the outcome of the decision will still be able to proceed.

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45 Response of the senior judiciary, above n. xx, para. 22.

46 David Pannick QC, *Why judicial review needs protection from our politicians*, The Times, 20 February 2014.

47 Streamlining Judicial Review in a Manner Consistent with the Rule of Law, above, para.5.7

48 B. Jaffey and T. Hickman, “Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014” U.K. Const. L. Blog (6 February 2014) available at <http://ukconstitutionalallaw.org>

49 ECHR Memorandum, paras 111–118.

45. We accept that it is a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law. However, for the reasons we have explained above, in our view lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied. It therefore risks giving rise, in particular cases, to incompatibility with the right of practical and effective access to court, which the European Court of Human Rights recognises as an inherent part of the rule of law requiring States to ensure that legal remedies are available in respect of unlawful administrative action determining civil rights or obligations.

### *Practical concerns*

46. The more practical concern about the proposed lowering of the threshold is that this will turn the permission stage of judicial review proceedings, which is meant to be a preliminary consideration of the merits of the claim to determine whether it appears to be *prima facie* arguable, into a full “dress rehearsal” of the substantive claim, as the parties argue about whether the procedural flaw would make any substantive difference to the outcome. This would therefore be counter-productive as it would lead to greater cost and delay at the permission stage. As the Government notes in its response to consultation, this concern was expressed by many legal practitioners and their representative groups.

47. The Government dismisses this concern, asserting in response that it is “satisfied that the risk of dress rehearsals is manageable”.<sup>50</sup> It does not, however, suggest any ways in which to mitigate the risk of dress rehearsals of the full substantive hearing taking place at permission stage. Elsewhere in the Government response to the consultation, the Government recognises that it is undesirable to turn permission hearings into dress rehearsals, but suggests that this can be managed “by the court through its case management powers.”<sup>51</sup> However, it omits to mention in its response to consultation the significant fact that the senior judiciary expressed a very clear view on this point in its response to the Government’s consultation paper:<sup>52</sup>

“In a small number of cases it may be obvious that a procedural flaw can have made no difference to the outcome. In these cases, permission will be refused. However, in most cases, the decision whether a procedural flaw made a difference to the outcome cannot be taken without a full understanding of the facts. At permission stage the requisite full factual matrix is rarely before the court. As foreshadowed in question 13, an obligation to focus further on the no difference principle at the permission stage would necessarily entail greater consideration of the facts, greater (early) work for defendants, and the prospect of dress rehearsal permission hearings. It is difficult to see how this outcome could be avoided.”

48. **The Government ought not so lightly to go against the views of the senior judiciary on a matter concerning the practical impact of its proposal on court proceedings, at**

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50 Government response to consultation, para. 38.

51 *Ibid.*, para. 48.

52 Response of the senior judiciary, above n. xx, para. 21.

least without any indication as to how the concerns of the senior judiciary can be mitigated in practice. In the absence of such concrete proposals, we set greater store by the senior judges' concerns that lowering the threshold will unavoidably lead to "dress rehearsal permission hearings", with all the associated cost and delay. We are also concerned about the combined effect of this proposal and the legal aid proposal that we consider below, because together the two proposals significantly increase the amount of pre-permission work which will have to be done by claimants' lawyers at their own risk.

### *Procedural or substantive defects?*

49. We also point out that the scope of clause 52, as currently drafted, is significantly broader than the proposal on which the Government consulted. As we explained above, the Government consulted on "proposed changes to the existing approach to challenges brought on the basis of procedural defects which could not have made a difference to the original outcome." Indeed, chapter 5 of the Government's consultation paper was called "Procedural defects", and all of the Government's justifications for the proposed change have referred to "technical" procedural flaws, or procedural irregularities, which would have made no difference to the substantive outcome even if the defects had not occurred.<sup>53</sup>

50. As drafted, however, the new provision is not confined to procedural defects. The court or Tribunal is required to refuse permission or withhold relief if it is highly likely that the outcome would not have been substantially different if "the conduct complained of" had not occurred, and "the conduct complained of" is defined broadly as "the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court (or the Tribunal) in granting relief."<sup>54</sup>

51. This wide definition covers not merely procedural defects, but all possible grounds on which an application for judicial review could be based, and opens up the possibility of defendants relying on the "no substantial difference" argument in response to claims based on other, more substantive grounds, such as that the decision-maker made an error of law, acted irrationally or incompatibly with a Convention right.

### *Removing judicial discretion*

52. Clause 52 also seeks to remove judicial discretion in the matter and instead to tie the judges' hands by imposing an express statutory duty to refuse to grant permission to apply for judicial review, or to withhold a remedy, if the statutory test is satisfied.<sup>55</sup>

53. Such an approach is in keeping with other recent provisions in Government Bills, which seek to replace judicial discretion with express statutory duties on courts and tribunals. We have expressed our concern about such provisions in a number of legislative

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53 The Government's ECHR Memorandum, for example, talks throughout of "procedural irregularity" in its consideration of clause 52 of the Bill: see paras 111–118.

54 New s. 31(8) of the Senior Courts Act 1981, as inserted by clause 52(3) of the Criminal Justice and Courts Bill and new s.16(3C) of the Tribunals, Courts and Enforcement Act 2007, as inserted by clause 52(5) of the Bill.

55 New s. 31(2A) and (3C) of the Senior Courts Act 1981, as inserted by clause 52(1) and (2) of the Criminal Justice and Courts Bill, and new s. 15(5A) and 16(3D) of the Tribunals, Courts and Enforcement Act 2007, as inserted by clause 52(4) and (5) of the Bill.

scrutiny Reports,<sup>56</sup> and we are equally concerned about the removal of judicial discretion in this context. In our view, the Government has not made out its case that the current discretionary approach of the courts is not working, and we think it is unnecessary to seek to interfere with the judicial function in judicial review cases by replacing the current judicial discretion with an express statutory duty on the High Court and the Upper Tribunal.

## Recommendation

**54. We are not persuaded that there needs to be any change to the way in which courts currently exercise their discretion to consider, at both the permission and the remedy stage, whether a procedural flaw in decision-making would have made any substantive difference to the outcome. We therefore recommend that clause 52 be deleted from the Criminal Justice and Courts Bill.**

**55. However, if Parliament prefers to retain clause 52, we recommend that clause 52 be amended so as to reflect the current approach of the courts. In our view, there is a case to be made for such an amendment in order to clarify the approach which the courts currently take to the issue of whether the correction of a procedural defect would make any difference to the outcome. The fact that the Government's own consultation initially proceeded on the mistaken assumption that there is currently no role for the "no difference" argument at the permission stage demonstrates the need for such a statutory clarification.**

**56. We therefore recommend amendments which would make clear that the High Court and the Upper Tribunal have the discretion to withhold both permission and a remedy if they are satisfied that the outcome for the applicant would inevitably have been no different even if the procedural defect complained of had not occurred. The following amendments to clause 52 would give effect to this recommendation:**

**Page 52, line 35, leave out 'must' and insert 'may'**

**Page 52, line 37, leave out 'not' and insert 'decide not to'**

**Page 53, line 1, leave out 'highly likely' and insert 'inevitable'**

**Page 53, line 12, leave out 'highly likely' and insert 'inevitable'**

**Page 53, line 13, leave out 'must' and insert 'may'**

**Page 53, line 16, leave out 'conduct (or alleged conduct) of the defendant' and insert 'procedural defect'**

**Page 53, line 34, leave out 'conduct (or alleged conduct) of the defendant' and insert 'procedural defect'**

**Page 53, line 38, leave out 'highly likely' and insert 'inevitable'**

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<sup>56</sup> See e.g. our Reports on the Immigration Bill, in which we expressed our concern about proposals in the Bill to prescribe the weight to be given to certain matters by courts and tribunals, and to give the Secretary of State a power of veto over whether the Upper Tribunal can hear a new matter on an immigration appeal: see *Legislative Scrutiny: Immigration Bill (Second Report)*, Twelfth Report of Session 2013–14, HL Paper 142/ HC 1120, paras. 94–97 and 109–111.

