Low Incomes Tax Reform Group
A voice for the unrepresented

Judicial Review: Proposals for Further Reform (Ministry of Justice)

Response from the Low Incomes Tax Reform Group ('LITRG')

1 Executive Summary

1.1 Our interest in this consultation is from the point of view of the unrepresented taxpayer or tax credit claimant seeking redress in a matter in which there is no statutory right of appeal and they have exhausted all other possible remedies.

1.2 We are not unsympathetic to the Government's wish to discourage unmeritorious claims while speeding up progress in genuine cases, but feel there should also be proposals to make it easier for individuals to challenge unlawful action (or inaction) by the executive. In our view, there would be merit in empowering the lower courts and tribunals, particularly the First-tier Tribunal, to deal with judicial review where (a) an appeal before them raised judicial review principles, or (b) there was no statutory right of appeal, and judicial review was the only remedy.

1.3 On standing, either the 'sufficient interest' test should be retained, or any 'direct and tangible interest' test that is introduced should allow for representative bodies to mount challenges on behalf of classes of individuals or persons with a direct and tangible interest in the outcome. On the rare occasions when we ourselves might become involved in a judicial review challenge, we would normally proceed by supporting an individual claimant; but if:

- there were no such individual prepared to take that risk, or
- the issue concerned a whole class of individuals, or
- there was no harm done yet but we could envisage that harm would be done if the executive action complained of went ahead,

we would ourselves contemplate a challenge as a representative body with sufficient interest (although first we would make every effort to resolve the problem by negotiation with the public authority concerned).

1.4 On the 'no difference' rule, we would have no objection in principle to bringing forward the argument to permission stage. But we suggest there should be more than an assertion on the part of the defendant; the burden of proof that the procedural flaw would have made no difference to the outcome should rest with the defendant. The consultation document offers no evidence in favour of changing the threshold from certainty to high likelihood; but we cannot envisage any circumstances in which someone would institute proceedings in a tax case when a successful outcome would make no difference at all to their financial status or wellbeing.

1.5 Regarding the public sector equality duty (PSED), the fact that judicial review is the preserve of the High Court can put PSED challenges beyond the reach of many individuals who might be affected by a breach of the duty by a public body. In view of its importance to individuals with protected characteristics, who by their very nature often lack means to pursue High Court actions, access to justice would be better served if the PSED were justiciable in the lower courts and tribunals – for tax and welfare matters, this might include the First-tier Tribunal as well as the Upper Tribunal which already has a limited judicial review jurisdiction.

1.6 On costs, we are greatly concerned that the proposals will have the effect of rebalancing financial incentives in favour of the defendant and against the claimant. The present costs regime has evolved in such a way as to achieve a reasonably fair balance between state and citizen taking account of the imbalance in the resources of each. Implementing the proposals in this consultation paper could well have the effect of putting judicial review well beyond the reach of individuals of modest means who need it the most, and who have good cases to pursue. We would be particularly opposed to withdrawing protective costs orders from claimants (such as those in tax and related welfare cases) who would not so much benefit if they were successful as suffer a detriment, such as having a tax liability or penalty imposed upon them, or a welfare entitlement withdrawn from or denied to them, if unsuccessful. If judicial review applications were able to be heard in the First-tier Tribunal, that would both contain the costs of the proceedings and enable the parties to contest the action in a costs-free environment.

1.7 On interveners, ordinarily we agree they should be liable for their own costs and additional costs incurred by the other parties that would not have been incurred but for the intervention. But there will be circumstances in which that presumption can and should be rebutted. For example, if through lack of means a claimant would not have been able to bring a judicial review challenge but for the assistance of the intervener, and the claimant won the case, any adverse costs order made against the defendant should be capable of including an amount in respect of the intervener's costs.

1.8 By way of summary: these proposals will further reduce access to a remedy that is already out of reach of most ordinary citizens, but which increases in importance as statutory appeal rights become more restricted. To the extent that judicial review becomes further beyond

the reach of the ordinary citizen, those with protected characteristics suffer even more because they no longer have access to the only effective remedy for failures by the executive involving discrimination, whether direct or indirect, and other breaches of their PSED. Few apart from those who are fortunate enough to secure pro bono representation will be able to enforce their rights, and that is bad for justice and bad for the rule of law.

