RESPONSE TO CONSULTATION: FURTHER REFORM OF JUDICIAL REVIEW

Introduction

1. The Discrimination Law Association (‘DLA’), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

3. The DLA welcomes the opportunity to respond to the proposals set out in the Ministry of Justice (MoJ) Consultation Paper. We sincerely hope that the concerns we set out below on behalf of our members will be given due consideration before any final decisions are made regarding these proposals.

4. As the Government states in the first paragraph of this consultation document, “Judicial review is a critical check on the power of the State, providing an effective mechanisms for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful.” Judicial review provides the means for public authorities and those exercising public functions to be held to account.

5. For more than a century this essential role of the courts has been recognised.
For example: in Roberts v Gwrfai DC [1899] 2 CH 608 at 614, Lindley MR stated:

“I know of no duty of the Court which it is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights.

6. In R v Ministry of Defence ex p Smith [1996] QB 517 at 556 Sir Thomas Bingham MR stated: “…the court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power.

7. DLA is extremely concerned that the Government’s rationale and the arguments it has put forward in support of the current proposals are misconceived. The problems cited to justify proposals regarding standing, protected cost orders, and interveners -- including “massive expansion” and “abuse” - are unsupported by any reliable evidence. This suggests that the Government’s intention is not to “ensure that judicial review continues to retain its crucial role”¹ but rather to radically reduce the opportunities for individuals and organisations to have access to the courts in order to challenge abuse or misuse of powers by State institutions. Not only will this mean a weakening of the constitutional protection afforded by judicial review, but it will also mean poorer policy development and decision making in the public service. ²

8. DLA rejects totally that judicial review is often used as a “campaigning tool” or deliberately to delay legitimate executive actions, as the Government suggests but fails to support with any reliable evidence.

9. One further issue we believe should be noted from the outset is the inaccurate and misleading conflation of ‘unmeritorious’ applications with applications for judicial review which are accepted as having sufficient merit but which are ultimately unsuccessful. By treating these two different types of cases as the same, the Government then relies on a greatly exaggerated and inaccurate description of the number of ‘unmeritorious’ applications to provide a justification for a number of the proposed measures, which in are in reality completely unnecessary.

10. DLA has set out below its responses to those questions upon which it can offer a view on behalf of its members.

Standing

Question 9: Is there, in your view, a problem with cases being brought where

¹ Consultation document, para. 1
² The Cabinet Secretary acknowledged in the foreword to the 2006 edition of The Judge Over Your Shoulder, administrative law is “a key source of guidance for improving policy development and decision-making in the public service.
the claimant has little or no direct interest in the matter? Do you have any examples?

11. No. There is no evidence that the test of standing which was established by the Common Law, implemented by the Senior Courts Act 1981 and construed by judicial interpretation thereafter has been inappropriately applied. In order to bring proceedings for judicial review applicants have to show that they have ‘sufficient interest’ in the matter in question. As Baroness Hale advised: “The ‘sufficient interest’ test was selected by the Rules Committee when it devised the new Order 53 unified judicial review procedure in 1977, precisely in order to get away from the technicalities of the old law of the prerogative writs and to offer sufficient flexibility to recognise a proper interest when one saw one.”

12. It is important, in DLA’s view, that everyone in society retains an ability to challenge an abuse of the administration of power and thus the test for judicial review should not be restricted to only those directly affected by the matter which is the subject of the proceedings. Technical rules should not be used to insulate acts of public authorities from accountability. In AXA General Insurance Limited v HM Advocate Lord Reed warned of situations where “the excess of misuse of power affects the public generally, [where] insistence upon a particular interest could prevent the matter from being before the court, and that in turn might disable the court from performing its function to protect the rule of law”.

13. There are times when if NGOs and other representative or interest groups are not able to bring judicial reviews some unlawful acts by public bodies will be impossible to challenge. This could arise when it is not possible for an individual to bring a challenge, either because the unlawful policy has not yet been applied or because people with a direct interest are not in a position to bring a challenge (for example having been unlawfully deported). We note that while seeking to exclude applications by NGOs, charities and campaigning groups, the Government acknowledges that judicial reviews brought by interested groups have a higher success rate than those brought by individuals. Therefore we submit that it is in the public interest and wholly appropriate for NGOs and other interest groups to be able to bring proceedings under the present flexible approach to standing, which should continue unchanged.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

14. DLA does not consider that the Government should legislate to amend the

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3 “Who Guards the Guardians?”, address to the Public Law Project Conference, October 2013
4 [2011] UKSC 46
current test for standing, as set out in the answer to question 9 above.