**Page 53, line 40, leave out 'must' and insert 'may'**

### 3 Legal aid for judicial review cases

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#### The proposal consulted on

57. In its consultation on legal aid reform, *Transforming Legal Aid*,<sup>57</sup> the Government proposed that providers of legal services in applications for judicial review against public bodies should only be paid for work done on the case if the Court grants permission for the application to proceed. The rationale for the proposal was to transfer the financial risk of work on an application for permission for judicial review to the legal aid practitioner, in order to provide them with a greater incentive to give careful consideration to the strength of the case before applying for permission.

58. We were concerned about the possibility that this proposal might significantly restrict access to judicial review, particularly by vulnerable groups requiring public assistance to make practical and effective their right of access to court to challenge unlawful actions by public bodies. We therefore indicated our intention to scrutinise this proposal when we announced our inquiry into the implications for access to justice of certain of the Government's proposals to reform legal aid in July 2013.

59. In the Government's response to its consultation on *Transforming Legal Aid*, (*Transforming Legal Aid: Next Steps*), in September 2013, it indicated that respondents to the consultation had raised concerns that the proposal would also affect meritorious cases where permission is not granted simply because the case is settled prior to consideration by the court. The Government announced that, in light of those concerns, it would be consulting separately on an alternative proposal on payment for permission work in judicial review cases.<sup>58</sup>

60. The Government's modified proposal was then published in its separate consultation paper on judicial review reform, *Judicial Review—Proposals for further reform*.<sup>59</sup> This latest consultation included a modification in that the Legal Aid Agency would be given a discretion to make payment after the event in cases where proceedings are issued but the case concludes prior to a permission decision, and that case is considered "sufficiently meritorious" to justify payment.

#### The Government response to consultation

61. The Government response to the consultation notes that some respondents recognised that the proposal had been modified from the original policy, to allow the Lord Chancellor to pay legal aid practitioners in certain cases which conclude prior to a permission decision, thereby seeking to address some of the concerns expressed about the original proposal.<sup>60</sup> However, respondents to the consultation remained generally opposed to this proposal, arguing in particular that the uncertainty and financial risk for legal aid

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57 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/legal-aid-inquiry--call-for-evidence/>

58 *Transforming Legal Aid: Next Steps* (5 September 2013), para. 1.25, p. 9.

59 *Judicial Review—Proposals for further reform* (Cm 8703, September 2013), paras 114–134.

60 Government response to consultation, paras 42–46.

practitioners would affect both the number of practitioners willing to carry out public law work and the kinds of cases they would be willing to take on in future.

62. Following the consultation, the Government “remains of the view that the taxpayer should not be paying for a significant number of weak judicial review cases which issue but are not granted permission by the court.”<sup>61</sup> It considers it appropriate for the financial risk of the permission application to rest with the provider and to use the permission test as the threshold for payment. The Government therefore intends to implement the proposal, and will seek to accommodate concerns expressed about the proposed discretionary payment mechanism by adjusting the factors to be taken into account by the Legal Aid Agency when deciding whether or not a provider should be paid in a case which concluded prior to a permission decision.<sup>62</sup> The adjustments, the Government says, will reduce the risk that providers will be expected to take when deciding whether or not to take on a judicial review case.

### The Civil Legal Aid (Remuneration) Regulations

63. The Government has decided to take forward this element of its reform package by secondary legislation subject to negative resolution rather than by primary legislation. The relevant Regulations, amending the Civil Legal Aid (Remuneration) Regulations, were laid on 14 March.<sup>63</sup> The Regulations provide that legal aid practitioners will not be paid for their work on making an application for permission in a judicial review case, where that application has been issued, unless (i) permission is given by the court or (ii) the case concludes before a permission decision is made but the Lord Chancellor (in practice, the Legal Aid Agency) considers that it is reasonable to pay, taking into account the circumstances of the case.<sup>64</sup>

64. When considering whether it is reasonable to pay the practitioner for the work done, the Lord Chancellor is to take into account in particular certain factors set out in the Regulations, including the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person; the extent to which, and the reason why, the person obtained the outcome sought in the proceedings; and the strength of the application for permission at the time it was filed, based on the law and facts which were known, or should have been known, to the practitioner at the time.<sup>65</sup>

65. The House of Lords Secondary Legislation Scrutiny Committee has drawn the Regulations to the attention of the House of Lords on grounds of their legal importance and public policy interest.<sup>66</sup> In a highly critical Report, that Committee was particularly concerned about the uncertainty caused by the Regulations amongst legal aid providers as to whether they will get paid for work they do in the very sensitive area of judicial review,

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61 *Ibid.*, para. 45.

62 See Annex B to the Government response to consultation.

63 Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (SI 2014/607).

64 New Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013, as inserted by Regulation 2(5) of the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014.

65 New Regulation 5A(1)(b).

66 Secondary Legislation Scrutiny Committee, *Civil Legal Aid (Remuneration)(Amendment) (No. 3) Regulations 2014*, 37th Report of Session 2013–14, HL Paper 157 (27 March 2014).

which, the Committee noted, plays a significant role in holding the Executive to account. The Committee received a number of submissions about the Regulations, including some from organisations that conduct such litigation themselves or represent practitioners who do,<sup>67</sup> and it made a number of criticisms of the Regulations.

66. It was critical of the inability of the Ministry of Justice (MoJ) to say clearly how many cases a year were likely to be affected by the changes, or to state with any certainty how many cases were likely to receive a discretionary payment from the Legal Aid Agency under the proposed discretionary payment regime. It criticised the lack of clarity in the Regulations themselves about how the discretionary payment regime will work in practice, giving rise to unacceptable uncertainty for legal aid providers, and called for “urgent clarification of exactly what work will, and will not, be paid for and how the Legal Aid Agency will exercise its discretion over payment”, preferring a clearer definition to be set out in the Regulations themselves. The Committee was also concerned that the MoJ had done little in its Explanatory Memorandum to explain the Regulations in the wider context of other changes to judicial review contained in Part 4 of the Criminal Justice and Courts Bill and a number of other recent changes. It called on the Government to provide Parliament with a better overview of the cumulative effect of the various changes proposed to the judicial review system.

67. In short, the Secondary Legislation Scrutiny Committee shared the concerns expressed more generally that this proposal will have a serious “chilling effect” on providers of legal aid services: they will not be prepared to take the risk of whether or not they will get paid for the work they do, with the result that meritorious judicial review cases will not be brought.

68. Lord Pannick has tabled a regret motion in the House of Lords, regretting that the Regulations make the duty of the Lord Chancellor to provide legal aid in judicial review cases dependent on the court granting permission to proceed. The regret motion is due to be debated on 7 May 2014. In the Commons, an Early Day Motion against the regulations has been tabled, but there are currently no plans for a Commons debate on the instrument, which, unless annulled by a resolution of either House, will come into force on 22 April.

