



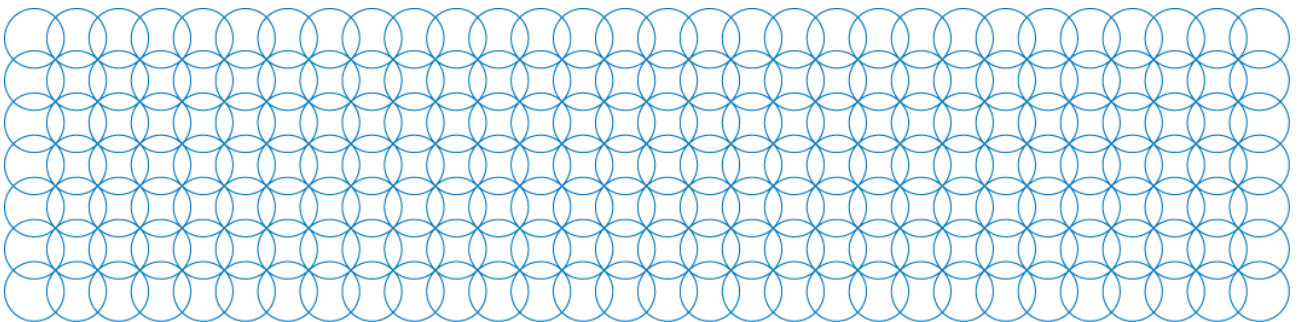
Ministry
of Justice

Costs Protection in Environmental Claims

Proposals to revise the costs capping scheme for eligible environmental challenges

This consultation begins on 17 September 2015

This consultation ends on 10 December 2015





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of Justice

Costs Protection in Environmental Claims

Proposals to revise the costs capping scheme for eligible environmental challenges

A consultation produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>

About this consultation

- To:** Seek views from those who may be involved in environmental legal challenges within the scope of the amendments made by the Public Participation Directive (2003/35/EC)¹ or within the scope of the Aarhus Convention on proposals to revise the costs capping scheme for those cases.
- Duration:** From 17/09/15 to 10/12/15
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- Response paper:** A response to this consultation exercise is due to be published within 12 weeks of the consultation closing at:
<https://consult.justice.gov.uk/>

¹ The relevant amendments made by the Public Participation Directive have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU).

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Executive summary

1. The purpose of this consultation is to seek views on how to improve the rules relating to costs protection in certain environmental challenges, governed by Section VII of Part 45 of the Civil Procedure Rules (the CPR), related parts of the CPR and associated Practice Directions (the Environmental Costs Protection Regime). The consultation sets out proposals for how to improve the Environmental Costs Protection Regime within the framework of relevant EU law requirements.
2. The Civil Procedure Rule Committee (CPRC) is an advisory non-departmental public body which is responsible for making the CPR. This consultation is being conducted prior to the CPRC considering the various proposals. Following consultation and consideration of the responses, the CPRC will be asked to consider and make any necessary amendments to the CPR.
3. The proposals to amend the Environmental Costs Protection Regime have arisen in light of:
 - the judgment of the Court of Justice of the European Union (CJEU) in case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914;
 - the subsequent judgment of the Supreme Court in the same case: *R (Edwards) v. Environment Agency* (No.2) [2014] 1 W.L.R. 55; and
 - the judgment of the CJEU in case C-530/11 *European Commission v. UK* [2014] 3 WLR 853.
4. In addition to the developments above, respondents may wish to be aware of statutory developments concerning costs protection in judicial review cases generally. Following a consultation on proposals for wider reform of judicial review,² the Government included a number of reforms to judicial review in the Criminal Justice and Courts Act 2015, which received Royal Assent on 12 February this year.³ The Act contains sections to give effect to a number of the options which the Government decided to take forward from the consultation and which are intended to tackle the potential for people to use meritless judicial review applications to cause delay and frustrate proper decision-making, without undermining the crucial role judicial review can have as a check on the Executive. Sections 88 and 89 of the Act, which have not yet been commenced, make provision for a new type of order – a costs capping order – which will replace protective costs orders in England and Wales and which will limit or remove the liability of one party to pay another’s costs in appropriate judicial review cases. The Government’s intention is that the new costs capping order regime will not apply to relevant environmental judicial review cases and that costs protection in these cases in England and Wales will be governed by the costs rules in Section VII of Part 45 of the CPR.

