Criminal Justice and Courts Bill:
Judicial Review

House of Lords Second Reading

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JUSTICE regrets that many of the civil justice proposals in the Criminal Justice and Courts Bill are ill-evidenced and ill-advised. Whether by design or coincidence, we are concerned that measures which will change the funding structures for judicial review will significantly limit the ability of groups and organisations without independent means to hold the Government, local authorities and public agencies to account. Importantly, the Joint Committee on Human Rights shares our view that the case for change has not been made.

This briefing focuses principally on Part 4 of the Bill and judicial review. It proposes that Clauses 64 - 69 should not stand part of the Bill. In the alternative, we propose detailed amendments to retain the discretion of the court to control its procedures commensurate with the public interest.

Specifically, we propose that the hands of the court should not be bound to apply the "no difference" test at permission stage in any case where a Respondent asks for it. This test should remain a high hurdle. The alternative – as proposed in the Bill – would see judges stepping into the shoes of decision makers. This would be constitutionally inappropriate and costly as decisions on permission become dress-rehearsals of the merits of a claim.

If the proposals on financial disclosure remain in the Bill, they must be significantly amended to give the court the power to waive the requirements in appropriate cases and to control the processing and storage of the information through the use of reporting restrictions and other safeguards.

JUSTICE considers that the proposals on interveners' costs are unnecessary and contrary to the public interest. We propose amendment to reflect the practice of the Supreme Court which leaves adequate discretion with individual judges to control both the scope and cost of any intervention in the public interest. There is no evidence that intervention is anything other than a tool to assist the court predominantly exercised for the public interest alone and entirely controlled by judicial discretion. In the circumstances we urge Parliamentarians to subject this part of the Bill to close scrutiny.

We are concerned that the proposals on costs capping orders in Clauses 68 - 69 will have a significantly chilling effect on the courts' ability to do justice in public interest cases and recommend significant amendment to maintain the discretion of the court.

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. JUSTICE has worked actively on issues of good administration, oversight and accountability since our inception.[1]

2. We regularly intervene in constitutionally significant proceedings as a third party, including in cases arising by way of judicial review. Most recently, we argued in *R (Cart) v Upper Tribunal,* for the retention of judicial review for the determinations of the Upper Tribunal and other similar specialist tribunals. In that case, Lord Dyson stressed the fundamental nature of the function of judicial review:

> There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review.[2]

3. This briefing paper deals with the proposals in Part 4 on judicial review. We have produced separate briefings on our concerns about the criminal justice sections of the Bill.

4. **JUSTICE is concerned that the proposals in Part 4 are, by and large, unnecessary and potentially damaging. Without significant amendment, we consider that the measures could inhibit access to justice and will restrict the discretion of the court to do justice in cases which should be heard in the public interest.**

Judicial Review (Part 4): Background

5. Judicial review and associated administrative law provide an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control

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[1] See for example, *The Citizen and the Administration* (1961), *The Citizen and his Council* (1969), and *Administration under the Law* (1971) during the early development of modern administrative law in England and Wales. We briefed on the retention of the constitutional duties of the Lord Chancellor in connection with the rule of law, independence of the judiciary and the public interest in the administration of justice, during the passage of the Constitutional Reform Act 2005.[1] We regularly intervene in constitutionally significant proceedings as a third party, including in cases arising by way of judicial review.

[2] Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

the relationship between the citizen and the State, this function takes on a particular constitutional significance.[3]

6. In his 2013 JUSTICE Annual Lecture, the President of the Supreme Court, Lord Neuberger explained the continuing importance of judicial review:

> The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not be more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly.

7. He added an express note of caution about the reforms proposed:

> While the Government is entitled to look at the way that [Judicial Review ("JR")] is operating and to propose improvements, we must look at any proposed changes with particular care, because of the importance of maintaining JR, and also bearing in mind that the proposed changes come from the very body which is at the receiving end of JR.[4]

8. Appearing before the House of Lords Constitution Committee, on Wednesday 25 June 2014, both Lord Neuberger and Baroness Hale expressed similar caution:

> I would start by saying any interference with or restriction of judicial review has to be looked at very carefully … Because judicial review is so important and because the world is imperfect, I think one has to accept as well worthwhile and inevitable the fact that there will be some applications that are unmeritorious and nonetheless get pursued and hold things up. (Lord Neuberger)

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[3] We consider the full constitutional function of judicial review and its evolution in our Second Consultation Response, at paras 9 – 15.

