



## **BRITISH INSTITUTE OF HUMAN RIGHTS**

### **Response to Ministry of Justice Consultation: Judicial Review: proposals for reform**

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**About BIHR:** The British Institute of Human Rights (BIHR) BIHR is a national independent human rights charity that is committed to bringing rights to life in the UK. Founded over 40 years ago, we have pioneered work to animate and promote human rights. We work with civil society organisations and the public sector, equipping them to translate human rights principles and laws into living and practical tools for change. Through this work, we aim to realise the potential of human rights to empower people, and to provide a safety net for us all when our rights are compromised. Uniquely, BIHR harnesses its learning from putting human rights into action in everyday situations to underpin its policy positions. Further information about BIHR visit [www.bihar.org.uk](http://www.bihar.org.uk)

## Introduction

1. The British Institute of Human Rights (BIHR) primarily works beyond the courtrooms, helping to ensure human rights are part and parcel of peoples of everyday lives and public policy and legal developments. Whilst the focus of our work is on the practical application of human rights (particularly as contained in the Human Rights Act 1998 and the European Convention on Human Rights), we believe that access to the courts is important for ensuring legal accountability, and protecting against the misuse and abuse of power. Judicial review is a key mechanism in the UK's constitutional arrangements, helping to ensure a system of checks and balances based on the rule of law. The present consultation on reforming judicial review raises a number of concerns for the protection of human rights and the rule of law, which we address in this response.

## The importance of judicial review

2. Ensuring the Government and public bodies are not misusing or abusing power is vital in a democratic society. Judicial review is an important part of our legal system, enabling individuals and organisations seek legal accountability and justice by ensuring the decisions of the Government and public bodies are lawful, fair and transparent. It is certainly welcome that the consultation paper acknowledges judicial review can be thought of the “rule of law in action, providing a key mechanism for individuals to hold the Executive to account.”<sup>1</sup>
3. However, BIHR is worried that the context for this consultation, and justifications provided within it do not sufficiently recognise the constitutional importance of judicial review. We note that this consultation was announced following a recent speech from the Prime Minister which associates judicial review with red-tape, “bureaucratic nonsense”, “time-wasting” and a “massive growth industry” in legal challenges to government policy.<sup>2</sup> Similar sentiments are echoed in the consultation.
4. We believe judicial review is important in ensuring public bodies are making lawful, fair and transparent decisions. For example we note that judicial review has ensured:
  - the police are accountable for inhuman and degrading treatment in forcibly removing a young man with autism and learning disabilities from a swimming pool and unnecessarily restraining him in a police van whilst dripping wet;<sup>3</sup>
  - local authorities do not unlawfully cut funding for vital services for people experiencing disadvantage and vulnerability, such as women fleeing violence and Rome communities<sup>4</sup>

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<sup>1</sup> Judicial Review: proposals for reform (2012) para 11

<sup>2</sup> David Cameron speech at CBI annual conference, November 2012: <http://www.cbi.org.uk/media-centre/news-articles/2012/11/david-cameron-sets-out-plans-to-slash-red-tape-at-cbi-annual-conference/>

<sup>3</sup> ZH v Commissioner of Police for the Metropolis [2012] EWHC 604 (QB)

- the inquiry into the deaths of patients of Dr Harold Shipman was held in public.<sup>5</sup>
- Virgin Trains were able to challenge the decision-making process of the Department of Transport in relation to the West Coast Main Line rail franchise, revealing worrying errors in decision-making with significant economic and other consequences<sup>6</sup>

## Judicial review and human rights

5. Judicial review is also one of the ways for ensuring legal accountability for human rights abuses. The specific proposals which suggest changes to planning and procurement cases may raise human rights issues, as we set out below. The wider context, in which judicial review is seen as a burden or red tape, sets a worrying tone for the future of judicial review. For example, should these proposals take place they may set a precedent for further changes to the judicial review system which would have a wider impact on human rights issues.
6. The Human Rights Act (HRA) is designed to be a framework law. Through section 6 of the HRA there is a duty to deliver public services which respect rights. The HRA can help guide public-body decision-making and provide the point of reference for individual's everyday dealings and negotiations with public authorities. However, when poor decisions are made it is vital that people at the sharp end are able to seek justice and legal accountability. Judicial review is a vital means for ensuring this legal bite.
7. Through our practical work on the ground we know the difference legal accountability can make to people's lives. For example, the family of a girl with Down's Syndrome were able to rely on the possibility of future court action, should a Housing Association continue to refuse to consider the rights of the girl and her family under the HRA when determining a request to move to alternative accommodation. This move was vital to ensure the girl could access a mainstream school, and maintain and develop educational and social relationships (her Article 8 HRA/ECHR rights). Judicial review was not necessary in the end. The Housing Association negotiated a move with the family, and used this experience positively to revise the way its assessment system worked, adopting a social model of disability which considered the rights of its tenants. We also know from our other work with the public sector (including in health and social care and the police) that judicial review can be an important driving force for positive developments in public services to take action.
8. Thus, irrespective of whether a person ever takes their case to court, knowing that this is a possibility helps strengthen peoples' dealings with the state., ensuring public services are held accountable. BIHR notes that this strongly chimes with current government