## Evidence

69. A lot of evidence we received was concerned that this proposal, even as modified, will have a serious impact on access to justice, because its effect will be to force claimants’ solicitors to bear the risk of not obtaining permission, and those law firms are already carrying out such work at reduced rates and do not have financial surpluses to enable them to shoulder the risk<sup>68</sup>. We heard from Karen Ashton that the proposal to give the Legal Aid Agency a discretion to make a payment in meritorious cases where the lawyers’ work would not otherwise be paid does not meet this concern, because any payment will still be after the event and therefore does not reduce the risk involved in first doing the work before knowing whether payment will follow.

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67 Eg. JUSTICE, Liberty, the Howard League for Penal Reform, Shelter, the Immigration Law Practitioners’ Association, the Legal Aid Practitioners Group and Young Legal Aid Lawyers: the submissions can all be found on the website of the Secondary Legislation Scrutiny Committee <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>

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70. The Lord Chancellor and Secretary of State, on the other hand, considers “instinctively” that the legal profession should do a bit more at risk if it is confident in its case. He could not see why it should be possible to bring personal injury claims on a no-win no-fee basis, but not judicial review claims<sup>69</sup>.

71. Karen Ashton did not accept this analogy, arguing that judicial review claims do not concern compensation for an historic event such as a personal injury, but their subject matter is much more fluid and dynamic, concerning ongoing relations between the individual and the public authority, which is why the market for legal services has not developed similar insurance products to those which exist in relation to private law litigation. We recognise that there are important differences between a personal injury claimant and a judicial review claimant. These include greater uncertainty about the prospects of success in judicial review cases prior to permission being granted because of the lack of mandatory pre-action disclosure requirements, which makes it difficult to assess the strength of the defendant's case at the outset.

72. Michael Fordham QC also pointed out that the proposed reforms were not even-handed in their attempt to save public funds: judicial reviews are defended by public authorities, which often incur public expense resisting meritorious claims for judicial review, but none of the Government's proposals address that problem.

## **Analysis**

73. As we made clear in our recent Report on the implications for access to justice of the Government's proposed reforms to legal aid, we accept the legitimacy of the Government's aim of ensuring that limited legal aid resources are properly targeted at those judicial review cases where they are needed most.

74. The question we have sought to answer, as Parliament's human rights committee, is whether the Government has got the balance right in this proposed reform, between deterring weak claims from being brought at public expense on the one hand, and preserving effective access to court for meritorious claims to hold the Government to account on the other. We are concerned that the effect of the reform will be to prevent meritorious cases from being brought.

### ***Chilling effect on legal service providers***

75. We received a good deal of evidence to the effect that the Government's proposed reform will lead to many providers of legal services not taking the risk of taking on judicial review cases. We also heard evidence suggesting that the combination of this reform with the “no difference” reform in clause 52 of the Bill adds to the chilling effect on legal aid practitioners. The context in which these changes should be considered includes a number of significant changes which have already affected effective access to court, including the introduction of new court fees, and other restrictions on the availability of legal aid, for example in relation to borderline cases.

76. In our view, the reform pushes too much risk onto providers, and creates too much uncertainty about the degree of such risk, causing a chilling effect on providers which will have a significant impact on access to justice because meritorious judicial review cases will not be brought.

### *Evidence of number of weak claims*

77. The premise of this particular proposal is that currently the taxpayer is “paying for a significant number of weak judicial review cases which issue but are not granted permission by the court.”<sup>70</sup> However, the Ministry of Justice has not produced the evidence to substantiate this claim. It relies on the fact that in 2012-13, 751 legally aided judicial review cases were not granted permission. It invites Parliament to infer from this figure that a significant number of legally aided judicial review cases are brought every year which are weak or unmeritorious. However, such an inference cannot reliably be made without a more detailed breakdown of this figure. While this number will include some cases which were lacking merit and should never have been brought, it will also include meritorious cases which settled before permission was granted, and cases in which permission was refused but it was perfectly justifiable for the proceedings to be brought.

78. As the Secondary Legislation Scrutiny Committee observed, the Ministry of Justice does not offer an estimate of how much public money the proposal will save, and this is because it does not have clear evidence about the scale of the problem which the measure is designed to address.

**79. We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. In our view, for the reasons we have explained above, it constitutes a potentially serious interference with access to justice and, as such, it requires weighty evidence in order to demonstrate the necessity for it—evidence which is currently lacking.**

### *Secondary or primary legislation?*

80. **We also regret the fact that the Government has chosen to bring forward by a negative resolution statutory instrument a measure with such potentially significant implications for effective access to justice.** As the Explanatory Memorandum accompanying the Regulations records, since the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement of compatibility with the European Convention on Human rights is required.<sup>71</sup> Parliament therefore does not even have the benefit of an ECHR Memorandum setting out the Government's reasons for its view that the measure is compatible with the ECHR, notwithstanding its obvious implications for effective access to court to challenge unlawful decisions.

**81. In our view, the significance of the measure's implications for the right of effective access to court is such that it should have been brought forward in primary legislation,**

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<sup>70</sup> Government response to consultation, para. 45.

<sup>71</sup> Explanatory Memorandum, para. 6.1.

to give both Houses an opportunity to scrutinise and debate the measure in full and to amend it if necessary. The Government could have given both Houses of Parliament the opportunity to do so by including a provision expressly authorising the change in the Criminal Justice and Courts Bill which is currently before Parliament, Part 4 of which contains some other significant proposals for reforming judicial review.

## **Recommendation**

82. In view of the unusual level of concern about the substance of the proposal, and the critical report of the Secondary Legislation Scrutiny Committee, we recommend that the Government withdraw the regulations it has laid to give effect to its proposal, and introduce instead an amendment to the Criminal Justice and Courts Bill to provide Parliament a proper opportunity to consider and debate in detail this controversial measure with such serious implications for effective access to the courts to hold the Government to account.

## 4 Interveners and costs

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### Government response

83. The Government, in its response to the consultation, acknowledged that interveners can add value, supporting the court to establish context and facts, and that the Government itself intervenes in litigation on occasion.<sup>72</sup> However, it still believed that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and that this should apply equally to interveners, and it intended to bring forward legislation to achieve this.

84. The Criminal Justice and Courts Bill would change the current position by introducing a presumption that those who intervene in a judicial review case will have to pay their own costs and any costs incurred by other parties to the litigation arising from the intervention.<sup>73</sup> The presumption is rebuttable only if there are “exceptional circumstances” which justify a different order.

85. The Bill provides that the High Court or the Court of Appeal cannot order a party to judicial review proceedings to pay the intervener's costs in connection with the proceedings,<sup>74</sup> unless there are exceptional circumstances making it appropriate to do so,<sup>75</sup> and that, where a party to the judicial review proceedings applies, the court must order the intervener to pay any costs that the court considers have been incurred by that party as a result of the intervention,<sup>76</sup> unless there are exceptional circumstances making it inappropriate to do so.<sup>77</sup> What constitute “exceptional circumstances” for these purposes is not defined in the Bill, but in determining whether there are such exceptional circumstances the court is required to have regard to criteria specified in rules of court.<sup>78</sup>

86. According to the Explanatory Notes to the Bill, the new presumption only applies where an intervener applies to the court for permission either to provide evidence or make submissions to the court. It does not apply where a person or body is invited by the court to intervene, because in such cases the intervener does not require the intervener to be granted permission.<sup>79</sup>

### Analysis

87. The matter of who pays the costs of legal proceedings is usually entrusted largely to the courts' general discretion, to be exercised in light of all the circumstances of the case.