² *Judicial Review: proposals for reform 2013* – <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>; and *Judicial Review: proposals for further reform 2013* - <https://consult.justice.gov.uk/digital-communications/judicial-review>

³ http://www.legislation.gov.uk/ukpga/2015/2/pdfs/ukpga_20150002_en.pdf

5. The costs rules in Section VII of Part 45 of the CPR for costs in relevant environmental judicial review cases were established in response to obligations arising under the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and the Public Participation Directive (2003/35/EC).
6. The Aarhus Convention requires parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In particular, it requires parties to ensure the public have access to a procedure to challenge decisions subject to the public participation procedures (Article 9(2) of the Convention) and contraventions of national law relating to the environment (Article 9(3) of the Convention) and specifies that those court procedures should, amongst other things, not be 'prohibitively expensive'. Both the UK and the EU are parties to the Aarhus Convention.
7. The Public Participation Directive implemented in EU law the requirements from Article 9(2) of the Convention, relating to public participation procedures, and specified that such procedures should not be 'prohibitively expensive'. The Public Participation Directive did this by amending Directives on Environmental Impact Assessment and Integrated Pollution Prevention and Control. The relevant amendments made by the Public Participation Directive have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU) (the relevant Directives).
8. The current costs rules for these types of cases, introduced on 1st April 2013, provide for a simple fixed recoverable costs regime for relevant cases at first instance. Subject to the possibility of the claimant opting out, or the court determining the claim not to fall within the scope of the Environmental Costs Protection Regime following a challenge by the defending public authority, the regime involves a fixed asymmetric costs cap structure, whereby the defendant, if the claim fails, may recover no more than a prescribed amount from the claimant and, if the claim succeeds, the claimant may recover no more than a prescribed amount from the defendant. The amount recoverable from the claimant is capped at £5,000 where the claimant is an individual and £10,000 in other cases (for example where the claimant is a non-governmental organisation (NGO)); and the 'cross-cap' amount, capping the costs recoverable from the defendant, is £35,000. The costs protection applies to costs incurred at any stage of the claim; and the caps are fixed and not able to be varied. The rules apply only to relevant environmental judicial reviews and not to other forms of review established by statute.
9. There is presently no subjective element to the regime, in that no account is taken of the particular claimant's financial position (i.e. the only question is whether or not the claimant is claiming as an individual) or the strength of their particular case. Other than the distinction drawn between claimants who claim as individuals and all other claimants, the rules do not take into account the nature of the claimant.

Background

10. Between 2007 and 2010, the European Commission raised concerns that the UK had not properly transposed the requirements of the Public Participation Directive in respect of the costs of bringing proceedings challenging environmental decisions. In summary the Commission was concerned that, in the UK:
 - the potential financial consequences of losing environmental judicial review challenges could have prevented NGOs and individuals from bringing cases against public bodies; and
 - requiring applicants for interim injunctions to give cross-undertakings in damages before interim injunctions were granted by the courts could have been an impediment to the use of interim injunctions, which can be used for temporarily halting operations that may have a potentially damaging effect on the environment.
11. The European Commission subsequently announced that it was bringing proceedings against the UK over the cost of challenges to decisions on environmental matters.
12. In October 2011, the Government launched the consultation '*Cost Protection for Litigants in Environmental Judicial Review Claims – Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention*',⁴ regarding proposals to provide greater clarity about the level of costs for parties in environmental judicial review cases by introducing a codified regime for costs protection in these cases. The codified regime, contained in the CPR, was introduced in April 2013 and set out the circumstances in which costs protection would be granted and the level at which it would be set.
13. Shortly after the introduction of the current costs regime, the CJEU gave its judgment in the *Edwards* case, in which it clarified what is meant by the EU law requirement that the costs of certain environmental cases should not be 'prohibitively expensive'.⁵ This was in response to the Supreme Court in *Edwards* referring questions to the CJEU for a preliminary ruling, including on how a national court should decide whether the cost of litigation is 'prohibitively expensive'; and how flexible a national court could be in considering whether this is the case.⁶ The CJEU set out principles, which were subsequently reiterated by the Supreme Court,⁷ regarding the approach to determining what level of costs in any particular case would be 'prohibitively expensive'.⁸ The judgment suggested that, in meeting the not 'prohibitively expensive' requirement, the rules could be significantly more flexible than the Environmental Costs Protection Regime currently provides. For instance, it held that the test of what is 'prohibitively expensive' is not purely subjective: the cost of proceedings must not exceed the financial resources of the person concerned and, in addition, the cost must not appear to be objectively unreasonable.

