Lord Justice Sullivan's Working Group on Access to Environmental Justice

Points in response to consultation on reform of legal aid in England and Wales

- The working group welcomes the Ministry of Justice's (MoJ) proposal[1] that legal aid should continue to be available for environmental challenges.

- However, the working group notes that the proposed changes to the financial eligibility for legal aid will mean that some people currently eligible in environmental cases will cease to be so. This will be less of a concern if the Government implements the requirements under Aarhus and EU Directives that costs are not prohibitively expensive, as further discussed below and considered in our previous reports.

- The working group also welcomes the fact that cases assessed as having "borderline" (as defined) prospects of success will continue to be funded where they are assessed to be of Significant Wider Public Interest (SWPI)[2]. The working group considers that cases falling with the ambit of the Directives and/or Aarhus Convention should be treated as automatically having SWPI for those purposes (just as they are taken to satisfy the "public interest" requirements of Corner House: see Garner (CA) and Edwards/Palikaropoulos (SC)).

Points in response to consultation on reform of civil litigation funding and costs in England and Wales

- The working group welcomes the MoJ's acceptance that there needs to be a change to the current costs regime including for judicial reviews and including thus for judicial reviews falling within the Aarhus Convention and EIA/IPPC Directives.

- The working group welcomes in principle the proposal for QuOCS, albeit that it does not consider that the QuOCS rule currently proposed in paragraph 135 will be practicable and/or meet the requirements of the Directives/Aarhus Convention, as follows.

- One element of what is proposed is uncontroversial and the working group agrees that, where a claimant behaves unreasonably, the protection afforded by the basic QuOCS rule should be reduced. However, a defendant or interested party who wishes to allege unreasonable conduct should not be entitled to wait until the conclusion of the case to do so – they should raise the point at the time to enable the claimant to seek the guidance of the court, if necessary, as to whether the conduct is in fact unreasonable.

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1 Ministry of Justice Consultation Paper "*Proposals for the Reform of Legal Aid in England and Wales*", paragraphs 4.138-4.140 available at: http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf

2 As above, paragraph 7.15

- The working group notes the proposal to adopt a rule limiting the liability for costs of an individual claimant (see further below on groups) to the "amount which it reasonable for them to have to pay". The working group continues to be most concerned about the practicability and compliance (as above) of that proposal, as currently framed. In particular, unless clear rules are laid down as to how the question of what is "reasonable" should be approached, then claimants will not be provided with sufficient certainty as to their likely exposure. Any rules in place to deal with that problem would also need to be clear as to how the court is to assess the claimant's financial position (capital, income, liabilities, expenses, etc). And that, in turn, would draw the court into a process of financial assessment parasitic to the determination of the actual environmental claim which (1) will add disproportionate complexity, delay and cost, (2) will unacceptably compromise confidentiality, (3) by virtue of (1) and (2) itself create a chilling effect on the bringing forward of appropriate environmental claims. None of that would be acceptable given that (as above) there is an inherent public interest in such cases progressing.

- The working group notes that the proposed rule also refers to the "financial resources of all the parties" [para 135]. We make no comment about the appropriateness of that for cases other than environmental. We consider the defendant's position and that of interested parties, as follows.

    - Most, if not all, JR cases which engage the Aarhus Convention or Directives would in practice be against defendants with substantial resources (eg Environment Agency, local planning authority, Secretary of State) so no issue could arise in any event. But, in the event of a challenge to a smaller public authority, we do not consider that it would be consistent with the requirements of the Convention/Directives for the claimant's liability to be increased just because the state happens to have allocated the decision in question to a smaller public body. Accordingly, for cases within that ambit, the resources of the defendant body should not be in issue.

    - Although the narrative text in the report refers only to the defendant's costs [paragraph 136], in the context of environmental JRs the reference in the proposed rule to the resource of "all the parties to the proceedings" could also be taken to refer to a claim for costs by an interested party (such as the beneficiary of a permission or licence) which exceptionally (presumably on Bolton principles) might be sought by such a party against the claimant, The prohibition on "prohibitive expense" covers all costs (including this potential liability to an Interested Party) and not just potential liability to the public authority defendant. So a modification would be required.