[4] Lord Neuberger, *Justice in an age of Austerity,* JUSTICE Annual Tom Sargant Lecture 2013 , delivered on 15 October 2013. http://www.justice.org.uk/events.php/52/justice-tom-sargant-memorial-annual-lecture-2013

> I think the problem is, not surprisingly, that nobody who is running a government department, or who is operating in a government department, is very happy when somebody comes along and says the decision you have just taken is not in accordance with the law. Nobody likes that (Baroness Hale)[5]

9. Clearly, it must be open to the Government – and to Parliament - to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. Parliament should ensure that the Government takes this obligation seriously.

10. Importantly, the Joint Committee on Human Rights (JCHR) published their conclusions on 30 April 2014. Their report was highly critical of the case made by the Government, including concern about the role of the Lord Chancellor. They concluded:

> We 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 process taking place, or that the powers of the courts to deal with such abuses are inadequate.[6]

11. We consider that no reliable evidence has been produced to support the Government's claim that judicial review is open to abuse or that an expansion in the use of judicial review is such that significant restriction is necessary. The financial savings which the Government estimates that these proposals will make are limited. We consider that Government's calculation of these limited savings remains doubtful. Importantly, the likely on-cost associated with reducing access to advice and representation – which will result from the operation of the Civil Legal Aid (Remuneration)(Amendment)(No 3) Regulations - has not been considered. Costs associated with the proposed changes have not been quantified or considered and no estimate of the benefit to the taxpayer of judicial reviews which save public money has been conducted. Alternative suggestions

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[5] At the time of drafting a full transcript was not available. The session can be viewed online. http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15627. See also http://www.theguardian.com/law/2014/jun/25/judges-restrictions-judicial-review-challenges

[6] Thirteenth Report of Session 2013-14, *The implications for access to justice of the Government's proposals to reform judicial review,* HL Paper 174/HC 868, para 30 (Herein "JCHR Report").

designed to enhance the efficiency of the Administrative Court have been rejected by the Government.[7] The bulk of responses to the Government consultation opposed the case for any further change to judicial review. However, the Government has determined to press ahead with these additional changes.

Clause 64: Likelihood of a substantially different outcome for the applicant

12. Clause 64 of the Bill would require that any court or the Upper Tribunal refuse a judicial review claim if it "appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". Clause 64(2) requires any "no difference" submission to be considered at permission stage. Under the current, common law, "no-difference" test, a judge can refuse the remedy sought by a claimant when there "inevitably" would have been "no difference" had the decision been taken properly.

13. JUSTICE does not agree that there is any benefit to be gained by amendment of the current approach to the "no-difference" test. We are concerned that this change may, at best, create further delay, duplication and cost. At worst, this Clause could significantly change the supervisory function of our judges on judicial review applications, with associated constitutional implications about the distinct supervisory role of review.

14. These proposals illustrate a significant lack of understanding about the purpose of administrative law and the function of judicial review. The Second Consultation asked for examples of cases "brought solely on the grounds of procedural defects" and seemed grounded in the implication that it should be easier for the Court to dismiss or refuse a full hearing in cases which raise issues of procedure. This is reflected in the Impact Assessment which explains: "In some cases, whilst technically successful, some of these challenges may result in no substantive change to the original decision".

