

**Reform of Judicial Review  
Proposals for the provision and use of financial information**



**A response by the Association of Personal Injury Lawyers**

**Date: 20 August 2015**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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## Introduction

APIL is a membership association: representing those who provide legal services to injured individuals. As such, we may come within the consultation paper's category of claimant, third party funder or intervener. As such, we have only answered those questions in this consultation which fall within our remit.

In our response to the Ministry of Justice's November 2013 consultation, "*Judicial Review: proposals for further reform*" we were asked about its proposals 'to give greater clarity on who is funding the litigation when considering a protective costs order (PCO)'. We responded that applicants for a PCO should provide details of who is funding the case and that in practice, this generally happens already.

We were also asked whether 'third parties who choose to intervene in judicial review claims [should] be responsible in principle for their own legal costs in doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or defendant.' We responded that, 'interveners should, in principle, be responsible for their own costs. Further, non-parties who provide financial backing should be liable for their [own] costs.'

What is being asked now, however, is an entirely different order of inquiry into the finances of third parties, to an extent which in our view is unacceptable. It is clear that the intention behind these proposals is to deter organisations and individuals with valid claims from making applications for fear that their supporters may inadvertently find themselves liable for the opposing parties' costs. The chilling effect upon the ability to launch a judicial review, by smaller corporate entities and individuals is likely to be substantial and can only benefit those governmental bodies which will thus avoid the scrutiny of the courts.

## Financial Information

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

A. There is nothing objectionable in a multiple choice declaration *per se*. Indeed, if it is to be verified by way of a statement of truth, then a template wording for the declaration will avoid unclear or misleading declarations.

**Q.2. Do you agree with the government's proposed approach in paragraph 52(a)-(e)? Please provide reasons.**

A. We assume the question refers to paragraph 51(a)-(e). Our main concerns relate to 51(d) and (e). Contributors to the individual or corporate body's funds are not parties to the action. As the names and addresses of contributors will be used to enforce costs orders against them, we foresee a reluctance for third party funders to back meritorious judicial reviews if they are likely to be held liable not only for the claimant's costs should the review fail, but for adverse costs orders made against the claimant. Clearly, while there is established case law (see *Excalibur Ventures LLC v Texas Keystone Inc & others* [2014] EWHC 3436) third party funders can be found liable for the defendant's costs, the circumstances are still rare. In *Excalibur* the third party funder was the parent company and had, in the court's view, funded an action which in the courts' view was 'objectively hopeless' and in which there had been 'behaviour' by the claimant and it's lawyers to which the court took a dim view. It described the litigation as "*This case was 'well outside the norm' (emphasis added) for a 'considerable number of reasons'. In summary, the Court found that: i) the claim was essentially 'speculative and opportunistic'; ii) the claim involved litigation 'gargantuan in scope', but based on 'no sound foundation in fact or law' which met with a "resounding, indeed catastrophic, defeat'."* at para 58.

Note that as the law currently stands, third party funders need to be joined as parties to the action in order to have costs orders enforced against them. We see these Ministry of Justice's proposals as a means of going behind that to enforce orders against non-parties.

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

A. We agree. We concur with the assessment in paragraph 52 of the consultation that this would place the claimants under too significant a burden to discharge.

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

A. Proceedings in judicial reviews tend to move swiftly. If claimants are to be under a duty to update the court of material changes to their financial circumstances, then that duty should be to do so at the permission hearing or final hearing, but not otherwise.

There is a risk of the court being inundated with notifications of changes in finances if the duty was to notify as and when those changes take place.

**Q.5. Do you agree that the financial information requirements and approach to service the government proposes would apply to all applications. Please provide reasons.**

A. We have no views on this particular question.

## **Financial Information Threshold**

**Q.6. Do you agree with the proposal for a single threshold expressed in monetary terms? If not, please provide reasons.**

A. As costs are not determined until the end of the JR, it would be difficult to apply any other method and require a duty to notify of material financial changes above that threshold at the same time.

**Q.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.**

A. We have no data available to assist with this particular question.

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

In our view, £1,500 is too low. It is possible to obtain such contributions anonymously via crowd-funding websites<sup>1</sup> and the administration involved in tracking and/or providing the personal details smaller contributors would place the claimants under too significant a burden to discharge. In our experience, detailing the funding assistance provided in excess of the sum of £5,000 would reduce the administrative burden on both the claimant and the court.

Note that this answer should not be taken as APIL's approval of the proposal that such information should be provided at all. See our answers to questions above and below for our views on that aspect.

**Cost capping overleaf...**

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<sup>1</sup> See for example this page: <https://www.crowdjustice.co.uk/case/changing-the-law-on-joint-enterprise/>

## **Cost capping**

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

A. No. The requirement is intrusive and goes beyond what is required by the current Civil Procedure Rules on cost capping.

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

A. We agree.

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

A. Absolutely not. This is a blatant attempt to pierce the corporate veil. It would deter membership organisations from campaigning on behalf of their membership and effectively discourage companies from launching judicial reviews which may be for the benefit of those other than their immediate members.

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

A. We have no views on this question.

## **Association of Personal Injury Lawyers**

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