



## **RESPONSE TO THE CALL FOR EVIDENCE**

### **THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW PANEL**

#### **INTRODUCTION**

1. This submission is presented on behalf of the Public Interest Litigation Support Project (The PILS Project). The Project is based out of Community House, City link Business Park, 6a Albert Street, Belfast, BT12 4HQ, Northern Ireland; website – [www.pilsni.org](http://www.pilsni.org) ; email – [info@pilsni.org](mailto:info@pilsni.org)

#### **ABOUT PILS**

2. The PILS Project is Northern Ireland's access to justice organisation, supporting vital public interest cases. The Project is funded by philanthropic organisations and has existed since 2009. Since that time, PILS has assisted in the advancement of human rights and equality issues by empowering, and assisting an array of different groups to use legal tools in a smart, strategic and efficient manner.
3. The PILS Project is a membership organization, and the membership is comprised of both nongovernmental organisations (NGOs) and solicitor firms from across Northern Ireland. The PILS Project provides the members with legal and financial assistance in public interest cases – these are cases that will create positive change for vulnerable or disadvantaged groups of people in Northern Ireland. PILS has a subscribing membership of 129 different members (63 NGOS and 66 Solicitors) who together account for a depth of experience and expertise across a wide spectrum of issues and practice areas in Northern Ireland
4. One of the Project's principal goals is to remove any barriers that stand in the way of a citizens accessing justice through the Courts. One of the many ways the Project achieves this is to offer a range of free services to our members to help them take cases of public interest on behalf of individuals that have human rights or equality concerns at their core. This support comes in several forms. PILS can:
  - share legal information and advice

- source legal opinions, research or training sessions through our network of supportive legal professionals (called the Pro Bono Register)
- facilitate meetings between members on specific areas of public interest work
- provide direct legal representation ourselves by acting as instructing solicitor in a case
- give financial assistance in the form of indemnities against the costs of the respondent or direct financial assistance to the applicant.

All of this is available to PILS Project members free of charge.

6. In its 11 years providing the above support, PILS has been directly involved in cases that concerned (but not limited to): education; health; housing; Brexit, legacy issues, welfare reform, immigration; and open justice. See Impact Report <https://www.pilsni.org/impact-report-2019>

## **THE ISSUE OF COSTS**

7. Having regard to the Panel's Terms of Reference together with the Call for Evidence guidance, it is apparent that the Review's remit is broad in nature, with both the substantive and procedural aspects of Judicial Review on the table for consideration.
8. Considering the above, the PILS Project wishes to address the Panel primarily on the issue of costs.
9. However, before addressing the more specific costs points, the PILS Project wishes to communicate some general points to the Panel:
- The last 11 years has only served to strengthen the Project's firm view that an individual's ability to engage in Judicial Review proceedings is a fundamental safeguard necessary to ensure adherence to the Rule of Law and protect the human rights and equality of individuals.
  - In a dynamic and multifaceted society like the one that exists in the UK, countless public institutions have the potential to, and do, affect, engage and infringe an individual's rights and interests.
  - In a society emerging from conflict like Northern Ireland, the principle of holding public bodies appropriately to account through access to the courts assumes an even greater importance than in other jurisdictions.
  - Judicial Review is therefore engaged by various issues that impact upon people's daily lives, ranging from hospitals, universities, prisons, schools, and government departments, to name but a few.

- It is also important to note that as well as private sectors interests and public bodies, NGOs are very important as part of the Judicial Review process.
10. Whilst there are undoubtedly a number of other generalised points that the Project could make in relation to Judicial Review, for these purposes, these submissions will focus on the particular issue of costs as a barrier to accessing justice.