- We welcome the recognition in paragraph 142 that the rule as framed would not give claimants sufficient certainty at the outset. We note that paragraph 144 suggests that, if QuOCS is applied beyond personal injury cases "it might be necessary for the test to be more restrictive so as to avoid an increase in unmeritorious claims". As we have said before, we

consider that the existing permission stage already provides that for judicial review claims. It follows that no additional filter is required.

- We therefore do not consider that liability for a "fixed amount" which is contemplated for other types of case is unnecessary or inappropriate in this context. However, if applied to environmental judicial review, any level fixed would (as per our previous reports) need to be set at a level which would not be prohibitively expensive for an ordinary person (subject to possible exception for the "conspicuously wealthy" as contemplated in paragraph 144). We envisage that would be much lower than the level which might be considered appropriate in, say, personal injury claims, where the protections of the Convention/Directives are not in play.

- We welcome the proposal in paragraph 145 that the potential liability of a claimant whose means are at legal aid eligibility levels would in any event be nil. That is an important protection. For example, there will be some cases where legal aid is not granted even though the case falls within the ambit of the Aarhus Convention and the person is financially eligible for legal aid (for example, a claim may be sufficiently strong to secure JR permission but may be regarded by the LSC as not sufficiently strong to meet the requirements for legal aid). Costs protection as contemplated can also enable claims to be commenced at the earliest opportunity and without waiting for legal aid to be granted.

- We welcome the general recognition in paragraph 159 that it is important that claimants should be able to bring judicial review claims (albeit with the permission stage providing an important filter on unmeritorious claims).

- Paragraph 161 says that "it would not be unreasonable for claimants who do not get permission to proceed to continue to pay the defendant's costs of the application as at present, or a major part of them". We take that to mean that a claimant who is refused permission on paper and renews into court should be exposed to the defendant's full cost of the renewal hearing. The renewal process (which allows for renewal as of right) is an important safeguard which recognises that cases which merit judicial review permission do not, for whatever reason, always get permission on a paper consideration. It follows that the prohibition on prohibitive expense applies at that stage too. We also note that it is not uncommon for the question of permission to be considered first at an oral hearing (where the judge considering the paper application adjourns the permission into court). That should plainly be treated as a first consideration for costs purposes even if different rules are made for where an oral consideration of permission comes after a paper rejection.

- Paragraph 162 says that QuOCS as proposed would mean that a claimant of "modest means" bringing a justified claim and acting reasonably "would not be required to pay the defendant's costs if the claim fails" but that "it would allow the court to take into account the financial circumstances of the parties, the seriousness of the subject matter, the importance to the claimant and ... the litigation behaviour of both parties before deciding whether to make a costs order against the claimant." There is an obvious tension in that explanation as between the apparent certainty of the first part ("would not be required to

pay") and the obvious discretionary quality of the second. We have explained above our concerns about a regime which requires judges, case by case, to assess the claimant's financial position (and there is no indication in the report as to what the government seeing as being "modest means"); also, for environmental cases, the irrelevance of the means of the defendant. In such a case, the fact of being within the Convention should mean that the subject matter is treated as "serious" and, given the inherent public interest (per Garner) there should be no additional question as to the "importance to the claimant".

- In paragraphs 163-164 the report notes Sir Rupert Jackson's consideration (and then rejection) of a system of tariffs: say £3,000 to the grant of permission, £5,000 for the full proceedings. The report resurrects that proposal, with the additional refinement that a defendant could apply at the start of the case to lift the cap when faced with a wealthy claimant. We have no objection in principle to the use of tariffs (they can give certainty) provided they are set at a level which is not prohibitively expensive for an ordinary person. But the figures suggested are plainly well above that level. Moreover, whatever view is taken about exposure post-permission, we consider it wrong in principle (particularly in the context of Aarhus claims) for a claimant to face more than a minimal cost (such as the court fee which already discourages completely frivolous claims) for commencing proceedings. The pre-permission stage is an important constitutional opportunity for members of the public to bring to the attention of a judge potential illegality by the state. Nor should the cost of responding to claims at the permission stage be disproportionate for defendants, provided they respond appropriately and bear in mind the function of the permission process rather than incurring a significant proportion of the costs which might ultimately be required to respond to the JR if permission is granted (see thus Davey). The permission stage then acts as a filter to prevent defendants being inappropriately exposed to the more substantial costs of responding to claims through to a full hearing.