15. Judicial Review is a supervisory remedy. One of its core purposes is to ensure that administrative decision makers act within the bounds of the law, including by following fair

[7] For example, in the response of the Senior Judiciary, they questioned why the LAA should administer the proposed ex gratia scheme and not an individual judge. See Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform (2013).* http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf. In JUSTICE's response to the First and Second Consultations on judicial review, we comment on the possibility of using costs orders to deter Respondents from pursuing poor defences or resisting permission in cases where a clearly arguable claim exists.

processes which follow the principles of natural justice. Where statute or policy requires that a particular process be followed, in order to ensure that a decision takes into account all of the relevant factors deemed necessary by Parliament, administrative law requires that those procedures be followed for good reason. Every lawyer – and every decision maker – has encountered a "cut and dried" case which turns out, after consideration, not to be so straightforward. Just as due process exists in criminal procedure to deal with the risk of wrongful conviction in cases where individuals might be deemed "clearly guilty"; administrative procedures exist to encourage good administrative practice and to ensure that the varied interests of those affected are taken into account. It is extremely difficult to second guess how a disputed decision might have been different if a lawful procedure had been followed. This is particularly significant where the procedural flaw in play is a failure to comply with an obligation to consult. The lowering of the threshold of "no difference" should not be allowed to undermine the process of engagement in democratic decision making. Where an individual would have had the opportunity to make representations if an authority had acted lawfully, it is difficult to second-guess what would have been said by the applicant – and other respondents to the consultation - but also how the authority might have reacted to the representations made.[8] The case law is clear. Caution must be exercised in applying the "no difference" test.[9]

16. The change proposed is inappropriate and unjustifiable:

- **Front-loading, delay and cost:** Formalising the provision for argument on no-difference at permission would create a real risk of duplication with added cost. The inevitability of a "dress-rehearsal" of the merits case has been highlighted by the senior judiciary with concern.[10] Toproperly consider whether a decision would make "no-difference" to a claim would require a full consideration of the facts of a case and a substantive hearing. This could lead to more rolled-up consideration, but it will definitely lead to an unnecessary rehearsal at permission of arguments more properly considered as part of the substantive case. The Government asks for views on how to mitigate this likelihood while

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[8] See *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, para 352. See also *R v Home Department State Secretary; Ex parte Hickey (No2)* [1995] 1 All ER 490: "it is difficult to suppose that [a decision maker] can remain as open-minded as if no clear decision has been taken"

[9] See for example, R *v Broxtowe Borough Council ex p Bradford* [2000] LGR 386at 387f-g; *R v Life Assurance and Unit Trust Regulatory Organsiation Ltd ex p Tee* (1995) 7 AdminLR 289, 307F.

[10] See para 22. Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform (2013).* http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

formalising the consideration of "no-difference" at the earlier stage. We cannot see any way to avoid a substantive consideration of the facts if no-diffierence is in play. The Government accepts that a "no-difference" argument can currently be made in a claim at any stage by the Defendant local authority. However, the Government regrets that in many cases where the the argument is considered, it is after the full development of the case and would like the issue to be considered earlier in any set of proceedings. Unfortunately, in most cases a court will be unable to determine the issue of "no difference" without a fuller consideration of the issues in a case than ordinarily explored at permission stage. Even on the existing test, without fuller information, it will be difficult for a judge to make a reliable determination. In our view, the introduction of a "highly likely" test is likely to require the court to conduct a more extensive evaluative exercise in order to reach a conclusion that a claim should be dismissed. If the Government's proposed changes to legal aid are accepted, the shift of the consideration of this issue to permission stage with the associated front loading of any claim will be particularly problematic. This will increase significantly the work to be done for any permission application and any associated hearing. This will, in our view, contribute to the likelihood that individuals without means will be less able to secure capable public law solicitors willing to act on legal aid in judicial review claims, since conducting a complex permission stage application with no provision for funding would be a significant business risk.

- **Judges "second-guessing" decision-makers would significantly change the nature of judicial review:** Changing the 'inevitability' threshold to a 'highly likely' test will require judges to step beyond the bounds of their supervisory jurisdiction. The Judiciary will have to put themselves in the decisionmakers' shoes, and speculate as to the likely decision-making process of the defendant public body had the procedural defect not occurred. This is entirely inappropriate given that the role of judges in judicial review is to examine the lawfulness of executive decision-making, not to substitute their own decision for that of the original decision maker. Members of the judiciary have recognised the perils of adopting such an approach to the no difference test, calling it a 'slippery slope',[11] and terming the bounds beyond inevitability 'the forbidden territory of evaluating the