2 About Us

2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

2.2 LITRG works extensively with HM Revenue &Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 Introduction

3.1 We approach this consultation particularly from the point of view of the unrepresented taxpayer or tax credit claimant seeking redress in a matter in which there is no statutory right of appeal and they have exhausted all other possible remedies. In other words, they have been adversely affected by an alleged wrongdoing, or failure to act, by the revenue-raising authority for which the only remedy is judicial review. On the whole, where such matters have come to our attention, we have been able to resolve them by negotiation with HMRC. But if we cannot persuade the executive, we are prepared to support, pro bono, litigants who wish to appeal to the courts or pursue some other remedy, including judicial review. We recognise that other considerations may apply to other areas of the law, but tax is an area in which virtually all judicial review claims are genuine, with the claimant standing to lose financially or suffer some other detriment from an unsuccessful outcome.

3.2 Those occasions when the executive acts contrary to the law may be rare. But it is vital for there to be an effective remedy on those occasions when the executive does exceed its powers, or acts unlawfully, to the prejudice of the ordinary citizen. The rule of law depends

on it, and no branch of the executive is above the law. Judicial review must not only be robust and effective, it must also be within the reach of those who most need it.

3.3 We are not unsympathetic to the Government's objective to discourage claims for judicial review that lack merit while speeding up progress through the courts for more meritorious claims (para 20). But equally, if judicial review is to be reformed, we would prefer to see proposals that made it easier for individuals to challenge unlawful action (or inaction) by the executive.

3.4 Judicial review jurisdiction is currently exercisable only by or on the delegation of the High Court, which with its panoply of complex rules, procedures and costs regime is largely beyond the means or capacity of the ordinary citizen unsupported by a representative body such as a trade union or a charity. If the lower courts and tribunals were empowered to reach decisions on matters involving the application of judicial review principles, particularly where such matters were germane to an appeal before them, not only would it be beneficial for unrepresented individuals seeking a remedy from a tribunal or lower court, but considerable costs would be saved to all parties as it would not be necessary to engage in two sets of proceedings in order to examine all the issues raised by the appeal. There is also, in our view, merit in empowering the lower courts and tribunals, particularly the First-tier Tribunal, to hear applications for judicial review in cases where there was no statutory right of appeal, and judicial review was the only remedy.

3.5 Such a proposal would make judicial review more accessible to the ordinary citizen. By contrast, the current proposals risk putting judicial review even further beyond the reach of the ordinary citizen than it is now, and this concerns us greatly. Reform of the costs regime, or (as the consultation document puts it, 'rebalancing financial incentives') should be far more balanced in favour of the unrepresented, individual clamant with a strong case to pursue. It is also important that where individuals are unable to bring a claim in their own name, for whatever reason, a representative body such as a charity is able to seek a remedy on their behalf.

3.6 As an initiative of the CIOT to give a voice to the unrepresented taxpayer, LITRG's experience in this area is confined to cases in the tax and related welfare (mainly tax credits) fields. As already stated, we prefer persuasion and negotiation to litigation; but where we fail in the former, we do not shrink from the latter. Normally, if this led to an application for judicial review, we would proceed by supporting an individual claimant; but if:

- there were no such individual prepared to take that risk, or
- the issue concerned a whole class of individuals, or
- there was no harm done yet but we could envisage that harm would be done if the executive action complained of went ahead,

we would ourselves contemplate a challenge as a representative body with sufficient interest. Without exception we would only act in cases where there was a strong public interest in the outcome. We would act pro bono ourselves, and assist claimants in finding solicitors and counsel who would also act pro bono.

3.7 With those general considerations in mind, our responses to the questions in the consultative document concentrate mainly on standing and on rebalancing financial incentives.

4 Answers to questions

4.1 **Questions 1-8**: these are concerned with planning matters and we have no comment to make.

4.2 ***Standing***

4.2.1 Under the current rules, representative bodies of a charitable nature such as LITRG would often be deemed to have 'sufficient interest' in protecting the welfare of vulnerable individuals to mount a judicial review, and it is in the public interest that they should continue to be able to protect the interests of those whom they represent in this way. We would never in any circumstances use judicial review simply as a means of generating publicity or causing delay.