Question 11: Are there any other issues, such as the rules on interveners, we should consider in seeking to address the problem of judicial review being used as a campaigning tool?

15. As stated above, DLA does not accept that judicial review is being used as a “campaigning tool” and is not persuaded that there is any evidence to support this contention.

16. So far as interveners are concerned: their role is to assist the court and they are only permitted to intervene with the permission of the court where the court accepts that they will have something to add to the arguments already made by both parties. Lord Hoffmann made it clear in E (A Child) v. Chief Constable of the Royal Ulster Constabulary\(^5\) that interventions should not be made unless they make a material additional point in the case. This is an example of the court taking a strong line to prevent irrelevant or immaterial interventions. The court would not permit a party to intervene in order to further a ‘campaign’. Interveners can play a critical role in bringing to the court’s attention a perspective which would otherwise not be before the court and it is important that their role in judicial review – as controlled and determined by the court itself – is preserved.

17. The DLA has grave concerns that the combination of the proposals set out in this part of the consultation paper and those related to restrictions on legal aid set out in part 7 would result in limiting challenges by way of judicial review to individuals with independent means, institutions and corporations with a demonstrably direct interest in the act in question. Whilst this would indeed achieve a reduction in such challenges – which is undoubtedly a main aim of these proposals – it would not achieve an improvement in administrative law: quite the contrary, since it would allow public bodies acting in abuse of their powers to go unchallenged. This cannot be an outcome in the interests of good governance or the interests of a democratic society.

The Public Sector Equality Duty and Judicial Review

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

18. As a number of practitioners\(^6\) have pointed out in their response to this question, the Administrative Court and the PSED judicial review cases brought before it


\(^6\) Including LeighDay and Paul Bowen QC Doughty St. Chambers
have performed a valuable role in delineating the margins of the PSED and providing guidance on the circumstances in which an illegal decision might be quashed. From 2006 under the previous race, disability and gender equality duties and at the outset of the PSED a number of successful challenges set the parameters for public authorities; these have been followed by a number of unsuccessful challenges which established the limits of public expectations regarding the application of the duty and scope for challenging non-compliance. The number of judicial review applications on the PSED appears to be declining, which is to be expected as public authorities gradually come to understand what they must do to meet the PSED. As the Prisoners’ Advice Service states in its response, the PSED has a unique role in helping to embed equality into our culture as well as the law; therefore it should not be measured exclusively in terms of stark legal outcomes, but the opportunity to use the law to ensure it is applied should not be restricted.

19. The DLA does not propose any alternative litigation forum for resolving disputes relating to the PSED. Firstly, challenges raising a failure to comply with the PSED, ie illegality, often include other grounds of review, including breach of human rights and/or procedural unfairness. To relegate PSED challenges to a different forum would simply duplicate the work which would remain with the Administrative Court. Further, and far more worrying, to transfer PSED challenges to a different (non-judicial?) forum would give an impression that failure to comply with the PSED was of less importance than other public law failures, a message that, in our view, must not be given.

20. There are already other means to enforce the PSED, which DLA strongly urges should be used far more often. As DLA recommended to the review of the PSED and is now incorporated into one of the recommendations of the review steering group, the inspectorates, regulators and ombudsmen should play a far more active role in securing compliance with the PSED. These bodies have been established to ensure that the public authorities they carry out their functions in accordance with their legal obligations which, of course, must include obligations under the PSED. The influence of inspectorates and regulators should not be underestimated.