[11] *R v Ealing Magistrates Court ex p Fanneran* (1996) 8 Admin LR 351 at [365]

substantive merits.'[12] In *R v Tandridge District Council ex p Al Fayed* [2000] 1 PLR 58, 63C-D, the Court explained:

> *Once it is appraised of a procedural impropriety the court will always be slow to say in effect, 'no harm has been done'. That usually would involve arrogating to itself a value judgement which Parliament has left to others.*

17. The JCHR was not persuaded that there was any need to change the way in which the courts already exercise their discretion to consider this issue.[13] The JCHR accepted that there were strong principled arguments against the lowering of the threshold:

> "[I]n 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".[14]

18. For both practical and principled reasons, JUSTICE considers that Clause 64 should not stand part of the Bill. In the alternative, we support the amendments proposed by the Joint Committee on Human Rights.

Judicial review and disclosure of financial information (Clauses 65 – 66)

19. Clause 65 would require all applicants for judicial review to provide information about their financial resources on seeking leave to apply for judicial review. This would include information about the ability of the applicant to meet costs liabilities associated with the case. Where the applicant is a body corporate this will include information about its members and their ability to provide financial support for the application. Clause 66 provides that on determining the extent of costs to be paid by a party, the court will consider the information provided pursuant to Clause 65, for the purposes of considering whether to "order costs to be paid by a person, other than a party to the proceedings,

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[12] *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315

[13] JCHR Report, paras 54 – 56.

[14] JCHR Report, para 45.

who is identified in that information as someone who is providing financial support for the proceedings or likely or able to do so".

20. While it may appear reasonable for the court to pursue all avenues for the enforcement of costs orders legitimately made against unsuccessful applicants, the requirement for would-be applicants to provide any significant information about their financial information at the outset of a claim is new. In the context of this package of reforms, JUSTICE is concerned that these measures will - by design or coincidence - deter the use of judicial review by people without independent means.[15] Cumulatively, this approach will limit the ability of groups of people, including vulnerable people, to access judicial remedies for the unlawful activities of Government.

21. Little information has been given by Government about how this information will be stored, processed or otherwise disseminated by the Court. It would seem inappropriate in many cases to distribute this information to the parties in a case, particularly where the information is personal or may relate to commercial sensitivies. If the information is to be gathered solely for the purposes of aiding costs recovery, Ministers should be asked to explain why this information should be provided at the point of application rather than during the enforcement process after it is determined that an individual party is liable for costs. In this regard, we note that there is a considerable body of existing law which governs the ability of the court to pursue costs from "unseen" funders and backers of litigation.[16] We are concerned that measures designed to improve recovery of costs should not ultimately be used to limit access to judicial review only to those with substantial independent means by deterring others from pursuing litigation even where their claims are strong. By proposing to limit the ability to access PCOs and by limiting access to legal aid, it is likely that individuals and groups without significant funds will explore other avenues of support for litigation. If the mechanism for the handling of information in connection with the recovery of costs is unclear, or the means by which the court might pursue an individual are uncertain, these avenues are likely to be similarly constrained (for example, if a charity obtains a grant from a third party organisation for the purposes of pursuing litigation capped at £5,000, will the court be capable of enforcing a costs order against the donor for any sum over that amount?). These are

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[15] This could prove a general deterrent. If the extent of the information required will involve, for example, disclosure of sensitive financial information, including that which raises commercial sensitivities, this could create a particular hurdle for even corporate litigants.

[16] See for example, *Hamilton v Al Fayed (No 2)* [2003] QB 1175.

questions which have not yet been explored and which should be better defined before Parliament approves the changes proposed in Clauses 65-66.

Clause 67: Interveners and costs

22. Clause 67 of the Bill makes provision for attributing costs to third party interveners.[17] Clause 67(2) places current practice – whereby any third party must meet its own costs – on a statutory footing. Clause 67(4), provides that on any application to the High Court or Court of Appeal by either of the original parties to the dispute, the court must order an intervener to pay any costs incurred by those parties arising 'as a result' of the intervention.