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72 Government response to consultation, para. 62.

73 Clause 55.

74 Clause 55(2).

75 Clause 55(3).

76 Clause 55(4).

77 Clause 55(5).

78 Clause 55(6).

79 Clause 55 applies where an intervener is granted permission to intervene: see clause 55(1), as explained in Bill 169–EN para. 381.

Statutory provisions directing courts as to when they can and cannot order costs to be paid in relation to proceedings before them are unusual.

88. The prohibition on a court ordering that an intervener's costs be paid by another party is extremely wide: it would catch, for example, the situation in which a party contested an application by an intervener for permission to intervene, resulting in an oral hearing of the application at which the court rules that permission should clearly be given to the intervener. In such circumstances, the avoidable costs of the oral hearing are currently recoverable from the party which unreasonably resisted permission, but this would no longer be the case under the provisions in the Bill. Nor is it clear on the face of the Bill that the narrow exception, permitting a different order to be made in "exceptional circumstances", would enable the intervener's costs to be awarded in such a case.

89. Similarly, and more seriously, the requirement that the court must order the intervener to pay the costs incurred by other parties as a result of the intervention is also extremely broad: on its face it would appear to apply even where the outcome of the case is as argued for by the intervener and the intervention made a significant contribution to that outcome. Under the current law, it is inconceivable that costs would be awarded against the intervener in such a case, but under the Bill that possibility arises and it is again not clear on the face of the Bill that the "exceptional circumstances" exception would apply. The evidence we have received from many organisations with experience of interventions suggests that this risk of exposure to a costs liability will deter many of those organisations from intervening in future, because as relatively small charitable organisations they could not take the risk of being landed with a large costs bill as a result of their intervention.<sup>80</sup>

90. We also question the justification for the clause distinguishing between those interveners who are invited by the court to intervene (who do not require permission) and those interveners who apply and are granted permission by the court. Both have the court's approval for intervening, so it is not immediately apparent to us why the costs regime should be so starkly different in each case.

91. Finally, it is not clear to us at what mischief this clause is aimed. The Government has not produced evidence of abusive interventions or cases in which an intervention has significantly and unjustifiably increased the costs of the case for other parties.

## Recommendation

**92. Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case. Such interventions already require judicial permission, which may be given on terms which restrict the scope of the intervention. We are concerned that, as the Bill stands, it will introduce a significant deterrent to interventions in judicial review cases, because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention.**

**93. We therefore recommend that the Bill be amended in order to restore the judicial discretion which currently exists, by leaving out the relevant sub-clauses.**

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80 JUSTICE, Liberty, Public Law Project, Amnesty International, Reprieve.

94. The following amendment would give effect to this recommendation:

**Page 55, line 30, leave out sub-clause (4) and (5)**

**Page 55, line 37, leave out 'or (5)'**

## 5 Capping of costs (“Protective costs orders”)

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95. Protective Costs Orders limit the costs exposure of a party where the issues raised by a case are of general public importance. The Government considers that the applicable test has become increasingly flexible, and is being granted in wider circumstances than originally envisaged, and consulted on whether PCOs should be granted in cases where the claimant has a private interest.

### Evidence

96. Witnesses in favour of the courts continuing to entertain public interest challenges also argued strongly in favour of the courts continuing to have a discretion to make Protective Costs Orders, in order to make access to justice practical and effective. The Lord Chancellor and Secretary of State was concerned that they are too widely used, that they seem to have “become the norm rather than the exception” and that there are a lot of well-off campaign groups bringing cases in the safe knowledge that their costs exposure will be kept down by a protective costs order<sup>81</sup>. Others considered that any restrictions on the availability of protective costs orders risked important public interest litigation such as the *Corner House* case not being brought in future.

### The Government response

97. Following consultation, the Government decided not to abolish PCOs in any case where there is an individual or private interest regardless of whether there is a wider public interest. It recognised the value of PCOs in cases where there is a strong public interest in resolving an issue and therefore decided to retain the availability of PCOs, but to legislate to put them on a statutory footing and to restrict their availability.

98. There is much about the Government's proposals on costs-capping in the Criminal Justice and Courts Bill that we welcome. The decision to put PCOs on a statutory footing, and to enshrine in statute the principles developed by the courts, is a welcome recognition, in principle, of the importance of the availability of PCOs in order to ensure practical and effective access to justice. Subject to one important qualification, the proposed new statutory code in clauses 56 and 57 of the Criminal Justice and Courts Bill accurately reflects the common law principles developed by the courts, as summarised in cases such as the important *Corner House* judgment.

99. Contrary to what the Lord Chancellor and Secretary of State told us in evidence, it is clear that PCOs have not “become the norm rather than the exception.” As the senior judiciary remarked in its response to consultation, “our experience is that the use of PCOs is not widespread in areas other than Aarhus environmental claims”.<sup>82</sup> The Government response to the consultation implicitly acknowledged this, commenting that respondents focused on the small number of PCOs made in non-environmental cases. Nevertheless it is

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81 Q52

82 Response of the senior judiciary, para. 32.

clear that the Government still considers PCOs to be too widely available, and while deciding to retain them it intends to adopt a strict approach to ensure that they are reserved for the most exceptional cases. The provisions in the Criminal Justice and Courts Bill which are designed to achieve this aim are unexceptionable, and for the most part merely reflect the common law restrictions on the availability of PCOs.

### ***Availability of costs capping order pre-permission***

100. In one respect, however, the Government's proposal includes a restriction which in practice has the potential to limit very severely the practical effectiveness of PCOs in protecting access to justice. The Bill provides that a costs capping order may be made by the courts "only if leave to apply for judicial review has been granted."<sup>83</sup> The Government response to consultation explains the Government's thinking behind this proposal: that "only cases with merit should benefit". In practice, however, the usefulness of PCOs in promoting effective access to justice by overcoming the enormous disincentive of a potentially crippling liability for costs, is severely curtailed by their not being available until permission is granted. The Bingham Centre for the Rule of Law, in its supplementary written evidence to us, referred to this as "a serious problem":<sup>84</sup>

[D]efendants and interested parties not infrequently run up massive pre-permission bills, especially where the Defendant is a regulator or private body acting in a public capacity, or there is a private interested party. Cases may have pre-permission costs that comfortably exceed £30,000. The risk of unknown and potentially substantial pre-permission costs is a risk that those who would otherwise qualify for costs protection cannot possibly take. If a PCO cannot be obtained to protect against such a costs risk, very many claims with substantial wider public interest will not be brought. A PCO that cannot be obtained until it is too late to prevent the chilling effect of uncertain and unlimited costs exposure is a pointless PCO: it does not achieve the aim of enabling access to justice for those who cannot expose themselves to substantial costs risk. Here, again, the proposals appear to give with one hand (endorsing PCOs) but take back with the other through hidden financial disincentives that will in practice undermine PCOs and negate the attainment of the purpose they are intended to serve.

**101. In our view, restricting the availability of costs capping orders to cases in which permission to proceed to judicial review has already been granted by the court is too great a restriction and will undermine effective access to justice. We recommend that the court should have the power to make a costs capping order at any stage of judicial review proceedings, including at the initial stage of applying for permission. The following amendment to the Criminal Justice and Courts Bill would give effect to this recommendation:**

**Page 56, line 16, leave out "only if leave to apply for judicial review has been granted" and insert "at any stage of the proceedings."**

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<sup>83</sup> Clause 56(3).

