CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES
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# Judicial Review: Proposals for further reform

## A response by

## The Chartered Institute of Legal Executives

**1 November 2013**

# Introduction

1. This response is submitted by the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007. This consultation response follows membership engagement, together with a meeting of the CILEx Legal Aid Working Party.

2. CILEx continually engages in the process of policy and law reform. At the heart of its engagement is the public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform relating to justice issues.

3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this with Government and other stakeholders and will advocate for such reform.

4. CILEx welcomes the opportunity of submitting further comments and evidence to the Ministry of Justice's (MoJ) consultation on further reforms to the process of Judicial Review.

**General Comments**

5. CILEx is encouraged by the Government's acknowledgement in recognising the constitutional importance of Judicial Review as a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. CILEx also shares the Government's concerns that unmeritorious and frivolous cases can cause delay and frustrate proper decision making. However, the problem with the proposals are threefold:

- There does not appear to be a sound evidence base for the further proposals in the consultation. Throughout the consultation paper refers to Government “concerns” but the evidence is seemingly based on assertions and assumptions and is not sufficiently compelling to justify the further reforms proposed. The case examples given (which will have been decided on their own facts) are not cogent evidence of inappropriate use of Judicial Review or the negative impact of Judicial Review in respect of economic recovery or growth;
- The earlier changes to Judicial Review arising from the consultation ‘Transforming Legal Aid’ need time to bed in before further changes are contemplated to the process of Judicial Review.
- To limit access to judicial review when sufficient checks are already in place will undermine the ability for citizens to hold the Government to account. Maintaining the rule of law should be the most important principle rather economic growth or budgetary concern.

6. The Secretary of State’s explicit statements as detailed below make it clear that these proposals derive from an ideological position, rather than a genuine systemic, administrative, budgetary or constitutional need:

> *“Of course, the judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change.*
>
> *We will protect the parts of judicial review that are essential to justice, but stop the abuse.*
>
> *Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state.*
>
> *We need to make decisions quicker and respond to issues more quickly in what is a true global race.*

*The Left does not understand this, and believes that our society can do everything for everyone, and that those who work hard to get on in life should pick up the tab.*

*They want more money for public services, but at the same time to be able to halt the investments which can deliver the wealth that pays for those services.*

*In proposing these changes, I will no doubt be accused of killing justice and destroying Magna Carta.*

*Although as the great old lady of British law is approaching her 800th birthday, and the judicial review system is barely 40, I'm not sure that argument stacks up. But in proposing these changes, I know we will be doing the right thing for Britain"*[1]

7. Any Government policy proposing to limit the ability of the ordinary citizen to challenge the state based (as it appears from this statement) on ideological beliefs is deeply worrying. Moreover, it reinforces the perception that the proposed changes are nothing more than a cloak to insulate executive action from independent judicial scrutiny, thereby undermining the rule of law.

8. The doctrine of Judicial Review is not about whether the decision is economically right or wrong or politically right or wrong or where the appellant stands in the political spectrum; Judicial Review is about the High Court exercising supervisory jurisdiction over public bodies as part of its constitutional function of ensuring that public bodies do not act unlawfully.

9. It should not be the function of the executive to attempt to put a straight jacket on the High Court's inherent supervisory jurisdiction, lest it undermines the concepts which underpin our constitution; the doctrine of sovereignty of Parliament, the separation of powers and the rule of law.

[1] http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html

10. Whilst the figures show a noticeable growth in Judicial Review, the evidence in the consultation paper suggests that the main driver has been the disproportionate increase in the number of immigration and asylum applications. For example, these cases represented 76% of the total applications for 2012 which stood at 12,400[2]. Save for the immigration and asylum cases, the number of Judicial Review applications was 2,976. In 1992, the number of Judicial Review applications was 2,439 and the number of substantive hearings was 504[3]. The number of substantive hearings for 2011 was 422[4], presumably including Asylum and Immigration cases. The importance of these figures are twofold:
    - remove asylum and immigration cases and Judicial Review applications do not show a significant increase in applications;
    - It shows that the filter mechanisms: the rationing of the remedies available by the Courts are working and do not need further reform by the Government.

11. As Lord Neuberger, President of the Supreme Court, recently pointed out that many delays in Judicial Review were now "historic" having already been resolved by removing asylum and immigration cases from the main civil courts[5].

12. CILEx concurs with the belief that on the whole, "Judicial Review is an economic and effective branch of litigation, performing a constitutionally critical role in keeping the exercise of public power within the law'[6].

13. Subject to the above general comments, where CILEx is able to offer a view, we answer the consultation questions in relation to the planning proposals in the order that they are raised; and in relation to the other Judicial Review proposals in the order of the issues raised.

**Planning**

[2] Judicial Review – Proposals for further reform: MoJ September 2013 at paragraphs 9 & 10
[3] Leyland,P. Woods,T, Harden J., Textbook on Administrative Law 1994, Blackstone Press Limited at page 119.
[4] Ibid at paragraph 14: chart 2.
[5] http://www.theguardian.com/law/2013/oct/16/david-neuberger-uk-supreme-court?INTCMP=ILCNETTXT3487
[6] Sir Stephen Sedley: Beware of Kite Flyers; London Review of Books.

**Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?**

14. The advantages of a Specialist Land and Planning Chamber would be that Judges with the necessary technical planning and environmental experience would be able to deal with these kinds of cases. This would increase the quality of decision making leading to clarity on the law and less unnecessary delay in planning litigation.

**Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?**

15. Consistency of procedures for judicial challenge should result. Further, a directions phase to ensure procedural requirements are met may be advantageous.

16. Other cases the new Chamber might consider to include are Planning and Environmental Cases from lower Courts or Tribunals such as:
    - Appeals against decisions on section 80 Environmental Protection Act 1990 appeals in the Magistrates Court.
    - Appeals against section 215 Town and Country Planning Act 1990 decisions in the Magistrates Court.
    - Contaminated land cases under Part 11A Environmental Protection Act 1990 instead of going to the Magistrates Court and challenges to Inspector's decisions on Special Sites.
    - Appeals by way of Case Stated (s.111 Magistrates Courts Act 1980) for Planning and Environmental decisions in a Magistrates Court.
    - Appeals in complex proceedings under Building Act 1984.
    - Injunctive proceedings under Town and Country Planning Act 1990, for example, section 187B, 214A (trees), also for Listed Buildings (section 84A Planning (Listed Buildings and Conservation Act 1990) and possibly section 80 Environmental Protection Act 1990.

**Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and Country Planning Act?**

17. CILEx agrees that there is a case for a permission filter for statutory challenges under the Planning legislation. What planning professionals prefer is certainty and consistency of approach. Therefore if all planning challenges including Judicial Review have to be made within 6 weeks and include a permission filter then everyone knows where they stand.

**Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?**

18. Judicial Reviews and statutory challenges can on occasion hold up development for years on technicalities when the merits have long since been considered by the decision maker. However on other occasions bad decisions are properly quashed.

**Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?**

19. The proposals should improve the speed of operation with a special Planning Court and experienced Judges familiar with the issued involved.

**Question 6: Should further limits be placed on the ability of a local authority?**

20. Local Authorities would argue that they have a duty to local residents to act in their best interests. For example, the Localism agenda where planning decisions will originate from local rather than national policy.

**Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?**

- No comment

**Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?**

21. The evidence is that usually such cases which attract legal aid would be traveller site cases which involve the potential loss of someone's home, potentially interfere with their right to family life and to live a certain lifestyle. Therefore human rights issues are often engaged and as such if legal aid is not provided there would be a risk of human rights breaches.

**Standing**

**Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter?**

22. The rules of locus standi (standing) might appear to the Government at first sight to be all about preventing frivolous or vexatious applicants from troubling public bodies and overburden the courts. However, it is desirable and in the public interest, that such rules are not construed too narrowly, having the effect of another restrictive hurdle to obtaining relief, and thus excluding from a remedy all but the most worthy or most directly affected of applicants.

23. For example, the decision to close a hospital may have profound consequences for hundreds of people. If the remedy was available for only those people applicants with a 'direct interest', for example, NHS Trust managers, doctors/nurses, and ancillary workers, there would be an adversely affected section of the local community without a remedy for an ultra vires decision or no appropriate means of representation.

24. It is also important for the Government to bear in mind that the rules of standing to some extent involve the pre-judging of cases on their merits

subsequent to the substantive hearing[7]. That said, it is desirable, that frivolous, unmeritorious or just plain 'busybodies' are weeded out in advance. CILEx is not convinced that a bureaucratic streamlining remedy would be appropriate or the tightening of the rules as suggested by the consultation paper. In any event, there should be well publicised guidelines on the rules of standing to know, before appearing in court, how judicial discretion is likely to be exercised when considering a particular application. This would benefit applicants, lawyers and the courts.

25. It is also important to bear in mind that in some circumstances the court will look at the precise rules of standing for each remedy. In the case of *R v Felixstowe Justices, ex parte Leigh [1987] QB 582* a declaration was granted but an order of mandamus (mandatory order) was refused. The important issue in the case was that a declaration was granted because of the factual context which enabled the court to identify a public interest in the issue that had been raised. It is of interest to observe, however, that the applicant was simply a public spirited person acting on a matter of national importance. It was the court's view that he had sufficient interest to obtain a declaration to correct the general policy, because of the serious matter of the issue, but he did not have sufficient interest to be granted an order of mandamus/or a mandatory order. CILEx is concerned that restricting similar cases from being brought in the future will not be in the public interest and will prevent the court using its inherit jurisdiction to clarify the law in a matter of public interest.

26. The proposal to prevent challenges brought by people who do not have a direct interest in the matter at hand misunderstands the constitutional role of Judicial Review. Judicial Review is about public law wrongs that, if left unchecked, would undermine the checks and balances inherent in our constitutional settlement. The case of *Felixstowe Justices* shows that all members of our society have an interest in the proper administration of executive power and it is for this reason that access to Judicial Review should be not restricted to those directly affected by the matter at hand.