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<sup>4</sup> See for example *R (Kaur and Shah) v London Borough of Ealing* (2008) available at <http://www.publiclawproject.org.uk/documents/KaurandShahvLondonBoroughofEaling.pdf> and <http://www.romasupportgroup.org.uk/events.html>

<sup>5</sup> *Wagstaff v Secretary of State for Health* (2001) 1 WLR 292

<sup>6</sup> See for example: <http://www.bbc.co.uk/news/business-19809717>

policy around empowering people, active citizenship and demands for accountability within public services. Yet this does not appear to be reflected in the consultation paper.

9. Finally, we note that restrictions placed on accessing judicial review, may raise concerns under the Human Rights Act and the European Convention on Human Rights. The HRA was, in part, passed to ensure people in the UK have an effective remedy for breaches of ECHR rights in the domestic system. The European Court of Human Rights has been clear that our ECHR rights must be “practical and effective” and not “theoretical or illusory”. Access to judicial review is one of the main ways taking legal action when human rights issues are at stake. It is therefore important to ensure that reforming judicial review is not incompatible with human rights obligations.

## **The shortened consultation period**

10. We are concerned that that this consultation has taken place over a very short period, which, owing to the Christmas and New Year holidays, has left only 24 working days for people to respond to this consultation. We believe that public consultation is an important means of ensuring people have the opportunity to tell the Government what they think about possible changes to law and policy. It is part of the process of ensuring the Government is accountable to and seeks the views and evidence of the public. We are therefore concerned that the short-time frame will restrict the ability of individuals and groups to respond to this consultation.
11. We are also concerned that the curtailed consultation period may be contrary to The Compact,<sup>7</sup> the agreement between the Government and the voluntary and community sector which outlines a way of working. Paragraph 2.4 states the Government will “Give early notice of forthcoming consultations, where possible, allowing enough time for CSOs [community sector organisations] to involve their service users, beneficiaries, members, volunteers and trustees in preparing responses. Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach.” We are concerned that this has not happened with the judicial review consultation. The consultation is taking place over less than six-working weeks. Judicial review is a matter that is likely to be important to many voluntary sector groups, but the shortened time-frame is likely to negatively impact on their ability to involve service-users etc. which may mean people’s views, experience and evidence are not considered. Given the nature and substance of this consultation, an “informal approach” appears inappropriate.

## **Evidence base for the proposals**

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<sup>7</sup> ‘The Compact: The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England’, 2010.  
[http://www.compactvoice.org.uk/sites/default/files/the\\_compact.pdf](http://www.compactvoice.org.uk/sites/default/files/the_compact.pdf)

12. We are particularly concerned that there does not appear to be a sound evidence base for proposals in the consultation. The paper refers to unidentified “anecdotal evidence”, “concerns” it is assumed that unidentified parties hold and phenomena that “seem” to exist.<sup>8</sup>
13. We also note that where evidence is provided in the consultation paper it does not appear to support the case for change put forward in the paper, e.g. the relationship between the volume of judicial review cases and reducing the time limits for applications (see below para 17). Additionally, recent research Bondy and Sunkin<sup>9</sup> on this issue, calls into question a number of the assumptions on which the case for change is made; we highlight these below.

## Equality Impact Assessment

14. We note that the consultation’s equality impact assessment has not been completed. We believe it is likely that the proposals will have a disproportionate impact on disadvantaged groups and people in vulnerable situations. As noted below this may include people who have been detained, people with mental health problems, Gypsies and Travellers, as well as other disadvantaged groups who are often those most at risk of human rights abuses. This is all the more worrying in light of reductions to legal aid and access to legal advice and representation. We would be concerned if the proposals in the consultation paper were implemented without properly assessing the impact.