<sup>84</sup> Bingham Centre for the Rule of Law, supplementary written evidence (12 February 2014), para. 24.

### ***Meaning of “public interest proceedings”***

102. A costs capping order can only be made if the court is satisfied that the proceedings are “public interest proceedings”.<sup>85</sup> The Bill defines “public interest proceedings”: proceedings are public interest proceedings only if an issue that is the subject of the proceedings is of general public importance, the public interest requires the issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it.<sup>86</sup> The Bill also contains a non-exhaustive list of matters to which the court must have regard when determining whether proceedings are public interest proceedings, including the number of people likely to be directly affected if the judicial review succeeds, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance.<sup>87</sup> The Lord Chancellor is also given a ‘Henry VIII power’, exercisable by affirmative order, to amend this section of the Act by “adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public interest proceedings.”<sup>88</sup>

103. The Government has not explained the necessity of giving the Lord Chancellor such an extensive power to amend the statute by order in a way which will affect what count as public interest proceedings for the purposes of costs capping orders. The Lord Chancellor also has the power, again exercisable by affirmative order, to amend the Act by adding to, omitting, or amending the matters to which the court must have regard when considering whether to make a costs capping order in judicial review proceedings and the terms of such an order.<sup>89</sup> In view of that power, **we do not see the need for the Lord Chancellor also to have the power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings. Such a power has serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power from the Lord Chancellor. The following amendment would give effect to this recommendation:**

**Page 57, line 3, leave out sub-clauses (9)–(11).**

### ***Cross-cap***

104. The Government’s consultation sought views on whether there should be a presumption of a cross-cap, limiting an unsuccessful defendant’s liability for the claimant’s costs. The senior judiciary, in its consultation response, did not object to the presumption of a cross-cap in favour of the defendant when making PCOs in non-environmental cases. The Government, in its response to consultation, decided that, where a PCO is granted, there should be a presumption that the court will also include in the order a cross-cap on the defendant’s liability for the claimant’s costs.<sup>90</sup>

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85 Clause 56(6)(a).

86 Clause 56(7).

87 Clause 56(8).

88 Clause 56(9)–(11).

89 Clause 57(3)–(5).

90 Government response to consultation, para. 58.

105. The Bill, as drafted, however, goes further than such a presumption in favour of a cross-cap, and *requires* that where the court makes a costs capping order limiting the applicant's liability for the defendant's costs in the event of the judicial review not being successful, the court "must" also make an order limiting the defendant's liability for the applicant's costs in the event of the judicial review succeeding.<sup>91</sup> **We recommend that the provision for cross-capping should be a presumption not a duty, which would preserve some judicial discretion in deciding the appropriate costs order to make in the circumstances of the particular case. The following amendment would give effect to this recommendation:**

**Page 58, line 1, leave out "must" and insert "should normally".**

## 6 Alternatives to the Government's judicial review reforms

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106. A number of witnesses to our inquiry made suggestions about other possible reforms which might go some way towards achieving some of the Government's objectives of reducing unnecessary cost and delay. These include, for example, changes to the pre-action protocol in judicial review, to encourage greater recourse to cheaper alternatives to judicial review, and mandatory pre-action disclosure. Feizal Hajat considered that the need to reduce the cost to public authorities was the most important consideration, and that there were other proposals for reform which warranted consideration in that respect.<sup>92</sup>

### The Bingham Centre Report

107. The Bingham Centre for the Rule of Law has conducted a review, chaired by Michael Fordham QC, "to consider practical ways of streamlining the process of judicial review without impairing its chief function of vindicating the rule of law." Its Report, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*, was published in February and makes a number of recommendations.<sup>93</sup>

**108. We welcome the Bingham Centre Report as an important contribution to the debate about possible reform of judicial review, demonstrating that the perennial problem of reducing the cost and delay of judicial review proceedings can be addressed in ways which are compatible with effective access to justice. In our view the Government could go some way towards achieving its aims of reducing unnecessary cost and delay by other reforms which would make the process of judicial review more expeditious and therefore cheaper.**

109. As the Bingham Centre Report points out, the Government's proposed reforms are, without exception, about restricting access to judicial review for claimants. However, defendants to judicial review claims can also be responsible for unnecessary cost and delay, for example by failing to comply with the duty of candour sufficiently early in the proceedings, and by resisting the grant of permission in cases which are clearly arguable. In our view, a more even-handed approach would involve changes to the costs rules to incentivise conduct by defendants which also reduces cost and delay. We give one example below, but we recommend that the Government give careful consideration to the Bingham Centre's recommendations, and to other suggestions made by witnesses to our inquiry, such as mandatory pre-action disclosure by defendants to judicial review proceedings, again backed up with appropriate costs incentives.

### Costs at the permission stage

110. As part of its policy of using financial incentives to deter the bringing of weak judicial review claims, the Government intends to change the current costs rules which mean that

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<sup>92</sup> Qs 19–20, 4 December 2013.

<sup>93</sup> M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BIIICL, London, February 2014.

the costs of defending an oral permission hearing are not recoverable from the claimant.<sup>94</sup> The Government intends to introduce a principle that the costs of a failed oral permission hearing should be routinely recoverable by the defendant from the claimant. It intends to invite the Civil Procedure Rule Committee to give effect to that change by amending the Civil Procedure Rules.

111. The Government does not, however, propose to change the rules so that costs are recoverable against the defendant who unsuccessfully resists permission at an oral permission hearing. The Bingham Centre, however, points out that “permission is routinely resisted when defendants [...] are well able to see that there is no knock-out blow. It is perceived that there is little to lose in effectively taking a free shot at striking the case out.”<sup>95</sup> There is currently no real reason for judicial review defendants not to resist permission, because there is no costs incentive on the defendant to concede permission. Yet routine resistance to permission by defendants leads to additional cost and delay. The Bingham Centre therefore recommends that where a defendant unsuccessfully resists permission at an oral hearing, the claimant’s costs of obtaining permission should be recoverable from the defendant, rather than left to be determined at the end of the substantive hearing in light of the overall outcome of the case.

112. Such even-handedness was advocated by the senior judiciary in its response to the Government’s consultation:<sup>96</sup>

“To the extent that the Government intends to discourage the bringing of weak claims by the readier grant of costs against unsuccessful claimants, discouragement of defendants from delaying the progression of hearings by unsuccessfully opposing the grant of permission should be an equal consideration.”

**113. We recommend that the Government should invite the Civil Procedure Rule Committee to amend the Civil Procedure Rules so that the costs of oral permission hearings in judicial review proceedings should be recoverable from the unsuccessful party at that hearing, whether that is the claimant or the defendant. In our view, this more even-handed approach to costs at oral permission hearings would provide the appropriate financial incentive to defendants as well as claimants and so help to reduce unnecessary cost and delay.**

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94 Government response to consultation, para.s 47–50.