4.2.2 **Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?**

4.2.2.1 In the field in which we operate, we have no experience of 'problems' with cases where the claimant has little or no direct interest in the matter.

4.2.3 **Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?**

4.2.3.1 Either the 'sufficient interest' test should be retained, or any 'direct and tangible interest' test that is introduced should allow for representative bodies to mount challenges on behalf of classes of individuals or persons with a direct and tangible interest in the outcome. We cite two examples of cases where, if HMRC had not been persuaded to pursue a different course, we might ourselves have mounted a judicial review challenge.

Example 1

In 2007 it emerged that a number of pensioners with small pension schemes owed tax because their pension providers, with the acquiescence of HMRC, had (in some cases over a period of 20 years or more) operated a no-tax code irrespective of the pensioners' other sources of income. Because their other sources of income were small, little if any tax was lost in each individual case, but multiplied by the hundreds of thousands of pensioners involved, the amounts lost to the Exchequer became quite significant.

HMRC therefore decided the time had come to regularise the position of these pensioners. In doing so they decided to write off any tax that was owing for previous

years, apart from the last 12 months. This was mentioned in the NAO's report on HMRC's accounts for the year 2007/08.

We acknowledged that the taxpayers involved should pay the right amount of tax, but only from the time when they were notified through their PAYE code that they owed more tax. The right tax should be collected from them in the future, but we objected to HMRC's proposals to collect tax retrospectively. Not only would this have included the 12 months of 2007/08, but also tax falling due during any further period that elapsed before the pensioners received their PAYE coding notice notifying them of the increase in their liability. In some cases this would have amounted to two whole years, and a liability which many would have been quite unable to afford.

We took Counsel's opinion and were advised that for HMRC to collect tax retrospectively in such circumstances would constitute conspicuous unfairness amounting to an abuse of power, susceptible to a judicial review challenge. After much negotiation and debate HMRC agreed to collect the extra tax from the pensioners only from the point in time at which they received their PAYE coding notice notifying them of the extra liability.

Example 2

In March 2011, HMRC decided to end the claims of certain tax credit claimants who were, or would be after certain Budget changes had taken effect, in receipt of nil awards. It was possible for those claimants to continue their claims if they responded to the notices that HMRC sent out within a strict time limit. But the notices failed to set out fully the circumstances in which ending their claims in this way could prejudice any future claim to tax credits they might wish to make if their income fell or circumstances took a turn for the worse. It was only by pointing out HMRC's duty to make the claimants aware of the full implications of HMRC's action, and in what circumstances they should respond to the notices, and on Counsel's advice holding out the likelihood of a judicial review challenge, that LITRG persuaded HMRC to amend the notices (which were already at an advanced stage of production).

4.2.3.2 In both the above examples, it was of the essence that (had HMRC not backed down) we could have mounted a challenge as a body with sufficient interest, even if no suitable individual had been willing to apply for judicial review in their own name. It would in any case have been impossible to find such an individual at the time judicial review proceedings would have had to be instituted: in the first example, any given individual would not have known whether they were affected until they had received a coding notice showing the back tax; and in example 2, the individuals who would have been adversely affected would have been those who, because of HMRC's inaccurate communications, would never have known their rights and would consequently never have exercised them. In those two circumstances, it is clearly right and in the interests of justice that a representative body should be able to bring a claim on behalf of the persons or class of persons affected.

4.2.4 **Question 11: Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?**

4.2.4.1 We respond below to the specific questions on interveners.

4.3 ***Procedural defects***

4.3.1 **Question 12: Should consideration of the 'no difference' argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?**

4.3.1.1 For reasons we give in answer to question 14, we think it highly unlikely that the 'no difference' argument would ever be relevant in a tax case. We would have no objection in principle to consideration of the 'no difference' argument being brought forward to permission stage. But we suggest there should be more than an assertion on the part of the defendant; the burden of proof that the procedural flaw would have made no difference to the outcome should rest with the defendant.

4.3.2 **Question 13: How could the Government mitigate the risk of consideration of the 'no difference' argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?**

4.3.2.1 That would be a matter for the defendant to consider when deciding whether to assert the 'no difference' argument at permission stage. If the burden of proof rested on the defendant, it would be a stricter test than proposed in the consultation document.

