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Judicial Review Consultation,

Ministry of Justice,

102 Petty France,

London, SW1H 9AJ.

1/11/2013

By email to: admin.justice@justice.gsi.gov.uk.

Re: Ministry of Justice: Judicial Review: Proposals for further reform

ClientEarth is a not-for-profit environmental law organisation. We work to protect the environment through advocacy, litigation and research. We use the best scientific and policy analysis when choosing strategic directions. Our legal action, whether in advocacy or in cases before courts and administrative bodies, is built on law and science.

By this letter, we submit our responses to the document published by the Ministry of Justice in September 2013, entitled "Judicial Review: Proposals for further reform" Cm 8703 ("MoJ Proposals").

General observations

We share the general concerns which we are aware are being widely expressed by a number of respondents to the consultation. In particular:

- paragraph 1 of the MoJ Proposals states that "judicial review is a critical check on the power of the state, providing an effective mechanism for the challenging of decisions, acts or omissions of public bodies to ensure that they are lawful". Despite this recognition, in substance, the MoJ Proposals articulate a clear desire on the part of government to prioritise economic development and promotion of the policy of the government of the day over the fundamental English law principles of due process, the rule of law and natural justice;

- there is a lack of evidence to support the MoJ Proposals and the statistics used contradict the assertions made in the document; [1]

- we support the existing rules on "sufficient interest" applied by the courts to prevent vexatious claims;

- we believe that proposals in relation to costs on permission and wasted costs will operate as a major disincentive to providers of legal services from acting in judicial review cases and would be detrimental to access to justice;

[1] Refer to pages 2 and 3 of LINK's consultation response.

- the government should pay heed to the oft-cited quotes from Lord Bingham that "There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live"[2] and that "scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be".[3]

We expressly support the detailed response from Wildlife and Countryside Link (the LINK Response). Therefore, our submission will not repeat the information and examples set out in that document. We will focus primarily on those aspects of the MoJ proposals which are of particular concern to us in our role as lawyers for whom environmental protection through the use of law is our priority and *raison d'être*.

Our comments are informed by our experience of ongoing extensive and close involvement with the application of the Aarhus Convention both at an EU level[4] and in the UK.[5] We are the communicant in communication ACCC/C/2008/33 in which the Aarhus Convention Compliance Committee found that the UK was in breach of its obligations under the Aarhus Convention because, inter alia, access to the courts in environmental cases was prohibitively expensive. Also, after more than 3 years, in May 2013 the Supreme Court unanimously upheld our claim that the UK government is in breach of its obligations under the EU ambient air quality directive.[6]

In addition, on a number of occasions, we have engaged with Defra in relation to failures to properly implement other key pieces of EU environmental law. Where matters are not resolved, then it may be necessary to seek judicial review to establish the government's unlawful conduct.

These specific examples, together with our ongoing work, give rise to particular concerns about the government's proposals in relation to standing and rebalancing of financial incentives (see below).

We welcome the acknowledgement by the government that, as a result of the UK's obligations under the Aarhus Convention and EU law, environmental claims require a different approach to rules on both standing and costs from those being proposed for other judicial review proceedings.[7] However, we are deeply concerned that the proposals are contrary to the most fundamental principles on which the Aarhus Convention is based and would gravely undermine general principles of access to justice in public interest matters.

Further, we are concerned that the impact of the government's proposals could have the unintended consequence of actually increasing litigation. To the extent that more favourable rules on standing and costs are seen to apply in Aarhus claims, the greater the prospect of satellite litigation. Where applicants are faced with restrictive rules on standing

[2] The Rule of Law, Tom Bingham, p 65.
[3] Ibid, pp 92-93.
[4] ClientEarth has established the Aarhus Centre in Brussels http://www.clientearth.org/aarhus-centre/home/ which offer NGOs and citizens' groups top-level legal advice on their rights to information, participation and justice in environmental matters.
[5] ClientEarth is the communicant in Aarhus Communication ACCC/C/2008/33 which addresses the failure by the UK to correctly implement Article 9 of the Aarhus Convention, particularly in relation to costs.
[6] R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs [2013] UKSC 25.
[7] Para 73 and 81 on standing and para 156 on PCOs.

and the financial barriers resulting from the proposed changes to the costs regime, there is a compelling rationale for them to seek to demonstrate the applicability of the Aarhus Convention to their claims. Public bodies are likely to respond by seeking to challenge the use of Aarhus both on grounds of standing as well as in relation to applications for protective costs orders.