95 Streamlining Judicial Review, para. 4.1.

96 Response of the senior judiciary, para. 29.

## 7 Judicial review and the Public Sector Equality Duty

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### The consultation proposal

114. The Government's consultation sought views on whether disputes relating to the Public Sector Equality Duty ("PSED") could be better resolved by any alternative mechanisms that would be "quicker and more cost-effective" than judicial review.<sup>97</sup>

115. The PSED was introduced as a general duty by s. 149 of the Equality Act 2010,<sup>98</sup> and came into force on 5 April 2011. 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 people when carrying out their activities.<sup>99</sup> A failure by a public authority to comply with the PSED can be challenged by way of judicial review. The courts have established a number of general principles underlying the interpretation of the PSED by public bodies and decision-makers.<sup>100</sup> The courts have also explained the importance of the PSED for equality law. As stated by Arden LJ in *R (Elias) v Secretary of State for Defence*, equality duties "are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation".<sup>101</sup> The courts have also stressed that while legal proceedings are an important backstop, monitoring and self-assessment by public bodies in their decision making are crucial to advancing the aims of the equality legislation.<sup>102</sup>

116. In May 2012, the Government announced a review of the PSED (the "Review") as part of its Red Tape Challenge to examine whether it was operating as intended.<sup>103</sup> The Review was conducted by an Independent Steering Group and chaired by Rob Hayward OBE. Its findings were published on the same day as the Government launched its consultation on judicial review.<sup>104</sup> The Review contained a recommendation that, "In light of the Review's findings around judicial review, the Government should consider whether there are quicker and more cost-effective ways of reconciling disputes relating to the PSED".<sup>105</sup> The Review's findings on judicial review referred to in this recommendation were summarised elsewhere in the Review as follows:

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97 *Judicial Review: Proposals for further reform*, September 2013, Cm 8703, Foreword (p. 3), paras. 106–109 (p. 30), and Q 17.

98 The general duty in s. 149 of the Equality Act was preceded by specific duties on race (2001), disability (2006) and gender (2007).

99 For the purposes of the PSED, the protected characteristics are: age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief, sexual orientation (s.149(7) of the Equality Act 2010)

100 *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

101 [2006] EWCA Civ 1293 at para 274; *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, para. 26; *R (Chavda) v London Borough of Harrow* [2007] EWHC 3064 (Admin) para 40

102 *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, para 273

103 HC 15 May 2012 col. 29WS

104 GEO, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013

105 *Ibid.* Recommendation VIII, p.16

“Central and local government are particularly sensitised to the risk of legal challenge and the impact on a public body facing a legal challenge can be significant. The review has found that, even where decisions are overturned due to non-compliance with the PSED, it is not uncommon for the initial decision in question to remain unchanged following further work by the authority to demonstrate they had discharged the duty effectively. It is not clear how this benefits anyone.”<sup>106</sup>

117. Responding to the Review, the Minister for Women and Equalities, the Rt Hon Maria Miller MP, stated:

“We accept the recommendation to consider what complementary or alternative means, other than judicial reviews, there may be to enforce the PSED. Recognising that many of the concerns identified in the report are not unique to the PSED, we will take account of this recommendation in the wider work, led by the Justice Secretary, to ensure that disputes are resolved in the most proportionate way possible and in the most appropriate setting.”<sup>107</sup>

## The Government response

118. The Government's consultation response provides a summary of the main evidence that it received in relation to the PSED.<sup>108</sup> It outlines that the majority of respondents who answered the consultation questions about the PSED (107 out of 136 respondents) believed that judicial review should remain the principle mechanism for resolving PSED disputes.<sup>109</sup> Other responses suggested that a statutory code of practice or further guidance is required to ensure better compliance by public bodies with the PSED. A small number of respondents suggested alternative mechanisms to judicial review, including the use of Alternative Dispute Resolution, or the creation of a specialist tribunal or an independent regulator.<sup>110</sup>

119. However, the Government's response does not set out any conclusions or proposals concerning possible alternative mechanisms for the enforcement of the PSED, stating that the Government Equalities Office “is considering the results of the consultation as part of its work to implement the recommendations of the Independent Steering Group”.<sup>111</sup>

## Evidence

120. We received a number of written submissions that addressed the availability of judicial review for PSED disputes. The Equality and Diversity Forum highlighted that judicial review:

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<sup>106</sup> *Ibid.*, para. 9, p. 28 and p. 31.

<sup>107</sup> Department for Culture, Media and Sport, the Minister for Women and Equalities, the Rt Hon Maria Miller MP, Ministerial Written Statement, Public Sector Equality Duty Review, 6 September 2013

<sup>108</sup> The Ministry of Justice, *Judicial Review—proposals for further reform: the Government response*, February 2014, Annex A, paras. 111–116

<sup>109</sup> *Ibid.*, paras. 112–113

<sup>110</sup> *Ibid.*, p. 114

<sup>111</sup> *Ibid.*, p. 40

“[...] is the only means by which individuals can challenge whether public bodies’ have met the PSED standards. The Equality and Diversity Forum has considered whether there are satisfactory alternatives to judicial review as a remedy for breaches of the PSED and we have not been able to think of any that would be appropriate and not lead to even further delays in the process of decision making. We do not think that an administrative or non-judicial process would be appropriate or effective. Furthermore any tribunal system would be likely to be subject to greater delays than are experienced by the High Court and would not have powers equivalent to those exercisable by the High Court.”<sup>112</sup>

121. In its written submission to us, JUSTICE also outlined its views on the legal enforceability of the PSED:

“In order for the duty to retain its teeth, any alternative remedy would need to retain the characteristics of independence and the ability to grant a binding determination and a remedy when a violation is identified. JUSTICE is concerned that any alternative remedy which satisfies this criteria would simply duplicate the function currently performed by judicial review.”<sup>113</sup>

122. In its consultation response, Matrix Chambers stated:

“[...] judicial enforcement is what ensures that decision-makers take the duty seriously, and do not merely pay lip service to equality. It follows from this that we do not consider that any alternative mechanism could be more appropriate and effective than the PSED than judicial enforcement. It would be contrary to the rule of law for this form of public law wrong, uniquely, to be placed beyond reach of the Courts. The message that would be sent by removing judicial enforcement of PSEDs (uniquely) would be that giving due regard to equality doesn’t matter anymore. We consider that this would be a retrograde step.”<sup>114</sup>

123. In giving evidence to us, Rob Hayward clarified the Review’s recommendation, and in particular whether the Review had considered that the duty ought not to be legally enforceable. He told us that what the Review was really seeking, in the light of the evidence received from local authorities in particular, was “increased expedition because of the associated cost rather than doing away with the process—quite definitely not”.<sup>115</sup> Expedition was the key concern, because that had an effect on local authority budgets. He went on to make clear, however, that the Review had not really considered in any detail what might be appropriate alternative ways to reconcile disputes relating to the PSED.

124. Other witnesses agreed about the importance of legal enforceability of the duty. The Chief Executive of the Equality and Human Rights Commission (EHRC), Mark Hammond, thought that “some of the impetus or imperative to make sure that the decisions we were taking were fully in accordance with the PSED would undoubtedly be lost” if it were not legally enforceable.<sup>116</sup> Helen Mountfield QC also stressed the importance

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112 Written Submission of the Equality and Diversity Forum to the JCHR, paras 17–18

113 Written Submission of JUSTICE to the JCHR, para 51

114 Judicial Review: Proposals for further reform, Response by Matrix Chambers, paras 57– 59

115 Q.31

116 Q.36

of the legal enforceability of the PSED,<sup>117</sup> and provided us with some examples of cases where there had been real practical benefits as a result of judicial decisions that authorities had failed to comply with their PSED,<sup>118</sup> including:

- a case against a local authority regarding its decision to reconfigure its domestic violence services in a way that would preclude funding for specialist services for black and minority ethnic women<sup>119</sup>
- cases where schools had adopted uniform policies without regard to their adverse effect on those with sincere religious or cultural reasons for adopting a particular form of dress<sup>120</sup>
- a case against a local authority regarding a major planning decision, permission for which had been granted without proper analysis of the concerns of small minority ethnic owned businesses that their future commercial prospects had not been properly taken into account<sup>121</sup>
- a case against a local authority concerning its decision on how to set care home fees had not taken specific account of the additional needs of (and costs of providing for) those with dementia<sup>122</sup>
- a case against a taxi-licensing authority for its policy of licensing only one kind of taxi as the decision had been taken without due regard to the needs of some wheelchair users<sup>123</sup>
- a case against a local authority which held that it should consider the need to take steps to meet the specific community care and mental health needs before deciding to evict them<sup>124</sup>

125. In its written submission to us, JUSTICE explained the importance of the PSED in relation to equality law:

“JUSTICE considers that embedding, deepening and mainstreaming equality values within decision-making leads to better and more transparent decisions. The PSED ensures that relevant policy-makers and decision-makers take into account the needs of all affected parties.”<sup>125</sup>

126. In its consultation response, Matrix Chambers stated:

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117 Q.36

118 Q.33. See also *Response by Matrix Chambers to Judicial Review—proposals for further reform*, paras. 47–61; Written Submission of Equality and Human Rights Commission to the Joint Committee on Human Rights, p. 26; Written Submission of JUSTICE to the JCHR, paras. 51–52; Written Submission of the Equality and Diversity Forum to the JCHR, paras. 17–21

119 *R(Kaur & Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin)

120 *R (Watkins-Singh) v Governing Body of Aberdare High School* [2008] EWHC 1865 (Admin); *R(G) v Head Teacher & Governors of St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin)

121 *Harris v London Borough of Haringey* [2010] EWCA Civ 403, [2011] PTSR 931

122 *R (South-West Care Homes) v Devon County Council* [2012] EWHC 2967 (Admin)

123 *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin)

124 *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104

125 Written Submission of JUSTICE to the JCHR, para 51

“It is demonstrably the case that any neutering of the PSED which...would arise from restrictions on the use of judicial review as a mechanism for its enforcement, will impact particularly on those who are disadvantaged for reasons connected in particular with their race ethnicity or disability.”<sup>126</sup>

127. In its written submission to us, the EHRC considered that the courts can be the only real enforcement option. The Commission also highlighted its view that the Review took insufficient account of the role of the existing pre-litigation protocol in assisting resolution of potential judicial review claims involving the PSED, and the role of the permission stage in encouraging early settlement of disputes. The Commission believes that these preliminary stages of a judicial review are useful in resolving PSED complaints.<sup>127</sup> In addition, the EHRC calls for a statutory Code of Practice for the PSED to ensure better understanding and implementation of the duty.<sup>128</sup> Feizal Hajat of Birmingham City Council said in his evidence that “neutral evaluation by an independent party” would offer a quick resolution to issues concerning the PSED.<sup>129</sup>

128. In a previous evidence session relating to our earlier inquiry into the implications for access to justice of the Government's proposals to reform legal aid, the Lord Chancellor and Secretary of State made clear that he does “not believe the courts are the answer to all issues in our society.”<sup>130</sup> We asked him, therefore, for his view about the legal enforceability of the PSED. He explained that the questions in relation to the PSED were included in the Government's consultation on judicial review at the request of the Government Equalities Office in the Department of Culture, Media and Sport, which is responsible for equality policy and legislation across Government, and was intended to raise a discussion rather than seek views on a specific proposal. He stressed that the Government takes equality issues very seriously and recognises the importance of the equality duty, but was seeking ways of ensuring that it is tested “only when there is a genuine issue”.<sup>131</sup>

## Recommendation

**129. We welcome the unequivocal confirmation from the Chair of the Independent Review that in his view the PSED should continue to be legally enforceable. From the examples of actual cases that have been cited to us in both written and oral evidence, it is clear to us that the legal enforceability of the PSED is crucial in ensuring the implementation of, and compliance with, equality law by public authorities. We do not rule out the possibility of there being a “quicker” and more “cost-effective” mechanism, but we recommend that any such mechanism must retain the ultimate legal enforceability of the duty by judicial review, rather than be an alternative to it. The Government's overall objectives of reducing cost and delay could be taken forward by the Equality and Human Rights Commission as part of their ongoing work to develop a**

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126 Ibid., para 89

127 Written Submission of Equality and Human Rights Commission to the Joint Committee on Human Rights, p. 20

128 Ibid., p. 21. In January 2013, the Commission issued Technical Guidance on the PSED on the basis of its powers to provide information and advice under s. 13 of the Equality Act 2006 (EA 2006). The Guidance may be used as evidence in legal proceedings. However, this guidance is not a statutory Code issued under s. 14 EA 2006.

129 Q.19

130 26 November 2013 HC 766 Q.44

131 Q.54

**statutory code of practice and further guidance on the PSED. We look forward to the Government Equalities Office keeping us closely informed about its work to implement the recommendations of the Independent Steering Group on the PSED.**

# Conclusions and recommendations

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## Introduction

1. Restrictions on access to justice are in principle capable of justification. As Lord Neuberger pointed out in his lecture, the Government is obviously entitled to look at the way judicial review is operating in practice and propose improvements. Discouraging weak applications and reducing unnecessary delay and expense, for example, are clearly legitimate aims, and, to the extent that evidence shows that there exists a need to introduce changes to law and practice to serve those aims, proportionate restrictions which serve those ends will be justifiable. (Paragraph 17)
2. In our view, the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice. This raises issues which should be considered by a number of parliamentary committees, including the Commons Justice Committee and the Lords Constitution Committee. We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice, and of the restructuring of departmental responsibilities between the Home Office and the Ministry of Justice that followed the creation of the new merged office. (Paragraph 23)
3. We recognise that there has been a substantial increase in the number of judicial reviews in recent years, but this has been largely because of the predictable and foreseen increase in the number of immigration cases being pursued by way of judicial review. Such cases, however, have been transferred from the High Court to the Upper Tribunal since November 2013. We note that the number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We also note that there has not been sufficient time since the transfer of immigration cases to the Upper Tribunal for any assessment to be made of whether the numbers of judicial review cases is still growing. We therefore do not consider the Government to have demonstrated by clear evidence that judicial review has "expanded massively" in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate. (Paragraph 30)

## Procedural defects and substantive outcomes

4. We accept that it is a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law. However, for the reasons we have explained above, in our view lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied. It therefore risks giving rise, in particular cases, to incompatibility with the right of practical and effective access to court, which the European Court of Human Rights

recognises as an inherent part of the rule of law requiring States to ensure that legal remedies are available in respect of unlawful administrative action determining civil rights or obligations. (Paragraph 45)