4.3.3 **Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?**

4.3.3.1 The consultation document offers no evidence in favour of any change from the current threshold. In any event, tax cases are unlikely ever to be taken to judicial review unless there is an amount of tax at stake, or perhaps a penalty for non-compliance, or a costly administrative burden imposed; nobody incurs the expense of judicial review proceedings unless they have a financial stake in a successful outcome. The likelihood of someone instituting proceedings in a tax case when a successful outcome would make no difference at all to their financial status or wellbeing is extremely remote.

4.3.4 **Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?**

4.3.4.1 Procedural defects can make a difference to the outcome of a case, eg if a procedural defect amounted to an abuse of process.

4.3.5 **Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?**

4.3.5.1 No.

4.4 ***The Public sector equality duty and judicial review***

4.4.1 **Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.**

4.4.1.1 The fact that judicial review is the preserve of the High Court can put PSED challenges beyond the reach of many individuals who might be affected by a breach of the duty by a public body. The costs and complexity of proceedings at that level mean that unrepresented individuals without adequate means are effectively barred from using the remedy, unless supported by a representative body such as a charity or a trade union.

4.4.1.2 In the general comments at the beginning of this response we mooted the idea that time and costs could be saved if the lower courts and tribunals were able to entertain judicial review applications, or at least to consider and adjudicate on matters that currently fall within the purview of judicial review. In view of its importance to individuals with protected characteristics, who by their very nature often lack means to pursue High Court actions, access to justice would be better served if the PSED were justiciable in the lower courts and tribunals – for tax and welfare matters, this might include the First-tier Tribunal as well as the Upper Tribunal which already has a limited judicial review jurisdiction.

4.4.1.3 In practice, this could be achieved by a High Court judge or an Upper Tribunal judge sitting as a First-tier Tribunal judge on occasions when a PSED challenge comes up, or when a substantive appeal also involves a question as to whether the PSED has been breached; or alternatively for the PSED arguments to be transferred to and heard in the Upper Tribunal.

4.4.2 **Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide it?**

4.4.2.1 We rarely become involved in any judicial review challenge. On most occasions when we have pointed out to HMRC a breach or potential breach of their PSED, HMRC have generally acknowledged the challenge and taken corrective action.

4.5 ***Rebalancing financial incentives***

4.5.1 Some of these proposals concern us greatly. It seems from the tenor of the consultation document that the Government wishes to rebalance financial incentives in favour of the defendant and against the claimant. Given the kinds of judicial review we are most likely to be involved in as a charity and a representative body, that would indeed be a perverse form of rebalancing, since the present costs regime has evolved in such a way as to achieve a reasonably fair balance between state and citizen taking account of the imbalance in the resources of each. Implementing the proposals in this consultation paper could well have the effect of putting judicial review well beyond the reach of individuals of modest means who need it the most, and who have good cases to pursue.

4.5.2 **Questions 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.**

4.5.2.1 No. If the Government's main worry is the proliferation of JR applications by campaigners, this measure will do nothing to deter them. Instead, it will put yet another obstacle in the way of the ordinary citizen of limited means. It is effectively enforcing a no-win no-fee basis in these cases. While that may be appropriate in some areas of the law, it is certainly not appropriate when the rights of individuals are at stake. This will be another weapon in the armoury of the state, in an area where the state already enjoys a massive advantage over the citizen. Legal aid providers are less likely to take on even meritorious cases if they perceive the slightest doubt as to the outcome, and some of the more risk-averse providers may stop acting in judicial review cases altogether. If individual citizens of limited means cannot secure legal representation and are forced to act for themselves, they are more likely to fail anyway through lacking the skills to present their case to the best advantage in the papers. Judicial review challenges, both meritorious and unmeritorious, would be reduced, but at a high cost to the principle of access to justice.

4.5.3 **Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.**

4.5.3.1 We do not agree that the LAA should have any discretion not to pay a provider who has represented an individual in good faith believing the case to be meritorious.

