

**Association of Lawyers for Animal Welfare**



**Response to Ministry of Justice  
Judicial review: proposals for further reform**

**October 2013**

The Association of Lawyers for Animal Welfare (ALAW) is a charity which aims to bring together lawyers interested in animal protection law to share experience and to harness that expertise for the benefit of the animal protection community, including by securing more comprehensive and effective laws and better enforcement of existing animal protection laws. ALAW works closely with animal protection NGO's, organizing training and providing educational tools about the legal aspects of campaigning and the law relating to animal welfare, as well as providing guidance on legal issues that arise during campaigning.

This response recognizes that the MOJ is likely to have a significant number of contributions from lawyers, NGO's and legal groups and this response does not intend to replicate any of the submissions that are likely to be made. Instead ALAW has focused upon three areas where it believes the proposals could impact negatively upon animal welfare. These are standing, third party interventions and protective costs orders (PCOs).

In summary, ALAW believes that judicial review is an important tool to hold the executive to account and to vindicate the rule of law. ALAW's experience in this area is that public money is not being wasted by the deliberate pursuit of unmeritorious claims. Our experience as lawyers is that the existing rules have in place the safeguards to ensure that procedures are not abused and unmeritorious claims pursued for extraneous reasons. Furthermore, ALAW believes that any changes in the areas below will impact disproportionately on animal welfare, since animals have no standing and are wholly reliant upon concerned groups and individuals to challenge decisions by public bodies which unlawfully compromise their welfare.

**Standing**

Standing is critical for NGO's who are concerned with animal welfare since animals have no legal personality. A narrowing of the rules on standing in this area is therefore very likely to render decisions by public bodies unchallengeable. In fact the impact of any change is likely to impact disproportionately on animal welfare, since individuals who are directly affected by a decision (farmers, researchers, pet owners etc...), but have an opposite interest to the animals who are subject to regulation will continue to have the ability to challenge such decisions, thereby creating a skewed system whereby decisions which impact negatively on animal welfare may be challenged, whereas pro welfare decisions remain unchecked.

**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 examples?**

This has not been a problem that ALAW has come across. To the contrary, ALAW is aware that animal groups who have brought cases have done so in areas directly relevant to their work, where they would be expected to have a good 'on the ground' understanding of the issues surrounding animal protection and an in-depth understanding of the legal and regulatory framework, including the significance of any proposed or actual changes.

**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?**

ALAW considers that there are no realistic alternatives to the existing standing rules that would enable animal welfare NGO's to challenge decisions of public bodies. It is certain that animals would not fulfil the victim test for the purposes of bringing a

claim under the Human Rights Act 1998 and very unlikely that animal NGO's would, even assuming that the subject matter fell within the HRA/ECHR, so this route is unavailable to challenge the decisions of public authorities. A 'person aggrieved' test is, for similar reasons, also inappropriate where the concern is that animals have suffered as a result of the decision of a public body.

### **Interventions**

#### **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**

ALAW disagrees with the premise that there is a problem with judicial review being used as a campaigning tool. In ALAW's experience NGO's are very mindful of the cost of litigation and unlikely to bring proceedings unless it considers that there is a realistic prospect of success. In any event the current rules already have a mechanism to screen out weak or unmeritorious claims at the leave stage. It is likely that any tightening of the rules on intervening will have the same (indirect) negative impact on animal welfare as changes to the rules on standing.

ALAW's perspective as a legal group is that courts often benefit from the interventions of NGO's who have specialist knowledge and expertise in an area. The ability of an NGO to intervene is particularly important in this area to counter balance situations where individuals with a private interest may challenge governmental decisions aimed at protecting animal interests. The experience of an independent NGO may be invaluable to the court. It is unlikely in our experience that the court would allow an intervention if it did not believe that it would add benefit and lead to better decision making. We do not agree that the Government should consider rule changes on interveners.

#### **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?**

The experience of ALAW is that intervening NGO's generally bear their own costs of legal representation.

#### **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?**

We do not believe that third parties who intervene should be responsible for additional costs, if any, incurred by existing parties as a result. If proceedings are prolonged as a result of an intervention it is usually because there is an issue of public importance which the court needs to consider. In many cases we believe that interventions do not significantly increase costs.

#### **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?**

ALAW has no objection to information being provided about the source of funding. However if the courts had greater power to award costs against non-parties our experience is that this would act as a disincentive to NGO's taking part who would otherwise have a voice in proceedings. We believe that this is not in the interests of justice, particularly in the area of animal welfare where any intervention is wholly altruistic.

#### **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?**

ALAW has no direct experience of this.

## PCOs

**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?**

ALAW has no comment as we do not envisage circumstances where an NGO will have a private interest. If so, the existence of a private interest may be a relevant consideration, but we feel that it should not be determinative.

**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?**

ALAW's believes that there are already safeguards in the existing system. We are aware of some criticism of the criteria that an applicant must show that it will probably have to withdraw its claim, and be acting reasonably in doing so, if its application is rejected. There are some groups who believe that it is unnecessarily restrictive to make it a precondition which has to be satisfied in every case and it is suggested that the overriding test for a PCO should be one of reasonableness.

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

ALAW has no views on this.

**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?**

The ability to impose a PCO recognises the public interest in the litigation of issues of general public importance and the reality that there is often inequality in the financial positions of the claimant and the public body. We believe that cross caps should not be automatic and there should be no presumption of equality in their level, as this fails to reflect that inequality which the PCO strives to address. A cross cap fails to respect that inequality and places NGO's and their lawyers in a financially disadvantageous position.

If the Government pursues the suggestion in paragraph 163, that PCOs might become unavailable for non-environmental cases we say that the exception for environmental cases should extend to cases concerning animal welfare. There is no justification for making an exception for environmental cases, but not cases involving animal welfare. There is a similar rationale for making such an exception for the reasons propounded above, namely that animals have no legal personality, that there is almost inevitably no private interest and that any challenge to a decision by an NGO is for these reasons entirely altruistic. Animal welfare is a legitimate area of public concern and one which attracts much public sympathy. It would be wrong if Government proposals meant in effect that well meaning groups had no practical ability to challenge the decisions of public bodies in this area. Animals have no voice except through NGO's or concerned individuals. The fact that the Government has no choice but to make provision for environmental cases, because of Aarhus, is not a reason based on principle for differentiation between those cases and (non-environmental) animal cases.

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

ALAW has no comment.

*Paula Sparks*

***On behalf of the trustees of the Association of Lawyers for Animal Welfare***

***30 October 2013***