5. The Government ought not so lightly to go against the views of the senior judiciary on a matter concerning the practical impact of its proposal on court proceedings, at least without any indication as to how the concerns of the senior judiciary can be mitigated in practice. In the absence of such concrete proposals, we set greater store by the senior judges' concerns that lowering the threshold will unavoidably lead to "dress rehearsal permission hearings", with all the associated cost and delay. We are also concerned about the combined effect of this proposal and the legal aid proposal, because together the two proposals significantly increase the amount of pre-permission work which will have to be done by claimants' lawyers at their own risk. (Paragraph 48)
6. We are not persuaded that there needs to be any change to the way in which courts currently exercise their discretion to consider, at both the permission and the remedy stage, whether a procedural flaw in decision-making would have made any substantive difference to the outcome. We therefore recommend that clause 52 be deleted from the Criminal Justice and Courts Bill. (Paragraph 54)
7. However, if Parliament prefers to retain clause 52, we recommend that clause 52 be amended so as to reflect the current approach of the courts. In our view, there is a case to be made for such an amendment in order to clarify the approach which the courts currently take to the issue of whether the correction of a procedural defect would make any difference to the outcome. The fact that the Government's own consultation initially proceeded on the mistaken assumption that there is currently no role for the "no difference" argument at the permission stage demonstrates the need for such a statutory clarification. (Paragraph 55)
8. We therefore recommend amendments which would make clear that the High Court and the Upper Tribunal have the discretion to withhold both permission and a remedy if they are satisfied that the outcome for the applicant would inevitably have been no different even if the procedural defect complained of had not occurred. (Paragraph 56)

### **Legal aid for judicial review cases**

9. We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. In our view, for the reasons we have explained above, it constitutes a potentially serious interference with access to justice and, as such, it requires weighty evidence in order to demonstrate the necessity for it— evidence which is currently lacking. (Paragraph 79)
10. We also regret the fact that the Government has chosen to bring forward by a negative resolution statutory instrument a measure with such potentially significant implications for effective access to justice. (Paragraph 80)

11. In our view, the significance of the measure's implications for the right of effective access to court is such that it should have been brought forward in primary legislation, to give both Houses an opportunity to scrutinise and debate the measure in full and to amend it if necessary. The Government could have given both Houses of Parliament the opportunity to do so by including a provision expressly authorising the change in the Criminal Justice and Courts Bill which is currently before Parliament, Part 4 of which contains some other significant proposals for reforming judicial review. (Paragraph 81)
12. In view of the unusual level of concern about the substance of the proposal, and the critical report of the Secondary Legislation Scrutiny Committee, we recommend that the Government withdraw the regulations it has laid to give effect to its proposal, and introduce instead an amendment to the Criminal Justice and Courts Bill to provide Parliament a proper opportunity to consider and debate in detail this controversial measure with such serious implications for effective access to the courts to hold the Government to account. (Paragraph 82)

### **Interveners and costs**

13. Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case. Such interventions already require judicial permission, which may be given on terms which restrict the scope of the intervention. We are concerned that, as the Bill stands, it will introduce a significant deterrent to interventions in judicial review cases, because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention. (Paragraph 92)
14. We therefore recommend that the Bill be amended in order to restore the judicial discretion which currently exists, by leaving out the relevant sub-clauses. (Paragraph 93)

### **Capping of costs ("Protective costs orders")**

15. In our view, restricting the availability of costs capping orders to cases in which permission to proceed to judicial review has already been granted by the court is too great a restriction and will undermine effective access to justice. We recommend that the court should have the power to make a costs capping order at any stage of judicial review proceedings, including at the initial stage of applying for permission. (Paragraph 101)
16. We do not see the need for the Lord Chancellor also to have the power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings. Such a power has serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power from the Lord Chancellor. (Paragraph 103)

17. We recommend that the provision for cross-capping should be a presumption not a duty, which would preserve some judicial discretion in deciding the appropriate costs order to make in the circumstances of the particular case. (Paragraph 105)

### **Alternatives to the Government's judicial review reforms**

18. We welcome the Bingham Centre Report as an important contribution to the debate about possible reform of judicial review, demonstrating that the perennial problem of reducing the cost and delay of judicial review proceedings can be addressed in ways which are compatible with effective access to justice. In our view the Government could go some way towards achieving its aims of reducing unnecessary cost and delay by other reforms which would make the process of judicial review more expeditious and therefore cheaper. (Paragraph 108)
19. We recommend that the Government should invite the Civil Procedure Rule Committee to amend the Civil Procedure Rules so that the costs of oral permission hearings in judicial review proceedings should be recoverable from the unsuccessful party at that hearing, whether that is the claimant or the defendant. In our view, this more even-handed approach to costs at oral permission hearings would provide the appropriate financial incentive to defendants as well as claimants and so help to reduce unnecessary cost and delay. (Paragraph 113)

### **Judicial review and the Public Sector Equality Duty**

20. We welcome the unequivocal confirmation from the Chair of the Independent Review that in his view the PSED should continue to be legally enforceable. From the examples of actual cases that have been cited to us in both written and oral evidence, it is clear to us that the legal enforceability of the PSED is crucial in ensuring the implementation of, and compliance with, equality law by public authorities. We do not rule out the possibility of there being a "quicker" and more "cost-effective" mechanism, but we recommend that any such mechanism must retain the ultimate legal enforceability of the duty by judicial review, rather than be an alternative to it. The Government's overall objectives of reducing cost and delay could be taken forward by the Equality and Human Rights Commission as part of their ongoing work to develop a statutory code of practice and further guidance on the PSED. We look forward to the Government Equalities Office keeping us closely informed about its work to implement the recommendations of the Independent Steering Group on the PSED. (Paragraph 129)

## Declaration of Lords' Interests

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### **Baroness Kennedy of the Shaws**

Practising barrister, who very rarely undertakes judicial reviews (court appearances are usually in the Court of Appeal or Special Immigration Appeals Commission)

### **Baroness Lister of Burtersett**

Hon President, Child Poverty Action Group

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

# Formal Minutes

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**Wednesday 9 April 2014**

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland  
Mr Virendra Sharma  
Sarah Teather

Baroness Berridge  
Baroness Buscombe  
Baroness Kennedy of the Shaws  
Lord Lester of Herne Hill  
Baroness Lister of Burtersett  
Baroness O'Loan

Draft Report (The implications for access to justice of the Government's proposals to reform judicial review), proposed by the Chairman, brought up and read.

*Ordered*, That the Chair's draft Report be now considered.

Paragraphs 1 to 129 read and agreed to.

*Resolved*, That the Report be the Thirteenth Report of the Committee to each House.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 7 May at 9.30 am

# List of Reports from the Committee during the current Parliament

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## Session 2013–14

First Report	Human Rights of unaccompanied migrant children and young people in the UK	HL Paper 9/HC 196
Second Report	Legislative Scrutiny: Marriage (Same Sex Couples) Bill	HL Paper 24/HC 157
Third Report	Legislative Scrutiny: Children and Families Bill; Energy Bill	HL Paper 29/HC 452
Fourth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill	HL Paper 56/HC 713
Fifth Report	Legislative Scrutiny: Transparency of Lobbying, Non-party Campaigning, and Trade Union Administration Bill	HL Paper 61/HC 755
Sixth Report	Legislative Scrutiny: Offender Rehabilitation Bill	HL Paper 80/HC 829
Seventh Report	The implications for access to justice of the Government's proposals to reform legal aid	HL Paper 100/HC 766
Eighth Report	Legislative Scrutiny: Immigration Bill	HL Paper 102/HC 935
Ninth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report)	HL Paper 108/HC 951
Tenth Report	Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011	HL Paper 113/HC 1014
Eleventh Report	Legislative Scrutiny: Care Bill	HL Paper 121/HC 1027
Twelfth Report	Legislative Scrutiny: Immigration Bill (second Report)	HL Paper 142/HC 1120
Thirteenth Report	The implications for access to justice of the Government's proposals to reform judicial review	HL Paper 174/ HC 868

## Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810
Eighth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 128/HC 1014

	(second Report)	
Ninth Report	Legislative Scrutiny Update	HL Paper 157/HC 1077
<b>Session 2010–12</b>		
First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777