⁴ *Cost Protection for Litigants in Environmental Judicial Review Claims 2011* – https://consult.justice.gov.uk/digital-communications/cost_protection_litigants

⁵ Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914.

⁶ *R (Edwards) v. Environment Agency* [2011] 1 WLR 79; the questions are set out in the CJEU judgment at paragraph 23.

⁷ *R (Edwards) v. Environment Agency (No.2)* [2014] 1 W.L.R. 55.

⁸ See the CJEU's judgment at paragraphs 40 to 46 and the Supreme Court's judgment at paragraphs 21 to 28.

14. In February 2014, the CJEU gave its judgment in *European Commission v. United Kingdom*.⁹ It found that the costs regime for environmental judicial review cases which had been in place in the UK in 2010 had not properly implemented the 'not prohibitively expensive' requirement as required by the Public Participation Directive. It should be noted that the Court was assessing the position before the UK jurisdictions' costs regimes were revised in 2013.
15. Following these developments and in light of the fact that the current Environmental Costs Protection Regime was introduced prior to the judgments in these cases, the Government considers there to be scope for making measured adjustments to the regime within the framework of the relevant Directives. The proposals contained in this consultation are aimed at providing greater flexibility, clarity of scope and certainty within the regime. In summary the main area of focus of the proposals in this consultation will be:
- the scope of the regime in terms of the types of cases that are eligible for costs protection and whether the regime should be extended to apply to certain reviews under statute;
 - the types of claimant eligible for costs protection;
 - the levels of costs protection available and whether they should remain fixed or should be variable; and
 - the factors which courts consider when deciding whether cross-undertakings in damages for interim injunctions are required in cases which fall within the scope of the regime.

⁹ Case C-530/11 *European Commission v. UK* [2014] 3 WLR 853

Introduction

16. The consultation is aimed at those who may be involved in or affected by environmental legal challenges in England and Wales falling within the scope of the relevant Directives and the Aarhus Convention.

The proposals

17. This paper sets out questions and seeks views about proposed amendments to the Environmental Costs Protection Regime. The paper also includes for comment proposed amended versions of the Environmental Costs Protection Regime (Section VII of Part 45 of the CPR, paragraph 5 of Practice Direction 45, paragraph 5 of Practice Direction 25A and paragraph 26.1 of Practice Direction 52D at **Annex A**), intended to give effect to the changes proposed in the paper.
18. The existing text of the rules and Practice Directions mentioned above are at **Annex B**. References to the rules by number in this paper are to the current rules unless the contrary is stated.
19. Following consultation and consideration of the responses, the CPRC will be asked to consider and make any necessary amendments to the CPR. If the CPRC does consider it necessary to make amendments, it would not necessarily make them in the same form as the proposals at **Annex A**.