4.5.4 **Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?**

4.5.4.1 We see no reason why the matter of costs should not be left to the court to decide in each case. Doubtless the present arrangements as described aim to balance out the inequality of arms when a citizen takes on the state. The consultation document cites the numbers of judicial reviews in immigration and asylum cases, and implies that that is the mischief against which this proposal is aimed; but it does not say how many of those claims are unsuccessful. If a high proportion of such claims were unsuccessful, there might be a case for introducing measures to curb the numbers of hopeless claims, but not in such a way as to discourage claimants whose case has merit. The risk of an adverse costs order often deters litigants who are genuinely aggrieved from pursuing any judicial remedy; while there is a good case for measures to deter hopeless cases that are brought simply to put off the evil day, it is vital that those with genuine and strong cases against public authorities are not put off claiming by the possible financial implications.

4.5.5 **Questions 22 to 25 – wasted costs orders**

4.5.5.1 The Government presumably wishes to ensure that legal representatives who pursue unmeritorious cases on behalf of clients can be at risk of a wasted costs order. While such an extension of the scope of wasted costs orders can be beneficial in some circumstances, the

proposal should, to our mind, be implemented with great care. Cases ought not to be condemned for being unmeritorious before the claimant, or claimant's representative, has had his or her say at an oral permission hearing. The papers can only take a case so far; often it is necessary to hear from the claimant before one can fully assess the merits of a claim. Furthermore, if the circumstances are to be widened in which a claimant's representative may be at risk of a wasted costs order, the same should apply to a defendant's representative who advises his or her client (the public authority) to defend a claim which clearly has merit and which ought to be settled rather than contested in order to prevent misuse of public funds.

4.5.6 **Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?**

4.5.6.1 It was clearly considered right in the *Corner* case to make that stipulation. But judicial review, like other legal concepts, develops over time and in response to changes in the environment in which it operates, and if PCOs are now granted in cases where there is an individual or private interest, there is presumably a good reason for it. Speaking from the perspective of the claimant in a tax or welfare case, the issue is less likely to be whether the individual derives a benefit from the outcome than whether they would suffer a detriment, such as having a tax liability or penalty imposed upon them, or a welfare entitlement withdrawn from or denied to them, if unsuccessful. We would be very much opposed to withdrawing PCOs from claimants in those circumstances.

4.5.6.2 In any case, the Government cannot in all fairness limit the ability of representative bodies to bring actions (as proposed in questions 9 to 11) and yet deny PCOs where a test claimant makes the claim instead of the representative body. To implement both would have the effect of denying the remedy altogether.

4.5.7 **Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?**

4.5.7.1 Where the parties to judicial review proceedings are of equal or similar standing, power and influence (eg a Government department or agency versus a multi-national corporation), we see no reason why there should not be costs in the cause, unless exceptional circumstances apply. Where on the other hand one party is an individual of modest means, or a small charity or NGO, and the other a public authority, it is right that the inequality between the two should be recognised in the costs regime.

4.5.7.2 An alternative approach to the PCO might be to stipulate circumstances in which the claimant may opt for a no-costs environment, in which the claimant would bear his or her own costs on the understanding that if successful he or she could not recover the costs of the defendant, and the defendant too would be bound to fund their own costs but not those of the claimant whatever the outcome. If a suggestion we made earlier in this paper were acted on and judicial review applications were heard in the First-tier Tribunal, that would

both contain the costs of the proceedings and enable the parties to contest the action in a costs-free environment.

4.5.8 **Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?**

4.5.8.1 As a representative organisation we would have no objection to greater clarity being given on who is funding litigation. But great caution should be exercised if it is proposed that a backer, or funder, of a judicial review action should be vulnerable to a costs order in the same way as a party, particularly as a costs order directed at a claimant would generally be settled by whoever was funding the claim in any event.

4.5.9 **Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?**

4.5.9.1 There may be a presumption to that effect, but it should be rebuttable if there is inequality of arms between the parties (if for example the claimant were a private individual of modest means and the defendant were a public authority or Government department).

4.5.10 **Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?**

4.5.10.1 We have no comment to make on whether there should be fixed limits or what the amount should be. We think every case would depend on its own facts.

4.6 ***Interveners***

4.6.1 **Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?**

4.6.1.1 Ordinarily that would seem a sensible starting point. But as the consultation document acknowledges, there will be circumstances in which that presumption can and should be rebutted. For example, if through lack of means a claimant would not have been able to bring a judicial review challenge but for the assistance of the intervener, and the claimant won the case, any adverse costs order made against the defendant should be capable of including an amount in respect of the intervener's costs.