Question 1 & 2: Planning Chamber in the Upper Tribunal

In principle, we support arrangements which enable access to justice through decision makers with relevant experience and expertise. However, expedition should not take priority over ensuring lawful conduct on the part of government. Government cannot underwrite commercial and legal risks inherent in development activities. Nor should economic development and commercial interests be promoted at the expense of limiting rights of access to the courts and curtailing due process.

Question 6: Local authority challenging infrastructure projects

As a relatively small charity, we do not have the resources to initiate challenges to major development infrastructure projects. Although the MoJ Proposals suggest that challenges could still be brought by other applicants,[8] the impact of the other proposals will be to significantly restrict and dissuade such action. We therefore, disagree with the proposal to further restrict the rights of local authorities to challenge nationally significant infrastructure projects.

This would unreasonably constrain the ability of a democratically elected body to invoke the rule of law to ensure lawful action on the part of another part of government. In many cases, it is the local authority which is best placed to address the complexities and wider implications of such projects and represent the interests of local people.

Questions 9-11: Standing

We note that the MoJ Proposals suggest that the rights of standing under Aarhus, both for individuals and NGOs, will not be affected by the remainder of the government's proposals.[9] However, the government notes that Aarhus access rights are "subject to requirements of national law" and that the government is of the view that the "current interpretation of "sufficient interest" as including those with a public interest provides a more generous approach than is required by Aarhus." ClientEarth does not accept this view.[10]

The implications of the comment are clear; it indicates that, if there are ways in which the government can seek to limit standing, it will do so; as demonstrated by the discussion in paras 67- 90 of the MoJ Proposals.

It should also be noted that, in many of the types of cases which appear to be of concern to the government – planning, land use and infrastructure projects, environmental issues will inevitably arise. So the attempts by government to restrict use of judicial review in

[8] Para 61 and 62.
[9] Para 81.
[10] refer to pages 6-7 of the LINK Response for a more detailed discussion.

these cases in the interests of economic growth and development will need to take account of the standing rules deriving from the Aarhus Convention.

In seeking to limit rights of standing, there appears to be confusion between the legal merits of a challenge to the acts of government and the nature and extent of the applicant's interest in the matter. The Aarhus Convention is based on the recognition that access to justice in cases relating to the environment is inherently in the public interest. There is a significant body of law (much of which implements the environmental policy of the European Union) which requires action on the part of the government to protect the environment. The component parts of the natural environment have no specific rights which they can enforce under English law. It is, therefore imperative that the mechanism of judicial review is available to as wide a range of applicants as possible to ensure that the government fulfils its environmental protection obligations.[11]

The government cannot, as suggested, be the final arbiter of what amounts to the public interest in such cases. It is the role of the courts to provide a forum in which to determine the legality of the government's conduct where protection of the environment is undermined.

Questions 12 - 15: Procedural defects

We are concerned that the approach proposed by government appears to minimise the relevance of due process to the legality of action.[12] It is a fundamental principle of the Aarhus Convention that procedural rights, particularly the right of public participation, should be protected and enforceable.[13] One of the key functions of judicial review is to remind decision makers of the "judge over the shoulder" and this should inform all parts of government that due process cannot be ignored.