Definition of 'Aarhus Convention claim'

20. A claim is currently eligible for the Environmental Costs Protection Regime if it is an 'Aarhus Convention claim' as defined at CPR 45.41(2) as:
"a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."
21. A claimant bringing a judicial review claim which falls within this definition is entitled to costs protection under the Environmental Costs Protection Regime.
22. Challenges brought as reviews under statute which are akin to but are not judicial reviews, such as applications under section 288 of the Town and Country Planning Act 1990 (TCPA), are not currently covered. These types of cases could potentially engage the relevant Directives, though it is certainly not the case that all challenges to planning decisions will do so.
23. The Government has now had the opportunity to consider the costs position in reviews under statute, including the potential for some cases which are brought in this way to fall within the scope of the relevant Directives (those cases which fall within Article 9(2) of the Aarhus Convention), depending on their subject matter. In doing so, it has come to the view that it is better not to draw a distinction in the Environmental Costs Protection Regime between judicial reviews and such reviews under statute which engage the relevant Directives. The purpose of many reviews under statute is to perform the role that judicial review would otherwise perform, namely to enable persons aggrieved with an administrative decision to challenge the legality of that decision in court. It is with that in mind that the Government considers it right to apply similar principles to reviews under statute that fall within the scope of the relevant Directives as are applied to judicial reviews. This is not to say that all statutory review proceedings would be within the scope of the new regime; it simply means that the

rules would extend to the limited number of these cases in which the relevant Directives are engaged.

24. The Government proposes modifying the definition of an ‘Aarhus Convention claim’, in part to reflect these requirements of the relevant Directives more accurately (proposed rule 45.41(2) at **Annex A**). The proposed modification is intended to ensure that the Environmental Costs Protection Regime can apply to all cases, whether brought by way of a judicial review or a review under statute, which fall within the scope of the relevant Directives (being cases which fall within Article 9(2) of the Aarhus Convention). As is currently the case, in the event that a defendant disputes that a claim is eligible for the Environmental Costs Protection Regime, it would be for the court to determine whether or not the regime applies.
25. The Government also proposes amendment of Practice Direction 52D (proposed paragraph 26.1(17) of Practice Direction 52D at **Annex A**) to provide that appeals under sections 289(1) and (2) TCPA and section 65(1) of the Planning (Listed Buildings Conservation Areas) Act 1990 are to be treated as reviews under statute for the purposes of the Environmental Costs Protection Regime. These are appeals against enforcement decisions relating to unauthorised development. The proposed amendments would mean that the Environmental Costs Protection Regime would be capable of applying to these types of appeals, provided they fall within the scope of the relevant Directives (again, meaning cases which fall within Article 9(2) of the Aarhus Convention). This proposal is in recognition of the fact that these types of appeals fulfil a similar function to reviews under statute. It is far from the case that all such appeals will engage the Environmental Costs Protection Regime; this will be dependent on their subject matter and whether they fall within the scope of the relevant Directives.

Q1. Do you agree with the revised definition proposed for an ‘Aarhus Convention claim’? If not how do you think it should be defined? Please give your reasons.

Eligibility – types of claimant eligible for costs protection under the Environmental Costs Protection Regime

26. The current Environmental Costs Protection Regime was introduced by an amendment to the CPR in April 2013. In the Supreme Court’s judgment in *Edwards*,¹⁰ Lord Carnwath quoted a summary of those changes in the update to the rules:

“Amendments are made to comply with the Aarhus Convention so that any system for challenging decisions in environmental matters is open to members of the public and is not prohibitively expensive.” (emphasis added)
27. It is clear that the intention of introducing the amendments was to protect “members of the public”, something that was also stated in the consultation paper ‘*Cost Protection for Litigants in Environmental Judicial Review Claims – Outline proposals for a cost*

¹⁰ *R (Edwards) v. Environment Agency* (No.2) [2014] 1 W.L.R. 55 at paragraph 19

*capping scheme for cases which fall within the Aarhus Convention*¹¹ and in the Government's response to that consultation paper.¹²