21. The Equality and Human Rights Commission (EHRC) has very clear statutory powers under the Equality Act 2006 to enforce compliance with the PSED. A procedure involving the service of compliance notices which are ultimately enforceable by the county court (in respect of specific duties) and the High Court (in respect of the duty under s.149 Equality Act 2010). Before serving a compliance notice in respect of the s.149 duty, the EHRC must carry out a formal statutory assessment in accordance with a procedure which, in our view, could be simplified. Inevitably, resource constraints (and a wide range of other functions/duties) will limit the EHRC’s ability to take such action, and it is therefore essential that the ability of individuals and groups to challenge failure to comply with PSED remains.
22. Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

23. DLA doubts that any respondent will be able to provide this evidence. As we discuss below, any tally of cases actually heard in the Administrative Court would be a significant under-counting of the total number of PSED-related challenges, since undoubtedly the majority of such challenges are resolved either before proceedings are begun or before the Court considers the application for leave. So far as DLA is aware there is no record anywhere of the number or types of challenges resolved at a pre-litigation stage. The more easily counted cases that have a full hearing in the Administrative Court represent a very small proportion of the total PSED challenges, and these, in turn, a very small proportion of all (non-immigration/asylum) judicial review cases.

**Rebalancing Financial Incentives**

**Paying for permission work in judicial review cases**

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

24. No. DLA does not agree with this proposal.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

25. No. DLA does not agree with the proposal to give the LAA discretionary power to pay providers legal aid according to the exhaustive list of criteria stated in the consultation document when a case concludes in the client’s favour prior to the permission hearing. This does not remedy the unacceptable proposal to remove payment for the permission hearing; solicitors cannot undertake a case on the basis that they may or may not be paid for the work that they do. No other business would be expected to take on work on this basis and the government should not expect solicitors to be any different from any other business in this respect.

26. As the Government now recognises, a large number of potential judicial review cases are resolved in the client’s favour without the need for a full hearing often during the period between submission of a permission application and its consideration by the High Court. One DLA member who frequently acts for
applicants in equality duty cases has indicated that for every judicial review equality duty case that goes to full hearing, approximately four are resolved in the client’s favour without a full hearing. This includes cases resolved as a result of pre-action correspondence as well as cases resolved pending permission decision and pending a full hearing.

27. We submit that it must be in the interest of all parties, including the legal aid fund, if such cases can be resolved at the earliest stage, that is, as a result of pre-action correspondence, and we are pleased that the Government has recognised this. DLA does not, however, regard the proposal that the LAA will have discretion, in limited circumstances, to pay a provider’s costs when early resolution has been achieved as meeting its objection to the Government’s basic position that the provider’s costs for the permission application will not normally be paid. DLA submits that in the knowledge that a provider is taking a major financial risk by applying for leave, public authorities may feel under far less pressure to agree to make a fresh, lawful, decision or to review the equality impact of a policy or practice, delaying resolution of even the most obviously meritorious claims.

28. As an association of lawyers, trade unionists, advice workers and others concerned to see effective implementation of equality law, the DLA regards this proposal as particularly worrying. DLA opposed the non-payment of provider’s costs in permission applications in the recent legal aid consultation; the adding on of uncertain discretionary payment does not make this proposal acceptable, and DLA strong recommends that it is not implemented.

Costs of oral permission hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

29. It is DLA’s view that the costs position in respect of an oral permission hearing should remain as it is at present – that costs should be awarded only in exceptional circumstances rather than as a matter of course. The Respondent is not obliged to attend an oral permission hearing and should it choose to do so it should bear its own costs.

Protective costs orders

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between
providing access to the courts with the interests of the taxpayer?

30. It is DLA’s view that the principles applied in relation to Protective Cost Orders which have been developed in a body of case law are sufficient to represent the balance that should be struck between the parties to the litigation and the taxpayer. These principles include that private interest is a factor to be taken into account, but it is not determinative. PCOs are particularly important where there is a serious issue at stake, affecting a large number of people, but an adverse costs order might mean that an individual/organisation could not otherwise afford to bring the litigation. It is DLA’s view that there are no further measures required in relation to PCOs.

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

31. DLA agrees that in any case where there is a request for a PCO there should be full and frank disclosure of the funding of the case for the party seeking the PCO and the court should be able to order such disclosure. The Court already has powers to order disclosure and thus DLA does not consider that additional obligations are required in this respect.

Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

32. So far as DLA is aware this is the normal procedure which is currently applied and it is one which DLA agrees should continue to be the norm.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

33. NO. DLA does not agree with this proposal. As set out above in relation to question 11, the role of interveners is to assist the court and they will not be given permission to intervene unless the court is satisfied they will play such a role. They will also not usually, in DLA’s experience, be given permission to intervene unless they will be able to fit their submissions into the existing timetable of the case – their submissions may be limited in oral time or to written submissions only.
Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-paties?

Do you see any practical difficulties with this, and how those difficulties might be resolved?

34. DLA does not consider that these measures, if introduced, should be limited to judicial review claims. There is no reason for imposing them in relation to judicial review only and not other High Court claims.

Leapfrogging

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

35. It is DLA’s view that leapfrogging appeals can be a useful way to resolving issues of national importance; nevertheless the Supreme Court Judges often say that they have benefited from the fuller exploration of the issues in the lower courts. It is however useful to be able to bring leap frog appeals to the Court of Appeal from the County Court.

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

36. Please see Q.39

Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

37. It is DLA’s view that it should be a matter for the Court as to whether a leapfrog appeal is appropriate.

Question 38: Are there any risks to this approach and how might they be mitigated?

38. There may be a risk that full range of legal arguments has not been adequately explored. It is difficult to see how this could be mitigated. It will be particularly important to ensure that any interveners are permitted opportunities to intervene in a leapfrog appeal – this may well assist in mitigation.
Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

39. DLA is of the view that these appeals should be able to leapfrog.

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

40. DLA is of the view that the same criteria should be applied. It will be important to monitor the numbers of cases leapfrogged, however, and to ensure that the criteria are fulfilled.

Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

41. DLA agrees that these changes should be applicable to all civil cases.

Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

42. DLA is concerned at the biased assumptions without any evidence base that underpin the estimated impacts set out in the Impact Assessment. For example, there is repeated reference to claimants who bring weak or frivolous cases or cases brought for the purpose of campaigning or delaying. The costs/benefits of the Government’s aims to reduce the overall number of judicial reviews through restricting standing, imposing new financial disincentives etc. are then attributed to claimants or defendants or third parties on the basis of these biased assumptions. Without any relevant data, most of the assessments of impact - who might gain and who might lose – are merely guesses.

43. The critical impact which has been ignored is the loss to protection of the rule of law which would follow from restricting access to judicial review beyond the test and safeguards already in place. None of the ‘benefits’ which the Government aspires to achieve could in any way compensate for the loss that would flow from
limiting the ability of citizens to hold public authorities to account. Democracy, good governance, quality public policy development and decision-making would be losers, and it is unclear who, other than authorities that prefer to ignore their obligations to act lawfully, rationally and fairly, would be the ‘winners’.

44. Many of the firms of solicitors who act for claimants in judicial review cases will be small and medium sized enterprises and micro-businesses. They will risk closure if the legal aid proposals with regard to permission stage of judicial review set out in this consultation are pursued.

**Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?**

45. Judicial review has again and again enabled people with little wealth or status to challenge actions by major state bodies which affect or are likely to affect them adversely. Applicants ask the courts to ensure that public authorities that exercise powers or provide services do so lawfully in accordance with the rules of natural justice and that procedures are fair and meet their legitimate expectations. This important role of the courts of course benefits all citizens but in particular benefits people who are most likely to be subjected to powers of authorities such as the police, prison or immigration services and/or most likely to be dependent on provision by authorities of housing, education, health or welfare services.

46. The lack of any form of equality impact assessment to accompany this consultation is very much to be regretted. It is difficult to know how the Ministry of Justice has been able to develop so comprehensive a set of proposals to reform judicial review without any obvious regard to its own obligations under the PSED.

47. Without the data which the Ministry of Justice should have gathered, DLA can only indicate from the experience of our members that to restrict standing and to make it more difficult for NGOs and other interest groups to bring applications for judicial review is likely particularly to disadvantage disabled people, people of different ethnic or national origins or nationalities, women, children and older people. With reference to disabled people, DLA would remind Government of its obligations under the UNCRPD.

48. For all of the reasons set out above, DLA does not consider that any group will truly benefit from these proposals; we all will lose rather than gain.

The DLA hopes that our above responses will assist the Government in assessing the merits or otherwise of the proposals within the consultation document. If any of our comments require clarification, we would be pleased to provide this.
Discrimination Law Association
1 November 2013