- In paragraph 165, the report considers the proposal we made in our Update Report - namely that an unsuccessful claimant should not be ordered to pay the costs of any other party unless they had acted unreasonably in bringing or conducting proceedings. The report notes that "this would mean that a well-resourced claimant ... would have full costs protection subject only to their litigation behaviour". It then reports the Government as being concerned that this proposal (and Sir Rupert's) "would have the potential to encourage a significant increase in unmeritorious claims". It seems to us that there are two issues here, and they must not be confused: discouraging unmeritorious claims, and the public purse recovering costs from wealthy claimants. As for the first, as we have previously explained, a well-resourced (or "conspicuously wealthy") claimant would (by definition) be unlikely to be deterred by the costs sanction arising in JR (which is, after all, a great deal cheaper than most other High Court litigation) so we do not see that as a mechanism for control. Moreover, any concern about unmeritorious claims can only properly be directed at the pre-permission stage when (as above) the defendants costs should (per Davey) be modest in any event. But, if there is a particular concern about recovering those pre-permission costs from conspicuously wealthy claimants (simply to recover money for the exchequer but not for deterrent reasons) then we have no objection of principle to that.

- Paragraph 166 explains that government does not propose to extend QuOCS beyond individuals because, as now, environmental groups and local residents associations would be able to apply for PCOs. The advantage of PCOs (as the report recognises) is the potential for early certainty as to exposure. However, as above, we see a need for early certainty (not present in the current QuOCS proposals) across the board. Accordingly, unless the QuOCS mechanism were made clearer and given more certainty (as above), we see individual claimants also applying for PCOs, simply to be clear about the exposure. As for PCOs for groups: (presumably thus NGOs and more informal groups), the key issue when it comes to environmental claims is the inherent public interest (per Garner) in the claim. We thus see no proper basis to distinguish a claim brought by a single individual, a group of individuals who have come together around an environmental issue, or a well-established NGO – they are all seeking to exercise rights conferred on them by the Convention specifically to secure judicial scrutiny of environmental decisions. We thus welcome the suggestion in paragraph 167 to apply the notion of QuOCS to non-commercial groups, albeit that – as above – significant changes would be needed to the QuOCS regime to ensure that appropriate cost levels were set, and early certainty secured (otherwise groups will simply be forced to apply for a PCO).

- Paragraph 168 notes that the Government is considering amendments to the PCO regime to deal with environmental cases. We assume that is a response to proceedings being taken against the UK by the EU Commission and the recent decisions of the Aarhus Compliance Committee. We welcome the recognition that the current PCO regime does not comply with the requirements of the Convention/Directive. But we do not think that tweaking the Corner House regime is likely to achieve that outcome. The inherent flaw in the Corner House regime in that it addresses the issue of prohibitive expense on a purely subjective basis. While the position is uncertain, the balance is in favour of an objective test, per Edwards. A fundamentally new approach is required because little of the thinking which went into framing the Corner House rules applies here: there is an inherent public interest in the challenge (per Garner), the defendant's financial position is (as above) not relevant, the costs level set must avoid "prohibitive expensive" (such that the "reasonableness test" is insufficient) and (overall) where an order is required it must be made (to comply with the Directive/Convention), rather than remaining discretionary (as per Corner House). Accordingly, any process which started from the current rules would require so much change that, in the end, it would be better to start from first principles. We note the intention to bring in new rules by April 2011. Given that, as at February 2011, there has not even been a public consultation on new rules, we are not clear how the Government intends to meet that target.

- We note, overall, that the consultation paper is more of a discussion paper than a paper which makes clear proposals. As our observations above show, the devil will be in the detail. We assume that, once it has settled on a single proposal (QuOCS? PCOs? Caps?) the Government will then consult on the detail. We would be happy to participate in the development of more details proposals.

Points in response to consultation on cross-undertakings in damages in environmental judicial review claims

- While we welcome the MoJ's decision to consult on this issue, it is unfortunate that proposals are confined to cases covered by the EC Public Participation Directive (i.e. effectively cases concerning Environmental Impact Assessment, EIA, and Integrated Pollution and Prevention Control (IPPC), and its replacement Industrial Emissions Control). Thus, while the proposals are clearly intended to bring the UK into compliance with EU law, they do not have the capacity to make us compliant with Article 9(4) of the Aarhus Convention, which requires review procedures for all environmental cases, including injunctive relief, to be "*fair, equitable, timely and not prohibitively expensive*". This is clearly pivotal given the UK's ratification of the Aarhus Convention in 2005.