## **SUBMISSIONS**

11. Every citizen is entitled to seek redress through the Courts, but not every citizen can do so; very often this is due to the cost of accessing the Courts. The two groups that can invariably take their case to Court without much financial trepidation are those wealthy enough to afford it, or, those who are poor enough to qualify for legal aid. Those neither wealthy enough to be able to risk an adverse costs order, nor are they poor enough to be entitled to legal assistance are very often effectively excluded from accessing the courts and especially the higher courts as a result. This distinction is, and should be, a matter of considerable concern for the Panel.
12. The Legal Aid scheme arises out of a clear acknowledgement that someone should not be denied access to the Courts because of their lack of means. But in Judicial Review cases, this is exactly what happens on a regular basis for those who are above the financial threshold for legal aid, but aren't financially secure enough to risk an adverse result in Court for fear of what could be a crippling costs order. Costs therefore can, and do, create an injustice in the individual's search for justice.
13. One of the main ways that the PILS Project offers support to members is by funding the cost of outlay and/or providing an indemnity for costs. As a result, the issue of costs is something that the Project encounters on a regular basis because of requests for financial assistance. In this respect, the Project is proud that it regularly steps in to provide the financial assistance required to those who would otherwise have to decide against seeking legal recourse, regardless of the merits of their case. Whilst PILS is able to provide that financial safety net for a small number of those in Northern Ireland whose cases involves human rights, equality or public interest issues, a significant proportion of Judicial Review cases will not involve such matters, leaving the potential Applicants in those cases in an unenviable position – go to Court and risk the potential for severe financial hardship.
14. The Project therefore asks that the Panel give active consideration to the issue of how costs concerns can in effect deter access to justice within the context of Judicial Review proceedings.

15. In considering this matter, the Project asks that the Panel give consideration within the Northern Ireland context to the increased use of **Protective Costs Order (PCO)** and the introduction of **Pro Bono Costs Orders (PBCO)** in matters of public interest. See PILS PCO Guide: <https://www.pilsni.org/guides> and Baker McKenzie Report: Attached to submission.
16. **Protective Costs Orders** are court orders that impose a limit on the costs that can be awarded against an unsuccessful applicant who brings a court case which addresses public interest issues. Whilst available in Northern Ireland, PCOs are not readily used and are infrequently applied for. The Project submits that greater consideration should be given to a presumption in favour of PCOs in a case involving a matter of public interest.

In cases involving a matter of public interest, the primary virtue of a PCO is that it enables an Applicant of limited means to have access to the Courts. This not only assists in resolving the problem described above, but it could also save the taxpayer money in both the short term and in the long term.

In the short term because the Respondent public body knows the extent of the potential costs bill due to the costs being capped. The public body can try to come to an agreement on the amount and/or can make submissions to the Court on the amount, thereby maintaining a significant level of control and input over the issue of costs.

In terms of the long term, if a case involves an issue that has ramifications beyond that particular case, and if that Applicant is able to take the case to Court without fear of financial ruin, then the Court has the opportunity to adjudicate on that particular issue. This would have the long-term effect of settling the question, thereby reducing similar or identical litigation on the same issue which would necessitate Court time, the costs of those parties and potentially the use of legal aid.

PCOs are a simple but proportionate way of ensuring that Justice can be done, whilst maintaining the principle that the losing party pays costs, but to an extent that the losing party and reasonable observers are not deterred from accessing the Courts in the future if needs be.

17. **Pro Bono Costs Orders** are not currently available in Northern Ireland. The PILS Project has long been an advocate and campaigner for their introduction in Northern Ireland. They are already available in England and Wales by virtue of Section 194 of the Legal Services Act 2007. PBCOs are similar to a normal costs order in that they are available when the successful party is represented wholly or partly pro bono. In England and Wales, the losing party does not escape liability for costs by virtue of the fact that the

successful party was represented pro bono. Instead, the losing party is ordered to pay the amount equivalent to the costs to The Access to Justice Foundation. In turn, this money is used to support legal advice charities in their continued provision of pro bono legal advice.

20. At a time of diminishing legal aid budgets, the work of pro bono organisations is becoming more important in assisting those who would otherwise go unadvised and unrepresented. The fact that with a PBCO the money is paid to the pro bono organisation and not to the lawyers instructed by the PBCO, maintains the admirable practice of legal advisers and lawyers giving their time and expertise to assist others free of charge, whilst also enabling this practice to continue due to the monies paid to the pro bono organisations on foot of the Court Order.
21. The Panel will note that the above two costs orders are different, but in effect, they both contribute towards the same goal – removing costs as a barrier to access to justice. ***Protective Costs Orders*** have a more Applicant/ individual focused nature, allowing the particular Applicant to proceed with a case that has a public interest element, without fear of an unbearable costs order. ***Pro Bono Costs Orders*** on the other hand assist those behind the Applicant's case – the lawyers and advisers. Pro Bono Costs Orders means that the organisations that help individuals free of charge can continue to do so.

Thank you for your consideration of this matter.

**THE PILS PROJECT**

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