23. Courts currently hold the discretion to make an order as to costs against any intervener. In practice, the general approach of the UK courts has been that the costs which result from an intervention are treated as costs in the case (in practice meaning that the losing party pays their own and the other party's costs of preparation and representation.). This reflects the nature of a public interest intervention being to assist the court and add objective value to the court's determination of a case. It underlines the special position of an intervener, who participates in any case only with the consent of the court. This position has been formalised in the Supreme Court Rules, where Rule 15 provides that there will generally be no order for costs, for or against, an intervener. The court does however retain the discretion to order costs, particularly where an intervener effectively steps into the shoes of one party or another.[18] This reflects earlier practice in the House

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[17] JUSTICE was one of the most frequent third party interveners before the House of Lords Judicial Committee and has statistically been the most frequent intervener before the Supreme Court since its creation. Our applications to intervene are limited to those cases which raise important constitutional issues and focus on the scope of legal principles designed to protect individual rights within the justice system. Our contributions usually focus on complex legal arguments not necessarily raised by the parties, on the international legal framework and comparative experience. They are generally welcomed by the bench. Most recently, our intervention in the case of *Rahmatullah* was described as "helpful"[17] and "powerful and significant" by two of the Justices in the case. In 1996, together with the Public Law Project, we conducted a review of public interest intervention, *A Matter of Public Interest,* with a view to identifying principles of good practice for third parties in public interest litigation. In 2009, in anticipation that the Supreme Court was likely to hear constitutionally significant cases which might clearly benefit from intervention by informed, specialist interveners, where appropriate, we published *To Assist the Court,* which considers both the public interest in reasonable, focused intervention in domestic and comparative practice and the proper limits and boundaries of such intervention. See http://www.justice.org.uk/resources.php/32/to-assist-the-court

[18] Rule 15: "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent). This reflects earlier practice in the House of Lords and open to other courts. Courts have been comfortable exercising this discretion in the face of unreasonable behaviour. For example, in *R (Barker) v London Borough of Bromley* [2006] UKHL 52 at paras 32 -33, where Lord Hope ordered costs against the Secretary of State, intervening in the appeal,

of Lords and other courts. Courts have been comfortable exercising this discretion in the face of unreasonable behaviour. This settlement reflects the value of reasonable intervention to the court by ensuring that interveners must be in a position to support the costs of their own contribution, yet retains the discretion of the court to act where an intervener imposes an unreasonable burden on the parties to the case.

24. The proposals in Clause 67(2) appear designed to deter any applicant from pursuing an intervention in the public interest, except before the Supreme Court (where it appears that the Rules of the Supreme Court will continue to apply).[19] Requiring the court to order an intervener to pay any costs of the original parties arising as a result of its intervention is likely to act as a significant bar on participation to many third party interveners. Many interveners – JUSTICE included - operate with very limited resources, and are subject to the oversight of a Board of Trustees, for whom risk management is a primary concern. A significant number are charitable organisations with an obligation to account for their activities to the Charity Commission. The threat of an as-yet-undetermined costs risk will operate as an overwhelming consideration as to whether to pursue a particular application.

25. Clause 67(5) provides only a limited exception to the requirement on the Court to order costs in all cases, based on "exceptional circumstances" which are to be circumscribed in secondary legislation. This limited provision for exceptional treatment – to be further outlined in delegated legislation not available in draft – is unlikely to provide significant comfort to would-be public interest interveners.

26. We are concerned that these proposals should not proceed on the basis of a misunderstanding about the role and function of a public interest intervener or without a clear understanding of current practice. In particular:

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explaining that the Secretary of State had in fact joined the appeal against the claim that there was a defect in regulations which bound the respondent local authority, but for which the Minister had been responsible. In the event, the Secretary of State ran his intervention as if he had been joined as a party to the case and it was only proper that the costs of the appeal should be met jointly with the local authority. See also, *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, para 4. In that case, the United Synangogue was granted permission to intervene, but in practice played the primary role in opposing the claim. The Court of Appeal determined accordingly that it should meet the costs of the case.

