Wildlife and Countryside Link Response to the Ministry of Justice Consultation on the Reform of Judicial Review in England and Wales

Proposals for the provision and use of financial information

September 2015

Wildlife and Countryside Link (Link) brings together 44 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following members of Link:

- Bat Conservation Trust
- Buglife
- ClientEarth
- Freshwater Habitats Trust
- International Fund for Animal Welfare
- John Muir Trust
- Marine Conservation Society
- Open Spaces Society
- The Ramblers
- RSPB
- Salmon and Trout Conservation UK
- Whale and Dolphin Conservation Society
- The Wildlife Trusts
- The Woodland Trust
- WWF-UK

Executive Summary

In this consultation paper, the Government underlines the importance of Judicial Review in defending the rule of law. The paper maintains that Parliament legislated in the Criminal Justice and Courts Act 2015 (CJCA) to protect JR from "misuse" and that the purpose of sections 85 and 86 of the CJCA is to provide the court with information on the funding of JR applications and oblige the judiciary to consider making costs order against third parties to the proceedings.

This response explains how the practical application of these proposals will create profound difficulties for the nature of charity funding, by both threatening the general funding available to charities and reducing the ability and willingness of charities to apply for Judicial Review. The potential exposure of charity donors and funders to legal cost orders arising from indirect funding that a charity subsequently decides to use to fund a JR offends the basic principles of justice. In relation to environmental cases, the proposed measures will reduce access to environmental justice in a manner wholly in opposition to the principles enshrined in the UNECE Aarhus Convention[1]. The corollary of these proposals is that by further

[1] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

undermining the UK's compliance with the access to justice pillar of the Aarhus Convention, they will result in further scrutiny of the UK at international levels.

These proposals also appear to have been developed in the absence of any narrative, evidence or empirical data explaining why they are necessary. There is no evidence to demonstrate that the process of JR is being "misused" or to show how these proposals will increase transparency and access to justice. Link urges the Government to ensure that any further proposals to reform JR are based on robust evidence that the process is, in fact, being manipulated or misused by claimants in any way.

Link proposes that charities and environmental cases should be exempted from the unworkable, burdensome and chilling proposals set out in this consultation paper.

Introduction

1. Link welcomes the opportunity to respond to this consultation paper. Members of the Legal Strategy Group were engaged, via numerous MPs and Peers, in the debates on Part 4 of Criminal Justice and Courts Bill 2014 and despite subsequent measures by the Government to ameliorate the "chilling effect" of the provision of financial information in JR proceedings, we are deeply concerned about these resulting proposals.

2. Further to correspondence with the Ministry of Justice, we note that proposals on cost capping do not apply to environmental cases at first instance. Our comments therefore focus on the proposals for the provision of financial information in all JRs as a pre-condition for the grant of permission and the proposals in relation to costs capping in so far as they will apply to environmental appeals.

3. The Foreword to the consultation paper emphasises the importance of the rule of law, recognising that its absence can lead to the abuse of administrative power. Judicial Review is an essential foundation of the rule of law and almost the sole mechanism for civil society to challenge unlawful decisions affecting the environment (as a fundamental public benefit) and achieve a remedy in the courts. However, these proposals will cause very real harm to environmental JRs. While such cases represent a tiny proportion of the total number lodged annually, they have very high success rates when compared to overall success rates (see later). As such, environmental cases play an essential role in checking the abuse of administrative power and upholding the rule of law.

4. The consultation paper maintains that the approach to the provision of financial information outlined by the Government is not unduly onerous and is required to ensure the court is provided with financial information appropriately, again without any explanation as to why this information is necessary. Consequently, the Government proposes that the requirements should apply in all JR applications and to all claimants. However, the Government invites views on whether there should be an amended approach for some types of claimant (such as charities).

5. We set out below that the manner in which charities are funded, as opposed to profit making organisations, introduces a range of complexities around determining the sources of funding and the intentions of funders that make the implementation of the proposals as set out burdensome to the point of being unworkable. In addition, the existing regulation of charitable objectives by the Charity Commission means that the measures are unnecessary and will achieve no public benefit but instead increases costs and may deter participation in civil society.

6. Through its ratification of the UNECE Aarhus Convention, the UK Government is obliged to ensure that civil society has access to a review procedure before a court of law that is "*fair,*

equitable, timely and not prohibitively expensive[2]" and also to "*remove or reduce financial and other barriers to access to justice*[3]". Our response explains how these proposals are contrary to the UK's compliance with the access to justice pillar of the Aarhus Convention – the corollary being that they are likely to result in further scrutiny of the UK at international levels.