28. It has though been pointed out that the wording of the current rules does not expressly specify the types of claimant which are eligible for costs protection under the Environmental Costs Protection Regime. On this basis, it has been argued that claimants are entitled to the costs protection under the regime whether or not they are members of the public for the purposes of the relevant Directives and the Aarhus Convention. The Government does not accept that this is a correct interpretation of the current rules. The rules are expressed to apply (see rule 45.41(2)) to “a claim for judicial review... which is subject to the provisions of the [Aarhus Convention]” (emphasis added). Therefore, whether any claim is subject to the Environmental Costs Protection Regime can only be answered by considering the terms, and purpose, of the Aarhus Convention itself. Under the Aarhus Convention, costs protection clearly only applies to persons who are members of the public, as defined in the Convention itself (see below).
29. However, in order to ensure a clearer alignment between the wording of the rules and the obligations arising under Article 9 of the Aarhus Convention and the relevant Directives, and to avoid such arguments being made in the future, the Government proposes amendment of the rules so that only a claimant who is a ‘member of the public’ is entitled to costs protection (see the definition of ‘Aarhus Convention claim’ at proposed rule 45.41(2), proposed rule 45.43(1), proposed paragraph 5.4 of Practice Direction 45 and proposed paragraph 5.1B(1) of Practice Direction 25A, all at **Annex A**). This is because the relevant obligations arising under Article 9 of the Aarhus Convention and the Directives only apply in relation to a member of the public.
30. Article 2 of the Aarhus Convention contains the following definitions relevant to the term ‘member of the public’:
- “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
- “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.
31. The same definitions are used in Article 1 of the EIA Directive and in Article 3 of the Industrial Emissions Directive. Whether a particular claimant is or is not a member of the public would, in a case where entitlement to costs protection under the Environmental Costs Protection Regime was contested, be a matter for the court to decide, having regard to any further guidance from future case law in this area. The proposed amendments are intended to make it clearer that, as was always intended and as the Government in fact maintains is the correct position under the current rules, eligibility for costs protection under the regime is based not only on the nature of the

¹¹ *Cost Protection for Litigants in Environmental Judicial Review Claims 2011* – https://consult.justice.gov.uk/digital-communications/cost_protection_litigants

¹² *Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention – response 2012* https://consult.justice.gov.uk/digital-communications/cost_protection_litigants/results/cost-protection-litigants-response.pdf

claim but also on the nature of the individual or body which would benefit from that costs protection.

32. Since the introduction of the current Environmental Costs Protection Regime in 2013 there has been significant change in the law relating to cost protection in judicial reviews. Sections 88 and 89 of the Criminal Justice and Courts Act 2015,¹³ which have not yet been commenced, make provision for a new type of order – a costs capping order – which will replace protective costs orders in judicial reviews in England and Wales and which will limit or remove the liability of one party to pay another’s costs in appropriate cases. Under section 88 of the Act, claimants will not be given costs protection until the court has granted them permission to apply for judicial review. Permission to apply is required for all judicial reviews; and to receive permission claimants must have an arguable case. Section 88 will mean that costs protection is not granted in unmeritorious cases which do not receive permission.
33. Although the Government’s intention is that the new costs capping order regime will not apply to relevant environmental judicial review cases, the Government would welcome views, in the light of this development, on whether a similar principle should be applied to the Environmental Cost Protection Regime. This would mean that claimants would only receive cost protection once permission to apply for judicial review or statutory review (where relevant) is given. In addition to aligning costs protection in environmental and non-environmental judicial reviews in this regard, it would minimise the grant of costs protection in unmeritorious cases and act as a disincentive against bringing unmeritorious challenges to cause delay. There is a risk that this approach could increase uncertainty for claimants who would not know when they first brought their case if they would receive costs protection; and if permission was not granted, there would be no cap on the claimant’s liability to pay the defendant’s costs, possibly deterring claimants from bringing a claim.

Q2. Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection? If not, please give your reasons.

Q3. Should claimants only be granted costs protection under the Environmental Costs Protection Regime once permission to apply for judicial review or statutory review (where relevant) has been given? If not, then please give your reasons.