[19] See also, Jaffey, B., and Hickman, T., *'Loading the dice in judicial review: the Crime and Courts Bill 2014',* U.K. Const. L. Blog, (6 Febuary 2014). Available at: http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/

- **The Court as gate-keeper:** The Government refers to individuals who "choose to intervene".[20] For example, in its response to the Second Consultation, it explains:

> *The Government considers that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and this should extend to interveners.*

While parties may choose to pursue an intervention, the scope and character of any intervention is ultimately at the discretion of the court hearing the relevant claim. While procedural rules may vary in the High Court, the Court of Appeal and the Supreme Court, in each instance a would-be intervener must make an application to intervene supported by grounds. As we explain in *To Assist the Court,* this will in most cases require an intervener to illustrate that they will bring value to a case not likely to be met by the parties and their contribution will assist the court in its consideration of the case. For example, in the Supreme Court Rules, Rule 15, expressly refers to interventions by individuals with an interest in proceedings brought by way of judicial review *or*:

> *any official body or non-governmental organization seeking to make submissions in the public interest.*

Further guidance is provided in Practice Direction 8, which references the guidance of Lord Hoffmann that:

> *An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything.*[21]

Although no such specific guidance is given in connection with reasonable intervention in the High Court and the Court of Appeal, it is understood by practice that submissions made must assist the court by adding something tangible to its consideration of the case, in order that such intervention will serve the public interest.

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[20] See for example, Second Consultation, Government Response, page 16.

[21] *In Re A Child (Northern Ireland)* [2008] UKHL 66

Thus, in the strictest sense, in every case, an intervener is invited by the Court to play a role which is defined ultimately by its discretion.

The Government intends costs to be divided proportionately to the assumption of financial interest in the case. This appears to subvert the role of the traditional public interest intervener, where their involvement has no direct interest for the organisation. In any case, an intervener can neither win nor lose. Instead, their contribution to the case is made in the public interest, to assist the court. They are contributing the cost of their own involvement to assist the court to reach a conclusion in the case, which is objectively improved by a consideration of the law which goes beyond the dispute between the parties. In JUSTICE's experience, our interventions generally focus on making good law, consistent with the rule of law, comparative practice and the UK's international obligations.

- **The public interest in interventions:** The Government recognises that the purpose of most interventions is to serve the public interest by placing information or argument which will add value to a case before the court.[22] It is extremely unusual – but not unknown - for third parties to be granted permission to intervene (rather than be joined) to represent their own personal interests.[23] It is regrettable that neither the Second Consultation document nor the Government's Response attempted to assess or quantify the value to the public interest of interventions undertaken for that purpose. Nor does it consider when an intervention might be beneficial to parties in a case where an intervener addresses issues – such as comparative practice – which they might otherwise be invited to consider by the court. The long term benefit to the development of the law of interveners willing to put objectively sourced information and argument before our judges to help ensure that the development of precedent is informed by the wider public interest outside the immediate demands of a case is not explored. Although these benefits may be difficult to quantify in monetary terms, the support of the senior judiciary for reasonable third party interventions is clear. As Baroness Hale recently pointed out:

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[22] See for example, Second Consultation, Government Response, page 62.

[23] See for example, *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. In this immigration removal cases, the appellants 12 year old son intervened to put before the court representation on the impact which removal would have on him personally.

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. […]

But from our – or at least my – point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied.[24]

Judges have regularly expressed their view – judicially and extra-judicially – that the involvement of third party interveners in the public interest is beneficial.[25] In the response of the senior judiciary to the Second Consultation, they explain:

The court is already empowered to make costs orders against non-parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.

In an adversarial system where few resources are allocated towards research facilities and support of our senior judiciary, it is unsurprising that judges, and specifically the senior judiciary, find interventions helpful in determining claims where significant issues of public interest are raised. In this context, it is understandable that the Government was unable to produce any specific evidence in its Consultation of a problem posed by individual interventions, or the role of interveners more generally.