7. Moreover, these proposals have seemingly been developed in the absence of any narrative explaining why they are necessary - or any evidence or empirical data demonstrating how often judges even use their existing powers to direct third parties to pay costs. There is also no evidence to explain how the process of JR is being "misused" or to demonstrate how these proposals will increase transparency and access to justice, as purported by the somewhat skeletal Cost Benefit Analysis. In the absence of any foundation, these proposals would appear to represent little more than the next chapter in an ongoing programme to undermine the process of JR for claimants generally.

8. Finally, although the Ministry of Justice identifies environmental NGOs as one of the audiences for the consultation, we note that no such groups were contacted about the proposals. We would be grateful if any future proposals impacting on environmental cases could be directed to Wildlife and Countryside Link, the Legal Strategy Group of which (and its individual members) work on access to environmental justice and are in touch with civil servants across the UK on this issue.

The Proposals

9. Paragraph 18 (onwards) of the consultation paper sets out the current position with regard to the courts' power to exercise their general discretion to order a third party to pay costs in a JR. As highlighted in the paper, present case law requires there to be a strong relationship between the party and the person funding their claim – essentially, the third party must be seeking to drive the litigation and to benefit from a potential remedy in the case for those court powers to be exercised.

10. Paragraph 22 states that the intention of section 85 of the Criminal Justice and Courts Act 2015[4] (CJCA 2015) is to provide the court with a clear picture of the funding of a JR application in order to inform decisions on costs. Section 86 of the Act obliges the court to consider making costs orders against those who are not a party to the JR but who have been identified as providing financial support[5]. While the Act does not require judges to make such an order if they consider that it would be inappropriate to do so, it requires them to consider properly the position of those identified in the information provided.

11. It should be noted that sections 85 and 86 of the 2015 Act go much further than the current position. They extend beyond enabling a judge to make a costs order in very specific circumstances to requiring judges to examine financial information provided in all cases and to consider making cost orders against charitable donors – regardless of their intentions or awareness of the case in point "direct or indirect".

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2 Articles 9(2) and 9(4), Aarhus Convention

3 Article 9(5), Aarhus Convention

4 Section 85 of the 2015 Act inserts into section 31 of the Senior Courts 1981 and into section 16(3) of the Tribunals, Courts and Enforcement Act 2007 a requirement for a claimant to provide the court or tribunal with specified information concerning the funding for the judicial review proceedings before permission can be given

5 Similarly, para Paragraph 44 summarises the aim of the proposals as "*making sure the courts have sufficient information to make the right costs orders so that those who fund and control judicial review applications are not able to avoid the appropriate costs liability arising from their actions and access to justice is protected*"

12. We have a number of general concerns about these proposals:

- No evidence has been provided to confirm the number of cases per year in which a costs order has been made against a third party using current powers. The consultation paper acknowledges that there is "*limited germane information available*[6]" and as such, we would question whether these proposals are actually necessary. In the absence of any data, even the Government anticipates the number of costs orders made against third parties on an annual basis will be "*small*[7]", suggesting that any revenue accruing to the public purse will be limited - in which case imposing this additional burden on all claimants and the judiciary would seem to be highly disproportionate;

- These proposals are fundamentally unsuitable to environmental cases, in which the remedy sought (the protection of the environment) is a *public* benefit. Claimants in environmental JRs are (almost universally) not seeking to achieve any personal or pecuniary benefit, they are attempting to protect natural assets for the benefit of present and future generations. Having acknowledged that environmental cases serve the public interest by establishing a separate costs schemes for them, it would seem illogical for the Government to tie-up fundraising around the caps in administrative complications;

- The effect of paragraph 51(d) will be to act as a deterrent to third parties who may be contemplating providing significant funding to individuals, community groups and environmental NGOs (charitable incorporated organisations (CIO) or charitable companies). Such benefactors, who are providing general funds or funding with a broad restriction would not expect their contribution to result in them acquiring additional liabilities due to the subsequent actions of the charity. Even if the benefactor was knowingly providing funding for a legal action, they would generally agree to provide funding up to a certain amount on the basis that it represents the extent of their liability – the potential for costs exposure in excess of that figure (either at first instance up to £10,000 or an indeterminate figure at subsequent stages of the proceedings) will undoubtedly have a "chilling effect" both on general charitable funding and on the willingness of individuals and charitable trusts to support action that may include JR. This effect will even apply to large and established charities, many of which rely on benefactors to cover the costs of particular activities, including litigation. In the absence of such support, we anticipate that a number of cases that would otherwise have been brought will not be brought because the organisation will not have the unallocated funds to bring them. As such, the proposals will further undermine the UK's compliance with Article 9(4) of the Aarhus Convention and the requirement that review procedures be "*not prohibitively expensive*".