- Paragraph 2 of the consultation paper refers to our first report, however, it incorrectly states that: "*The Working Group concluded that a cross-undertaking in damages should not generally be required in support of an interim injunction in environmental judicial review claims*"[3]. In fact, we make no distinction between claims for environmental judicial review and civil environmental claims more generally, on the basis that the Convention is capable of application in other areas of civil law[4]. We therefore urge the Government to modify the procedures relating to interim relief in relation to ***all*** civil environmental claims in order to ensure compliance with EU law and Article 9(4) of the Aarhus Convention.

- We agree that clarification in relation to interim relief in environmental cases is urgently needed. It is our view that this should be done by way of an amendment to the Civil Procedure Rules. We believe that an amendment to the CPR carries more authority and is the only way to provide certainty for claimants.

- The issue of certainty for claimants is pivotal in the light of the judgment of the European Court of Justice in Case C-427/07, *Commission v Ireland*. In this case, the ECJ held that judicial discretion cannot be regarded as valid implementation of the obligations arising from EC Public Participation Directive. It is our view that in order to respect the ruling in Case C-427/07, the opportunity for judicial discretion must therefore be reduced to a minimum. This is best achieved by way of an amendment to the Civil Procedure Rules.

- We welcome the proposal to dispense with the requirement for a cross-undertaking in damages in certain circumstances, however, we foresee significant problems with the present wording of paragraph 39, including:

  (a) ***"A final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded and bringing the case on quickly for trial would not resolve the problem"*** – in our view this sets the bar very high. This would only really catch cases where the damage done would be entirely irreversible (e.g. the

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[3] Ministry of Justice Consultation Paper "*Cross undertakings in damages in environmental judicial review claims*", paragraph 2, available at: http://www.justice.gov.uk/consultations/cross-undertaking-cp241110.htm

[4] *Morgan v Hinton Organics* [2009] EWCA Civ 107, paragraph 44

outright destruction of a protected area, for example) and not those cases where the damage could (but would be unlikely in practice) to be reversed by the court if the case succeeded. Thus, for example, if the challenge is to a landfill consent then, in theory, waste placed without permission in a landfill during the litigation could later be removed but the court is likely to be reluctant to order that and it is questionable whether it would cross the "impossibility" threshold.

(b) **"*Significant environmental damage would be caused*"** – the qualification "significant" would need explanation to ensure a consistency of approach; factors to be taken into account would need to include the reversibility of the damage (including, in particular, whether the court or other decision-maker would be likely to require its reversal in the event that the claim was successful[5]), the scale of the damage, whether it relates to something (an area, a species, etc) that has special protection (e.g. under planning policies or the law).

(c) **"*The claimant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required*"** – the issue here is how will the court decide whether a claimant is acting reasonably? Unless, as seems unlikely, the court would simply accept the claimant's statement to that effect, it is inevitable that judges will drawn into a detailed means assessment as to what a claimant can afford in each particular case. In our view, this could lead to significant uncertainty and further unhelpful satellite litigation.

- To conclude, while we welcome the MoJ's decision to consult on this issue, we do not believe these proposals address the access to justice deficits in the present judicial system. This is primarily because: (a) they will not apply to all environmental civil claims as required by EU law and the Aarhus Convention; and (b) the requirements set out in paragraph 39 create insufficient certainty to comply with the judgment of the ECJ in Case C-427/07. In our view they could also lead to costly and time-consuming satellite litigation.

- Our first report recommended that the requirement for a cross-undertaking in damages should be dispensed with in environmental cases where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings (see paragraph 82). In this eventuality, it is incumbent on the court to ensure that the case is heard "promptly". We continue to support this approach. However, we would stress that in view of the small number of cases in which interim relief is likely to be sought (being, as it is, a sub-section of environmental cases) "promptly" means hearing the case literally within a few weeks.

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5 Thus, for example, it might be theoretically possible that a judge might order a landfill which had been filled during the currency of the JR to be emptied in the even that the claim succeeded, but it is unlikely, so the impact would be regarded as irreversible in practice

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