[7] Inland Revenue Commissioners v National Federation of Small Businesses [1982] AC 617

27. Relatedly, we are not convinced that the Government has produced cogent evidence in its case for change, and in particular has failed to support its assertion that Judicial Reviews are brought by interested groups or individuals solely to get publicity or cause delays.

28. The consultation paper suggests at paragraph 78 that around 50 Judicial Review claims are issued each year by interested groups, with 20 being granted permission, 13 being heard at a final hearing and 6 being successful for the claimant. These figures are based on a "manual analysis of case level information" which "due to uncertainties in recording and interpretation" is "largely illustrative"[8]. We would suggest that these figures are insufficiently precise to make a cogent case for reform. For example, Research conducted by the Public Law Project and the University of Essex and funded by the Nuffield Foundation concluded that challenges brought by NGOs in respect of wider public interest matters are few and far between. In a 20 month period between July 2010 and February 2012 there were only three non-environmental challenges that reached final hearing, brought by NGOs alone (CPAG, Medical Justice and Children's Right Alliance).

29. Given the above, we do not share the Government concerns that the wide approach to standing has "tipped the balance too far". The issue of standing is a complex tool that is used to, at times, look at the merits of a case and a filter mechanism to weed out frivolous and unmeritorious cases. The Government statistics in the consultation show that in 2011 there was 11,360 applications for permission (these included immigration and planning cases which will no longer be part of the Judicial Review process and therefore historical). 5,593 were refused permission and only 1,276 were granted permission to proceed.

[8] See footnote 28 of the Consultation Paper

**Procedural Defects**

30. The consultation paper rightly points out at paragraph 93 that the courts have developed a 'no difference' principle: this is where the court can refuse to grant a remedy where it is satisfied that the outcome would inevitably have been the same even if the alleged procedural impropriety or procedural defect had not occurred. The consultation paper then proceeds to give examples where this has occurred. As such, the evidence from the consultation paper suggests that the current 'no difference principle' is working and as such there is no need for change. Importantly, no evidence has been provided that the current test applied by the court is flawed. In any event, the proposals to strengthen the current 'no difference' principle will not in any event achieve the Government's stated aim for the reasons given below.

31. Where decisions or actions are "perfectly reasonable" by the public body, Judicial Review challenges will, in any event, be filtered out of the system at the permission stage. The only cases that would be caught by the proposals are those where the decision or action being challenged has been reached by an unlawful decision-making process. No evidence is advanced by the Government that the courts do not strike the right balance in applying the present multi-faceted test for granting or withholding a remedy in such cases. Were the "no difference" test to be modified as is proposed, it would necessarily involve the court in matters it is ill equipped to adjudicate on. This will add to costs and require additional court time, thus defeating some of the primary objectives of the proposals.

**Public Sector Duty and Judicial Review**

32. CILEx makes no comment save for the need to ensure that any alternative remedy is genuinely available, transparent and independent with a right of an appeal.

## Rebalancing Financial Incentives

33. CILEx makes following general comments:

- Judicial Review is unlike normal civil litigation, and thus requires special costs rules.
- No cogent evidence has been provided to support further changes to the rules in favour of defendants (who are invariably public bodies).
- Financial incentives have already been rebalanced.

34. It has been recognised that there is a massive difference between Judicial Review and normal civil litigation. Most Judicial Review cases, for example, are brought by citizens against the might of the state to prevent abuse of power by the state. There are differences in purpose and differences in procedure (strict time limits; the need to exhaust all other remedies; and no rules of disclosure). Invariably, there will also be equality of arms issues.

35. Given the above reasons special costs rules have been developed by the courts to protect non-State parties from financial ruin if a case is lost. These special rules were carefully considered in a major review of costs by Lord Justice Jackson, published in 2009, who made recommendations to protect Judicial Review claimants from being deterred from bringing good claims by the risks of having to pay excessive costs if the case is lost. The Government's proposals run counter to Lord Justice Jackson's robust and comprehensive review of civil costs, and no evidence has been provided that Lord Justice Jackson's conclusions were incorrect.

36. The Government's April 2013 reforms included the introduction of a fee for requests for an oral permission hearing, and the removal of the right to an oral hearing where a claim is certified as being totally without merit by the paper permission judge. At paragraph 112, the Government confirms that it expects that these reforms will result in fewer oral permission hearings "in the future".

37. CILEx is of the view that the Government should review the effectiveness of its April 2013 reforms before proceeding with the proposed further reforms.

**Leapfrogging**

38. The Leapfrogging procedure should continue to apply in the limited cases and only as prescribed and thus continue to be the exception rather than the norm. Save for the rare cases it is applicable, CILEx sees no need for appeal cases deemed by the Government to be important to be allowed to leapfrog the court of appeal and go straight to the Supreme Court. As the consultation paper points out at paragraph 186 there are only a small number of cases that the procedure will be ultimately used in any event.

39. In principle, CILEx has no objection to the current prescribed procedure for leapfrogging being extending to the tribunal framework.