13. Not only are these proposals indefensible in their own right – they are also paradoxical in light of the contribution environmental cases make to the maintenance of the rule of law. Data obtained from the Ministry of Justice covering the period April 2013 to March 2015[8] confirms that nearly half (average 48%) of environmental JRs were granted permission to proceed (contrasting with a figure of 16% for all cases in 2014 and 7% in the first quarter of 2015). and, on average, 24% of the total number of environmental JRs were successful for the claimant (contrasting with a success rate of 2% for all cases in 2014).

14. Thus, while environmental cases represent a tiny proportion of the total number of cases lodged annually – some 136 of 20,000 (0.007%) – nearly half are granted permission to proceed (thus extinguishing any argument that claimants in environmental cases are

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6 Paragraph 106 of the Consultation Paper

7 Paragraph 109 of the Consultation Paper

8 Data provided to Leigh Day under the Environmental Information Regulations 2004

"abusing" the process of JR as a significant number of cases would be weeded out at this stage) and they have very high success rates when compared to cases taken as a whole. Environmental cases therefore play an essential role in checking the abuse of power and upholding the rule of law – the very doctrine the Secretary of State seeks to uphold in his Foreword.

Charities as corporate bodies

15. Paragraphs 50-60 of the consultation paper set out the process for JR claimants by type. While these are no doubt designed to be relatively straight-forward, the situation will be more complicated for most environmental NGOs.

16. For example, paragraph 51 holds that where a claimant is a corporate body that is unable to demonstrate it is likely to have sufficient financial resources available to meet liabilities arising in connection with an application for JR, it must provide information about its members and their ability to provide financial support for the application. We assume this proposal is intended to provide more information about (and dissuade) cases in which a corporate claimant may not be able to cover the full extent of an adverse costs order. This seems an extraordinary requirement particularly when there are no similar such requirements for developers when applying for planning permission. However, it would also encompass small-medium size charitable companies (limited by guarantee) relying on donations and/or grants to cover the costs of progressing a JR - in which case the charity would be required to provide the names and addresses of its members, as well as their interest in the JR. Even quite small environmental charities can have many company members, usually between 400 and 25,000; large environmental charities can have a membership of hundreds of thousands or millions. These memberships include a diversity of people, including large numbers of children.

17. This approach is ill-conceived and highly problematic. Firstly, it places an unnecessary burden on the claimant to provide details of all of its members. Secondly, the information that will be provided is misleading as the individual members have not agreed to previously underwrite the JR on behalf of the organisation. The consequence of this is that individuals may be dissuaded from joining small-medium sized charities for fear of having a potential costs order made against them in respect of legal proceedings they knew nothing about.

18. Finally, the ECHR (as incorporated in the Human Rights Act 1998) provides that the information requested must be proportionate and necessary[9]. The requirement to provide wide ranging information, such as the names and addresses of those individuals who may just provide limited funding to help a friend bring a claim - or in the case of a body corporate just be a member - is disproportionate.

Questions

Financial information

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

[9] Article 8 of the European Convention on Human Rights (ECHR) provides that: *(1) everyone has the right to respect for his private and family life, his home and his correspondence; and (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

We note there is no explanation as to why these proposals are necessary. In as much as any format is appropriate to gather information the Government concede will rarely be used, we believe the proposed format is particularly problematic for charities for the reasons outlined above.

Moreover, it is clear that the Government has not considered the full range of types and definitions of 'members' used by charities. While in some cases there is a complete overlap between company members and charity members, in other cases these categories are distinct or partially overlapping. Unlike company members, charity members are not shareholders and may not be directors of the charity. The declaration will require the charity to establish "*the interest in and connection to the applicant*" of each member. It is unclear what this means, but if this was to involve approaching 25,000 members with a series of questions about their interests and/or finances and collating the responses this would constitute a huge and expensive administrative exercise.