In particular, the proposed "no difference rule" has no basis in either the Aarhus Convention or EU Law. Ultimately, the procedural rights such as access to information and public participation conferred by the Aarhus Convention are guaranteed by the right of access to justice which requires the provision of effective remedies.[14] This is mirrored in EU law in which the principle of effective judicial protection requires national courts to provide effective remedies in order to uphold rights conferred by EU law.[15] The Aarhus Convention requires that:

"Each Party shall provide for early public participation, **when all options are open** and effective public participation can take place." (emphasis added)

The proposed "no difference rule" would be a clear breach of this requirement. If, for example, a public authority fails to conduct a proper and lawful public consultation, it cannot argue that this would have made no difference to the outcome without acknowledging that the consultation was a sham i.e. that the decision had already been taken, contrary to public participation obligations under the Aarhus Convention and EU law.

[11] See Lord Hope in Walton v. Scottish Ministers [2012] UKSC 44.
[12] Paras 91-103.
[13] Article 6 Aarhus Convention.
[14] Article 9(4) Aarhus Convention.
[15] Article 19 Treaty on European Union, Article 47 Charter of Fundamental Rights of the European Union

Question 21: Rebalancing Financial Incentives

The Aarhus Convention requires that access to the courts in environmental cases be "not prohibitively expensive".[16] The UK's approach to the allocation of costs was found to be in breach of the Convention by the Aarhus Compliance Committee[17] and is now before the Court of Justice of the European Union in *Commission v UK*.[18]

While significant progress has been made, namely the codification of the case law on protective costs orders, we are of the firm view that these steps are insufficient and that the UK remains in breach of its obligations under the Aarhus Convention and relevant EU law. Viewed in this context, any effort to further increase the financial risk borne by the claimant in all judicial review claims (with no exemption for environmental judicial reviews) would move the UK even further from a position of compliance.

We note that many of the MoJ Proposals are primarily aimed at further limiting the availability of legal aid. The proposal to re-balance financial incentives will dissuade applicants from pursuing environmental cases which often seek to identify and rectify breaches of environmental law.

Question 31: Costs arising from the involvement of third party interveners and non-parties

We do not agree that third party interveners should be liable for any of the main parties' costs. Such a proposal misunderstands the nature of third party interventions, and the existing rules on permission to intervene.

To further support the comments made in the LINK Response to Question 31, there have been a number of papers presented from well respected sources about the value of interventions to the court.[19] Indeed, in *Ambrose v Harris*,[20] the Court lamented the lack of an intervener. This is a clear illustration of the important value that the Courts, and in this particular case the Supreme Court, place on interventions. Further, the rules relating to when interventions should be permitted are clearly established by judicial authority.[21]

Any proposal to make interveners liable for the costs of other parties in a case, has the risk of dissuading interveners – who, (as Lady Hale recently so eloquently described)[22] often provide specialist knowledge to a particular case - from providing their useful and key service to a judge. Interveners ordinarily cover their own costs in a particular case and it is unlikely that an intervener will ever be able to obtain its own costs from another party. This is a good balance for the Court to strike. We strongly reject any proposal

[16] Article 9(4) Aarhus Convention.
[17] ACCC/C/2008/33
[18] Case C-530/11.
[19] Sir Henry Brooke, 'Interventions in the Court of Appeal' delivered on 23 November 2006 at an earlier seminar organised by the Public Law Project, "Judicial Review and Test Case Strategies", 23 November 2006; Sir Mark Waller, 'Interventions and Possible Reforms' Delivered at a JSB Seminar on Third Party Interventions on 1 December 2009.
[20] [2011] UKSC 43; Lord Brown.
[21] R (Northern Ireland Human Rights Commission) v Greater Belfast Coroner [2002] UKHL 25, [2002] HRLR 35, Lord Woolf.
[22] Public Law Project Conference 2013, *Who guards the Guardians?* Lady Hale.

which, through the introduction of restrictive costs burdens, has the potential to undermine the well-respected role that interveners have in the judicial system.

Questions 35 and 36: Leapfrogging

We believe that the role of the Supreme Court is primarily to address points of law of general constitutional/public importance and not to be used as a method of expediting matters which the government considers requires “swift resolution”.

From our experience, we would concur with the LINK Response that where questions of European law are likely to need to be referred to the Court of Justice of the European Union, which is often the case with environmental matters, then these could be added to the circumstances meriting a leapfrog arrangement.

Yours sincerely,

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