4.6.2 **Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to [incur] significant extra costs normally be responsible for those additional costs?**

4.6.2.1 Again, similar principles apply. If the intervention causes the existing parties to incur significant extra costs which they would not have incurred but for the intervention, there should be no objection to the intervener being liable for those costs; again the presumption should be capable of rebuttal, for example in cases such as that set out in the answer to

question 31. It should also be possible for an intervener to reach agreement as to costs with the other parties to the litigation, and provided the party in question has equal or similar bargaining strength to the intervener the court should be slow to upset any agreement so reached.

4.6.3 **Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?**

4.6.3.1 We see no objection to that, and if the claim is supported by representatives or advisers acting pro bono that should be apparent and should weigh heavily in a judge's decision as to whether to award costs.

4.6.4 **Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?**

4.6.4.1 No.

4.7 ***Leapfrogging***

4.7.1 **Questions 35 to 41**

4.7.1.1 We have no experience of litigation beyond first instance so all we would say, in response to these questions, is that it seems sensible to expedite judicial review cases as far as possible and in particular those cases which are of national importance or raise significant public interest issues. We would have no objection to removing the requirement for the defendant to consent to a leapfrog appeal. However, we would hope that if the need for the consent of the claimant were removed, the claimant would not find himself or herself in a more rigorous costs regime than if the appeal had taken its normal course.

4.7.2 **Impact assessment and equality impacts**

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment? The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses.

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence which tells us more about applicants for judicial review and their protected characteristics, as well as the grounds on which they brought their claim.

4.7.2.1 In the First-tier Tribunal case of *Bishop & Ors v HMRC Commissioners*, LITRG supported three lead appellants who appealed against HMRC decisions that they should file their VAT returns

online. The judge held that the decisions were discriminatory and breached their human rights, because there were no exemptions for those who were computer illiterate because of age, or who found it difficult or painful to operate a computer because of a disability, or who lived in a remote part of the country where broadband was unavailable or unreliable. There were some 100 other cases stayed behind the lead appellants'.

4.7.2.2 The winning arguments in this case were based on the European Convention on Human Rights rather than the Equality Act 2010, but to the extent that it found in favour of the appellants on grounds of their protected characteristics of age or disability, the same considerations could have applied in determining whether HMRC had had due regard to its public sector equality duty in requiring them to file online. Also, the case proceeded by way of appeal to the First-tier Tribunal; but the law has since changed so that similar challenges would now have to proceed by way of judicial review. As the judge observed (para 919 of the judgment):

> 'While the online filing regulations still exist, a taxpayer's liability to file online no longer depends on a decision by HMRC. It is very unsatisfactory, but the only way a taxpayer now has to challenge the regulations is by judicial review proceedings or by appealing against a penalty imposed for non-compliance . . .'

4.7.2.3 It is also still uncertain how far the public law jurisdiction of the First-tier Tribunal extends, so that taxpayers who are aggrieved (for example) by a failure by HMRC to apply an extra-statutory concession in their case, or to correctly apply the regulations governing PAYE, or to pay ex gratia redress to a taxpayer who acted to his or her own detriment in reliance on an unequivocal piece of guidance from HMRC that happened to be incorrect, can only confidently seek redress through judicial review. These are typical of problems that unrepresented taxpayers experience with the tax system, given that professional agents are unlikely to allow their clients to fall into such traps; and individual taxpayers with protected characteristics are more likely to be unrepresented.

4.7.2.4 We believe we have shown that these proposals, particularly those on standing and costs, will further reduce access to a remedy that is already out of reach of most ordinary citizens, but which increases in importance as statutory appeal rights become more restricted. To the extent that judicial review becomes further beyond the reach of the ordinary citizen, those with protected characteristics suffer even more because they no longer have access to the only effective remedy for failures by the executive involving discrimination, whether direct or indirect, and other breaches of their PSED. Few apart from those who are fortunate enough to secure pro bono representation will be able to enforce their rights, and that is bad for justice and bad for the rule of law.

LITRG
1 November 2013