It is unclear what purpose would be served by supplying to the court a list of names and addresses of individuals with unknown financial capacity. Furthermore it is unacceptable that this data (data may contain the names and addresses of children and vulnerable people) will be provided to the defendant and, unless the court directs otherwise, to interested parties. Not only is there a significant risk of accidental disclosure, individuals may feel deep disquiet that their names and addresses will be supplied to a public body that will then be able to identify them as supporters of a charity that may be perceived as troublesome.

The absence from this consultation of clarity about what further information the court should, or will, consider to be the necessary information to establish either the "*ability [of members] to provide financial support*" or their "*interest*" in the case, constitutes avoidance of a fundamentally significant issue.

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

No, for the reasons outlined above.

We would also point out that much of the terminology in paragraphs 51(d) and (e) is profoundly unclear. References to "the *claimant's resources*", "*the total contribution and/or likely contribution*", "*likely to exceed*" and "*likely to have*" lack certainty and may deter claimants from bringing a claim - particularly as the information must be verified by a statement of truth. The Civil Procedure Rules must be readily understood and accessible, otherwise they could be contrary to the requirement in Article 9(4) of the Aarhus Convention that legal review mechanisms must be "fair". It may also more generally offend against Article 6 ECHR[10], because a failure to provide the information required, but not clearly defined in this consultation, means the court cannot grant the applicant permission to bring the challenge.

Link believes the only workable solution is to specifically exclude charities from these proposals.

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

[10] Article 6 1 of the ECHR provides that: *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*

Yes. While it may be theoretically possible to estimate the likely total costs of litigation in environmental (Aarhus) cases at first instance (because adverse costs are capped to a known level), the application of the loser pays rule makes it very difficult for other claimants to assess costs with any precision. Moreover, the statutory cap on adverse costs in environmental cases does not apply beyond first instance. Claimants are not aware of the defendant's position beyond first instance and cannot therefore accurately estimate costs relating to the Court of Appeal and Supreme Court. To impose such an obligation increases costs unfairly for the claimant – to whom the obligation for "*fairness*" under Article 9(4) of the Convention applies[11].

4) Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 58 to 60? Please provide reasons.

We do not agree the approach should apply to charities, and to environmental charities, in particular.

If applied, this provision would place a significant administrative burden on charities with limited resources that are trying to ensure that the environment is protected for public benefit and the law applied. This burden could apply to a charity for years as the case goes through various stages.

Unfortunately, the reduction of time periods for applying for JR in relation to decisions under the Planning Acts means that there is usually greater uncertainty about the potential sources of finance as pre-application fundraising is no longer feasible. The 'likely' funders of a case are subject to constant change, new funders are found, existing unrestricted funds allocated away from the case and indeed predicted costs change depending on the decisions of the courts. This creates almost weekly, certainly monthly, significant changes in the planned structuring of income to fund any legal action.

Instigating a monthly management review of the funding of a JR and reporting this to the courts would introduce a substantial burden, a burden that would be pointless in all cases where costs are not eventually awarded against the charity, its members and its supporters.

Justice and the good of the public is best served by allowing charities to focus on the substance of the case and addressing any significant changes in circumstance, at the point that, and indeed if, costs are awarded against the charity.

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

No. We believe that charities and environmental cases should be excluded from these proposals for the reasons set out in this response.

Financial information threshold

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.

No. Link believes that the requirement to provide information about the financing of JRs and the potential for third parties to be exposed to a costs order in excess of the figure they may

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[11] See Findings and Recommendations with regard to Communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, paragraph 135 available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf

have pledged (either generally to the charity or specifically to a JR) will deter them from providing funding for charitable causes and environmental cases. A single threshold takes no account of the different types of corporate bodies affected, their widely varied funding models or the different intentions of supporters of the charity.

In addition, charities are governed by Trustees who are responsible to the Charity Commission for ensuring that the charity only acts within its charitable objectives. In taking a Judicial Review a charity must be convinced that it is acting specifically to achieve its charitable objectives, otherwise it may expose itself to regulatory action. The "*degree of third party control of the claim*" made by a charity is therefore already regulated through the objectives of the charity and the role of the Charity Commission. As long as the purpose of the JR falls within the charity's aims and objectives, the court should consider the independent aims or objectives of any third parties supporting the action to be irrelevant.

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.