- **The scope of an intervention:** Whether in the Supreme Court, Court of Appeal or the High Court, the scope of an intervention can be controlled by the bench,

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[24] Who Guards the Guardians, Public Law Project Conference: Judicial Review Trends and Forecasts, 14 October 2013. http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians

[25] *I.A. (Appellant) v The Secretary of State for the Home Department (Respondent) (Scotland)* [2014] UKSC 6 at [25] "Extremely helpful". Lord Kerr has described JUSTICE's intervention in *Rahmatullah* as 'powerful and significant'. http://www.justice.org.uk/data/files/Rahmatullah_JUSTICE_PRESS_RELEASE_FINAL_-_311012.pdf (Lord Kerr)

with specific guidance provided by the Supreme Court Rules on the conduct of a reasonable intervener. For example, although the consent of the parties to an intervention is not required, it is always sought before an intervention is pursued. Similarly, the scope of an intervention is expected to be reasonable and proportionate to the value to be added, with specific guidelines offered by the Supreme Court that written submissions should usually be less than 20 pages. Where an intervener acts unreasonably, it is open to the court to make an order as to costs. We return to this issue below, but the desire to avoid imposing any unreasonable burden on the parties and to avoid increased costs associated with disproportionate additions to a case will be foremost in the mind of a reasonable intervener and their representatives.

27. The Government has given no indication of having considered the practical implications of the costs presumption in Clause 67(2).[26] The impact on the initiation of individual interventions aside, the practical implications for the allocation of costs between parties and interveners is yet to be explored. While cases of obvious time wasting by third party interveners are easily addressed under the rules currently in place, how will the court be able to determine whether additional costs are in fact attributable to an intervention? If an intervener acts within the bounds of his permission to intervene, with written and oral submissions made only as directed by the court, will they avoid costs? On the language of "exceptional circumstances" proposed in the Bill, it would appear not. If an intervener provides clear, concise reasoning which clarifies the issues and saves everybody time, will saved costs be deducted from those otherwise payable by the intervener? The allocation of costs referable to an intervention is unlikely to be straightforward. The implications of this are two-fold – increasing the uncertainty of any potential costs risk for a putative intervener and increasing administrative costs for the court in connection with any intervention it accepts.

28. The JCHR confirms the public value of interventions in strong terms:

> 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

[26] Judicial Review: Proposals for Further Reform, *Consultation Response of the Constitutional and Administrative Bar Association*, [112]. Available at: http://www.adminlaw.org.uk/docs/ALBA%20JR%20Consultation%2010%202013.pdf

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.[27]

29. JUSTICE considers that the statutory costs presumption in Clause 67(2) is entirely inappropriate and counterproductive. Parliamentarians should allow courts to retain the discretion to control the involvement and engagement of interveners, including discretion to award costs against unreasonable, unhelpful behaviour or conduct not in the public interest. JUSTICE would support the JCHR amendments to this section of the Bill if it is not removed entirely.

Clauses 68 – 69: Protective costs orders

30. JUSTICE does not consider that there is any case for reform of the current law on Protective Costs Orders (PCOs). The development of the PCO rules in public interest litigation has been a valuable tool in ensuring that claimants without significant means who have a good case to pursue, and which raises clear issues of public importance, may be able to pursue their litigation with reassurance that they will be able to guage and plan for the costs risk that they are undertaking. In the limited number of cases where PCOs are granted, that order may be the difference between a serious question of public importance being considered by the courts or the individuals affected going without a remedy. The Government has failed to provide significant evidence to support the case for reform.

31. Clauses 68 – 9 would place PCO on a statutory footing. We welcome the Government's decision to retain PCO in the public interest. However, the Bill would make three substantial changes to the existing procedure, which would significantly undermine its usefulness to the public interest and limit capacity for supporting public interest litigation: a) PCOs will only be available once permission is granted; b) "public interest" for the purposes of PCO will be defined by the Minister in secondary legislation rather than being a matter for the court's discretion and c) the procedure to be followed by the court and the factors to be considered beyond public interest may also be amended by the Minister by regulation.

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[27] JCHR Report, para 92

Clause 68 (3): PCOs, the public interest and permission.

32. A PCO seeks to cap the costs of an applicant to a level which ensures they are able to pursue their litigation with the reassurance that they will be able to gauge and plan for the costs risks they are undertaking. Currently, the court will grant a PCO to an applicant at the stage of application for judicial review. Clause 68 (3) will only permit the court to award a PCO once permission is granted.