Levels of costs protection available

34. In its judgment in *Edwards*, the CJEU set out principles regarding the approach to determining what level of costs in any particular case would be ‘prohibitively expensive’;¹⁴ and these principles were reiterated by the Supreme Court in the same case.¹⁵ The principles are that the costs of the proceedings must not exceed the financial resources of the claimant and must not appear to be objectively unreasonable, having regard to certain factors including the merits of the case.
35. The approach currently taken in the Environmental Costs Protection Regime is very simple and contains no subjective element, capping the amount for individual

¹³ http://www.legislation.gov.uk/ukpga/2015/2/pdfs/ukpga_20150002_en.pdf

¹⁴ Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914 at paragraphs 40–46

¹⁵ *R (Edwards) v. Environment Agency* (No.2) [2014] 1 W.L.R. 55 at paragraphs 21–28

claimants at £5,000 and for all other claimants at £10,000. The court does not take into consideration an individual claimant's financial resources or whether the costs of the proceedings might appear to be objectively unreasonable. There is no provision to vary the terms of the fixed costs protection, although it is expressly left open to a claimant to opt out of the regime, so that (for example) a claimant can opt out in order that it would not be faced with a cap on the defendant's liability for the claimant's costs.

36. This approach, and in particular the absence of any requirement for the court to take into account the financial resources of a claimant, was influenced by the domestic case law at the time that the rules were introduced and was developed prior to the CJEU and the Supreme Court setting out the principles in *Edwards*.
37. It is proposed that the current rules be revised in favour of a 'hybrid' model. It would be a 'hybrid' because, in every case where the regime applied, the costs caps would – at least initially – be set at a default level, but any party could make an application for the court to vary their own – or another party's – costs cap (proposed rule 45.44 and proposed paragraph 5 of Practice Direction 45, both at **Annex A**). The court would also be able to vary the caps of its own motion. In varying the caps, the court would be able to increase or decrease them and, in appropriate cases, remove a cap altogether.
38. Under the proposed model, in all cases where the court considered whether to vary a costs cap, it would be required to have regard to the principles set out in *Edwards* in ensuring any variation would not make costs 'prohibitively expensive' for the claimant (proposed rules 45.44(3)(a) and 45.44(4) at **Annex A**).
39. The Government takes the view that it would be exceptional for claimants to require more costs protection than is provided by the default costs caps. Before lowering a claimant's costs cap or increasing a defendant's costs cap, the court would have to be satisfied that the case was exceptional because, without the variation, the costs of the proceedings would be 'prohibitively expensive' for the claimant, again having regard to the principles in *Edwards* (proposed rules 45.44(3)(b) and 45.44(4) at **Annex A**). This approach is intended to deter claimants from making unmeritorious applications to vary caps, but it would not limit the court's ability to provide more costs protection in the exceptional cases where that would be necessary.
40. The Government does not consider the level of a defendant's costs cap to be relevant to whether proceedings are 'prohibitively expensive' for the purposes of the Aarhus Convention or the relevant Directives; and this is not why it proposes to revise the rules in this regard. Instead, the intention behind the proposal to treat defendants' costs caps in this way is to prevent their presence from incentivising defendants (particularly when defendants have greater financial resources than claimants) to expand the scope of a dispute unnecessarily, with the purpose of increasing a claimant's costs so they substantially exceed the level of the defendant's costs cap.
41. The proposal that the costs caps could be varied on the basis of the *Edwards* principles would require the courts to have regard to whether the costs of proceedings would exceed the financial resources of the claimant, as this is the subjective element set out in the *Edwards* cases. The Government considers that, for these purposes, the financial resources of the claimant include financial support which third parties have already provided to the claimant or which they are likely to provide in the future. Consequently, it is proposed that, when the court looks at the financial resources of a claimant in considering whether to vary a costs cap, it should have regard to any

financial support which a third party has provided or is likely to provide to the claimant (proposed paragraph 5.8 of Practice Direction 45 at **Annex A**).