## Question 1: Proposed changes to the time limits

15. Access to justice is at the heart of a democratic society such as the UK. This means that people should have the ability to challenge Government actions and decisions which adversely affect them. We note that the current time limit for bringing a judicial review is three months, and cases must be brought promptly. We believe the current times and checks are already rigorous. We are worried that proposals to change times may reduce peoples’ access to justice and undermine legal accountability.
16. We are concerned that reducing time limits may reduce access to justice for people and groups in disadvantaged or vulnerable situations. For example, a person who is detained, and/or those with limited financial resources may find it difficult to access information or consult lawyers. This could particularly affect people with mental health problems who have been detained. We also note that changes to planning time limits may have a particular impact on Gypsy and Traveller communities, as planning decisions can often raise issues about the right to respect for private and family life (Article 8, Human Rights Act).
17. We are also concerned that the proposed reductions are not based on sound evidence. The consultation identifies increases in the number of judicial review cases is the main

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<sup>8</sup> Consultation paper in paras 64, 78, 35 and 49.

<sup>9</sup> <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>

problem which needs addressing. The proposed reductions will take effect in planning and procurement cases. However, as the graph on p.10 of the consultation document shows, these are not areas where there have been increases in judicial review. We also note recent research which suggests that shorter time likely to increase pressure on claimants to file a case and reduce space for settlement, and this may effectively lead to an increase in litigation.<sup>10</sup>

18. For those experiencing on-going abuse of their human rights, especially those who have difficulties in accessing the legal system, the proposed restriction in time to bring their claim may mean there are not able to seek justice. For example, a person who has been detained and not realised the detention could be unlawful until after three months has passed may lose the ability to challenge to this decision. This could have a particular impact on the rights of people with mental health problems.
19. We also note that changing the “start-time” for the three month deadline for on-going or multiple abuses may not be compatible with human rights law; under the European Convention on Human Rights a person is still within time for bringing a legal case if the abuse is on-going.

#### **Question 4: seeks views on other types of case in which a shorter time limit might be appropriate**

20. BIHR is particularly concerned by this question. The wider context of this consultation, in which judicial review is seen as a burden or red tape, sets a worrying tone. Should these proposals proceed, we are worried that they will set a precedent for further change to the judicial review system which will impact more widely on human rights issues.
21. We believe that judicial review is an important means of holding public bodies to account for misuse and abuse of power; it is vital for ensuring public monies are spent appropriately and decisions, policies and practices are fair, transparent and just. As we noted above, judicial review serves an important function in our constitutional system, including in ensuring the protection of people’s basic human rights. We would have serious concerns about future proposals to reform access judicial review which would impact on people’s basic human rights.

#### **Questions 7-13: removing the right to have an oral renewal hearing**

22. We are worried that proposals to remove the right to have an oral renewal hearing may adversely affect people’s access to justice and legal accountability. The ability to

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<sup>10</sup>Varda Bondy and Maurice Sunkin, 'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse.' <http://ukconstitutionallaw.org/2013/01/10/var-da-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/>

state your case in person is an important element of access to justice. Often this is how interpretations of the law are tested and developed. We are concerned that removing oral hearings is likely to disadvantage people who have to represent themselves, a situation which is likely to increase as the legal aid cuts take effect. Many people, particularly those without legal training, are likely to find it easier to make their arguments in person than in writing.

23. It is also important that judicial review is considered even in circumstances where the same issues have been considered before. For example, a person's right to respect for private and family life (Article 8) may have been considered by a court or tribunal in previous years, but things may significantly have changed in the intervening period.
24. We also question the basis for these proposals, noting the research of Bondy and Sunkin. They found that "When we look...at the success rate of permission claims that are dealt with at oral hearings in open court as opposed to by a judge on the papers alone, we find that over twice as many oral claims are granted permission as are paper claims. In our sample of cases for the Dynamics of Judicial Review report, the success rate of oral only permissions was 62 per cent...In short, our analysis suggests that the government is overestimating the failure rate at the permission stage, especially in civil JRs, and is overestimating the degree to which the system is being abused by claims that lack merit. Where abuse occurs it is strongly arguable that effective mechanisms already exist and that general reforms restricting the use of JR is unnecessary."<sup>11</sup>

## **Questions 14-15: increased fees to apply for oral hearing to look at permission to apply for judicial review**

25. On the face of it, the increase in fees may appear to be relatively small. However, we are concerned that raising the costs to access the courts is likely to disadvantage those on low incomes. When considered in light of decreased access to legal aid, this proposal may create further barriers to seeking access to justice.

## **Conclusion**

26. We encourage the Government to reconsider the proposals in light of the points raised in this response. Efficient and expeditious decision-making by public bodies is important, but it should not trump rule of law. Indeed, as noted above judicial review can result in better decision-making processes and be an important driver for positive change within public bodies. Judicial review is an important means of enabling individuals and organisations seek legal accountability and justice by ensuring the decisions of the Government and public bodies are lawful, fair and transparent. We encourage the Government to approach reform from a starting point which recognises judicial review as an important part of our constitutional system of checks and balances, ensuring that no-one is above the law.

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<sup>11</sup> See above.