



Response to Ministry of Justice Consultation: Reform of judicial Review: Proposals for the provision and use of financial information

September 2015

Introductory and general remarks

This set of proposals follow on from an earlier public consultation which led to reforms being enacted in the Criminal Justice and Courts Act 2015. As such, and although the Civil Justice Council (CJC) responded in full to the earlier consultation, in this response we have confined comments to the detail of implementing the reforms rather than the principles.

Answers to specific Questions

1) Do you agree that a multiple choice declaration is appropriate? Please provide reasons.

Yes – it will fulfil the legislation’s objective on how costs and liabilities will be met by the judicial review applicant. An additional choice may be considered of a combination of these options, to the limited extent that combinations can apply.

2) Do you agree with the government’s proposed approach at paragraph 51(a)–(e)? Please provide reasons.

For the categories provided, the information sought is light touch (which is welcome) except for ‘e’ where a corporate body is asked to detail names, addresses and interest in the claimant of all members. This will be difficult and burdensome for organisations to compile and courts to assess, and it may be better to ask for details of a designated person representing that body. It is also not clear what data a company would have to provide under this heading – e.g. board members presumably but not all shareholders?

3) Do you agree that there should be no requirement for the claimant to provide their estimate of costs? Please provide reasons.

Yes. This will be a task beyond many litigants in person or other smaller organisations without access to legal advice. In any event it may not be clear at application stage what the full costs of a case are going to be e.g. whether expert witnesses will be required.

4) Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 61? Please provide reasons.

Yes, in principle. It is logical that if applicants are required to provide financial data there is also an implicit obligation to make the court aware of any significant changes in finances, although the key element here is 'significant'. The paper (paragraphs 59-60) sensibly accepts this point and says the change in financial circumstances must be 'material'. Guidance should be provided in broad terms for applicants of this duty and some examples of when it would and would not come into play.

5) Do you agree that the financial information requirements and approach to service the government proposes should apply to all applications? Please provide reasons.

Conceptually the CJC does not support the need for the financial information which judicial review applicants are having to provide, as in most areas of litigation this is a matter left to the courts' discretion. However, it is difficult to see how a system of making exceptions could be administered – although the paper suggests charities for an exemption, but many charities bringing judicial reviews have in-house legal resources, in stark contrast to individuals who will not have any access to professional legal advice and representation.

6) Do you agree with the proposal for a single threshold expressed in monetary terms? If not, please provide reasons and, if possible, an alternative.

On the basis that legislation has expressly provided for there to be a threshold, we agree that the most sensible approach is for there to be a single one expressed in monetary terms.

7) Do you have any data on typical legal costs in the context of judicial reviews or typical contributions to judicial reviews? Please provide details.

No.

8) Do you agree with the proposed threshold of £1,500? If not, please provide reasons and, if possible, an alternative.

The paper makes clear that the available data suggests that costs for applicants in judicial review proceedings are in the region of £11-22,000. Given this, the suggestion of a £1500 threshold has a policy objective of identifying relatively small contributions from third parties. How useful that level of data is felt to be is a matter for the government, and how much conclusion can be drawn on 'control' of a claim from a contribution of that level from a third party is open to conjecture. A higher threshold would be a clearer indicator of committed third party support for an application, say £2,500.

We agree that a second threshold, based on a percentage of the litigation costs is not practicable given that claimants are not being expected to provide detailed and sophisticated financial statements.

9) *Do you agree with the government's proposal for a more detailed picture of the applicant's finances on an application for a costs capping order than is required with an application for permission? Please provide reasons.*

Yes, in principle. The cost capping principle is designed to allow meritorious and public interest applications to be brought by parties who would otherwise be deterred by the potential heavy cost liabilities. It is therefore reasonable that if a party is seeking cost capping order protection they need to provide a degree of financial information showing that they do not have substantial resources. This is also expressly provided for in the legislation, and therefore the proposal is to give effect to statutory provision.

10) *Do you agree that the applicant should not be required to provide supporting documents? Please provide reasons.*

Yes – there is a danger of courts becoming deluged with papers that are not germane to the judicial review application and the costs of all involved will rise. In any event, for the majority of cases proceedings will not reach a stage where a cost capping order would come into play.

11) *Do you agree with the government's proposal for the information on members which an applicant must provide when it is a corporate body unable to demonstrate that it is likely to have the resources available to meet liabilities arising in connection with the application for judicial review? Please provide reasons.*

Yes, the proposal appears a proportionate one. There are clearly major risks in embarking on this sort of information foray in terms of finding a sufficient but not excessive level of data that it is reasonable for a corporate body to provide. The basic level of data proposed seems to us reasonable.

12) *Do you agree that the financial information requirements and the approach to service which the government proposes should apply to all applications? Please provide reasons.*

No, we believe this would be disproportionate and add to the costs of the proceedings. We would favour the more discretionary approach and options outlined in paragraph 105 of the consultation paper.

13) *Do you agree with the assumptions and conclusions outlined in the Impact Assessment?*

Broadly, yes. These measures should affect a relatively small number of applications. The CJC always has concerns about proposals that add to the costs of litigation and the administrative burden on parties and the court administration, and the effects of the new system should be reviewed post-implementation.

14) Please provide any empirical evidence relating to the proposals in this paper. We are particularly interested in the costs associated with engaging in the judicial review process, the burden that these requirements would place on claimants and information on costs awards in judicial review cases.

We do not hold such information.

15) What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

The Council has, in previous consultation responses on judicial review, stated that it is difficult to consider the impact when detailed records on court users are not available. The clear link between ethnic minority and religious minorities being affected by reforms to judicial review in the numerous asylum and immigration cases is manifest. However, as the paper notes, most such proceedings do not qualify for protective costs orders and are unlikely to qualify for the cost capping provisions.

We would agree with the conclusion that a number of groups with protected equality characteristics (e.g. people with disabilities, older people) will have greater interaction with public services and therefore may be more likely to seek judicial review processes.

This is an area the Government should keep under specific review, in terms of whether the 'chilling effect' foreseen in the Parliamentary debates of these measures is borne out following their implementation.

16) What do you consider to be the impacts on families of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

We do not hold evidence that would enable us to comment on this. The same issues would apply as for the previous question in terms of the reliance of some families on state services e.g. health, education, respite care etc that are fundamental to families being able to cope and stay together.