In a recent statement on Access to Justice in the UK[12], Link stated that legal action remains prohibitively expensive for many individuals and community groups. This is because losing parties must pay the court fee (which has doubled in the last year to just under £1,000 in England and Wales), their own legal costs (which routinely amount to £25,000[13] and often more) plus the adverse cap of either £5,000 or £10,000. As such, claimants are routinely facing costs of £31-36k on losing a case (often more in Scotland) and may suffer significant financial losses when winning complex cases.

The recent important case of *Cairngorms Campaign & Ors v Cairngorms National Park Authority* [2012] was abandoned after the application to the Supreme Court for a PCO was refused and two small charities were left with court awarded costs of £38,000.

Charities also have to consider the costs that they will incur internally in undertaking legal action and will raise funds not only to address costs awarded against them, but also to cover their costs of managing and supporting the case internally, and indeed of paying their own lawyers and experts, particularly as there is a cross-cap in environmental cases. In such cases, charities will often be fundraising towards a target of £50-60,000. This target may not be met so funds will have to be drawn from general donations to cover the costs.

These general donations made by individuals, charitable trusts and others would then be providing an indirect source of funding towards the legal case. However, it would not be clear at the start of the case if the charity would need to call on these resources. Nor would it be clear to the donor when they made their general contribution that such funds would be used to support a court case and thereby expose them to further court costs. This effect falls short of being fair and just and places charities in an invidious position. They would need to decide whether: (i) they do not use general donations to support judicial review applications; (ii) they must make it clear to all donors that may fall into the category required to be disclosed that they may be exposed to legal costs should the charity use their donation to support a judicial review; and/or (iii) to take the risk that the donor only finds out they are liable to additional costs when these are imposed.

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12 A Joint Links Statement on Access to Justice in the UK submitted to the UNECE Task Force on Access to Justice in Geneva (June 2015) is attached to this response

13 Figures also informed by *R (on the application of Garner) (Appellant) v Elmbridge Borough Council (Respondent) & (1) Gladedale Group Ltd (2) Network Rail Infrastructure Ltd (Interested Parties)* [2010] EWCA Civ 1006

Unless charities are excluded from this provision the effect will be to introduce a very substantial chilling effect on either the charities ability to undertake a JR review or the willingness of individuals and bodies to donate general funds to a charity, or, after the first case of a naïve charity donor being subjected to court costs being reported in the media, a combination of both chilling effects.

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

No, for the reasons set out above. As an aside, we note that no reasoning is proffered as to why the figure of £1,500 is considered to be an appropriate threshold in any event.

Costs Benefits Analysis, Equalities Impact and Family Test

13) Do you agree with the assumptions and conclusions outlined in the Costs Benefit Analysis at pages 24 to 26 of this consultation?"

No. The Government has provided no evidence or empirical data to explain why these proposals are necessary. Even the Government anticipates the number of costs orders made against third parties on an annual basis will be "*small*[14]" – in which case imposing an additional burden on all claimants and the judiciary would seem to be highly disproportionate. Paragraph 107 of the consultation paper lists "*increasing transparency*" as one of the benefits of the reforms. It is difficult to see how this applies given that the information will only be available to the judge.

Moreover, the Impact Assessment does not consider the very substantial costs that will be incurred by charities in providing financial information relating to their members or updating the court on significant changes to funding allocations, nor does it consider the chilling impacts of the proposals on membership donations and significant contributions to charities. These factors are relevant to the findings of the Aarhus Convention Compliance Committee in Communication C33, namely that "*When assessing the costs related to procedures for access to justice in the light of the standard set by article 9(4) of the Convention, the Committee considers the cost system as a whole and in a systemic manner*[15]." In environmental cases the costs and impact of these proposals must not be considered in isolation but as part of the entire judicial process.

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.

Please see the answer to question 7, above.

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.

Charity membership is an affordable way for people with limited resources to contribute to the protection and enhancement of the environment and civil society. Vulnerable categories of society, such as children, older people and people with disabilities are also often members of charities – but the knowledge that membership may expose them to court costs is likely to

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14 Paragraph 109 of the consultation paper

15 *Supra*, n.12, paragraph 128

deter such individuals from joining environmental charities and hence participating in activities associated with improving the environment.

Link believes that all charities should be excluded from these proposals and that there is a particularly compelling case for environmental cases, as a result of the UK's commitments arising from the Aarhus Convention, to be exempt.

Legal Strategy Group

September 2015