33. In judicial review, and specifically the types of cases in which PCOs are generally sought, the pre-permission hearing costs can be significant. Jaffey and Hickman cite recent instances where the parties have incurred pre-permission costs in excess of £30,000.[28] If a PCO cannot be obtained to protect the claimant against the risk of liability for the entirety of unknown and potentially substantial costs, it is very likely that claims that raise issues of wider public interest will not be brought.

34. In addition, this limitation on the grant of permission, reflects a misunderstanding of the operation of judicial review more generally. As explained above, legitimate claims may settle before permission is granted, securing an effective remedy in practice for the applicant and others and ensuring that a Government decision is retaken within the bounds of the law. Yet, in some public interest cases, without the protection of a PCO, there will be no-one to issue proceedings and no incentive on a wayward Government body or public authority to change its ways.

35. This seemingly minor procedural change could ultimately undermine the purpose of the PCO and their codification.

Public interest, scrutiny and delegated powers (Clauses 68(9) & 69(3)).

36. Currently, the determination of whether a PCO serves the public interest remains a matter for the court's discretion. Following a line of existing case-law, the court will consider a number of factors including whether the issue is a matter of public importance

[28] Jaffey, B., and Hickman, T., *'Loading the dice in judicial review: the Crime and Courts Bill 2014'* See above.

and whether the proceedings are likely to proceed otherwise.[29] These factors are reflected in Clause 68. Regrettably, Clause 68(9) provides for the Lord Chancellor to amend the definition of public interest, removing or adding relevant factors in secondary legislation, albeit subject to the affirmative procedure.

37. We can see no justification for permitting the Lord Chancellor to determine the principles applicable to PCO without the opportunity for full parliamentary oversight. In effect, this measure would displace the power of the court to determine factors relevant to the public interest. If the Bill proposes that this should be the case, Parliament should take full responsibility for setting those criteria. In the majority of cases where a PCO is likely to be sought, a Government Department or public authority is likely to be the respondent. JUSTICE considers that granting this broad power to restrict the availability of PCO to the Minister without full Parliamentary oversight would be inappropriate. If these factors are to be codified, the list should be exhaustive and should reflect the existing broad criteria sensibly applied by the Court. If future flexibility is required, we consider that the discretion to determine public interest should remain with the court, with any change to the factors relevant to its discretion to be determined after hearing argument from both parties. The statutory list should remain non-exhaustive and subject to the ordinary interpretation of the Court. Clause 68(9) should be removed from the Bill.

38. Clause 69 provides for the criteria which the court should apply when considering the terms of any costs cap to be applied to either party's cost liability under a PCO. Again, these broadly reflect a codification of existing rules applied by the courts, including the financial resources of the parties and anyone supporting the litigation and whether the party which benefits from the cap is represented *pro bono.* However, Clause 69(3) provides for the Lord Chancellor to revisit any of these criteria in future regulations, albeit again subject to the affirmative procedure. Changes to these criteria could significantly alter the purpose and scope of any PCO. JUSTICE considers that such changes should be properly subject to parliamentary scrutiny if a new statutory regime is to displace the discretion of the Court. These provisions – in keeping with the recommendations of the JCHR – should also be removed from the Bill.

Cross-capping (Clause 69(2)

[29] R (*Corner House) v Secretary of State for Trade and Industry* et seq.

39. Clause 69(2) currently would require the court to make a reciprocal order in every case where a PCO is made in favour of the respondent, to limit the costs recoverable by the claimant in the event that they would win the case. The Government originally proposed that in every case the orders must not only be reciprocal, but mirrored. Existing case law already requires the court to consider the necessity for a "cross cap" in every case. JUSTICE considers that the court should retain the discretion to consider when a reciprocal order truly serves the public interest. The JCHR agrees. The level of a PCO is determined in order to ensure that a claimant is able to bring a claim – a claim where there is a public interest in its determination that would otherwise not be brought – and will be set at a level designed to allow the litigation to proceed according to the means of the claimant. The PCO serves the public interest. While a costs-cap ensures that the claimant, benefitting from this exceptional procedure, does not act unreasonably, whether a public body found to have acted unlawfully is to be excused from paying recoverable costs at a reasonable rate raises different public interest questions.

JUSTICE

June 2014