42. The proposal that the courts should have regard to claimants' financial resources when considering whether to vary a costs cap raises questions about the evidence which a court would have to consider, and whether this type of evidence would be available to other parties so that they could decide whether to make an application to vary a costs cap. The Government considers that information about how claimants are financing environmental challenges should be provided to the court, including information about financial support which third parties are providing or are likely to provide. This approach is consistent with the approach taken to judicial reviews at sections 85 and 88 of the Criminal Justice and Courts Act 2015 (these provisions have not yet been commenced).¹⁶ Courts require this information to ensure that they are able to make appropriate decisions about costs. This would be particularly relevant in the context of cases to which the Environmental Costs Protection Regime applied under the proposed 'hybrid' model, as without this information the court might not know that it would be appropriate to consider varying a party's costs cap.
43. Ordinarily, defendants would not have access to information about a claimant's financial resources. This has the potential to undermine the proposal that any party should be able to apply to vary any other party's costs cap based on the *Edwards* principles. It is therefore necessary to make provision in the Environmental Costs Protection Regime to ensure that defendants are able to access this information. The Government proposes that a claimant who indicates on the claim form that they consider the proceedings to be an Aarhus Convention claim would be required to file at court and serve on the defendant a schedule of their financial resources, verified by a statement of truth. This would be done at the same time as issuing and serving the claim form and would ensure that, in all cases, defendants had access to the relevant information (see proposed rule 45.42 at **Annex A**).
44. The schedule of the claimant's financial resources would have to take account of any financial support which third parties had provided to the claimant or were likely to provide in the future (see proposed paragraph 5.2 of Practice Direction 45 at **Annex A**).
45. In order for courts to apply the *Edwards* principles, it may be necessary to make reference to information concerning claimants' financial resources during oral hearings. There are already express provisions in Part 39 of the CPR which allow hearings to be in private if they involve confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. It is proposed that a signpost to these provisions be added to Part 45 of the CPR (see at the end of proposed rule 45.44 at **Annex A**).
46. In cases involving multiple claimants or defendants, the Government takes the view that a separate costs cap should be applied to each individual party. This is consistent with the broad policy aim of ensuring that each party to the claim has its costs capped at an appropriate level. It is therefore suggested that Practice Direction 45 is amended to make it clear that costs caps will be applied to each claimant and defendant individually (see proposed paragraph 5.6 of Practice Direction 45 at **Annex A**).

¹⁶ http://www.legislation.gov.uk/ukpga/2015/2/pdfs/ukpga_20150002_en.pdf

47. A question which the introduction of the 'hybrid' model raises is whether the default costs caps should be set at the same level as the fixed costs caps under the current Environmental Costs Protection Regime or whether consideration should be given to setting the default costs caps at an alternative level. Under the 'hybrid' model, the court will be able to adjust costs caps and this is something that will be considered at court hearings, resulting in additional costs and delay and taking up court resources. The impact could be minimised by setting the default costs caps at a level that is neither too high nor too low, minimising the need for this type of hearing. The Government's view is that the default costs caps should not be set at levels which mean they deter claimants from bringing challenges or from making use of the Environmental Costs Protection Regime. It does, however, recognise that the defendants in these claims are public bodies and are funded by the taxpayer, so there could be an unnecessary cost to the taxpayer if the default costs caps provide too much costs protection. It is therefore seeking views on whether the default costs caps should be set at the same level as the fixed costs caps under the current Environmental Costs Protection Regime (£5,000 for individual claimants, £10,000 for other claimants and £35,000 for defendants) or whether they should be altered and, if so, how that could best be done. For example, would increasing the caps for individual claimants to £10,000 and £20,000 for other claimants and reducing the cap for defendants to £25,000 be appropriate?

48. In the future, an alternative approach to setting default costs caps may be to introduce a range of default costs caps. The appropriate default costs cap would be determined with reference to the claimant's financial means. This would mean that the level at which costs protection was initially set would be different for different claimants, depending on their financial resources. It would still be possible to vary costs caps in appropriate cases. The Government recognises that there is currently limited data to use in setting the range for default costs caps and the corresponding levels of claimants' financial means, but expects that this data – in the form of case law – would become available once the 'hybrid' model had been implemented. It welcomes views on whether such an approach should be considered for the future.

Q4. Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps? If not, please give your reasons.

Q5. Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the *Edwards* cases? If not, please give your reasons.

Q6. Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed rule 45.44 at Annex A) to decide whether to vary costs caps? If not, please give your reasons.

Q7. Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

Q8. Do you agree with the proposed approach to the application of costs caps in claims involving multiple claimants or defendants? If not please give your reasons.

Q9. At what level should the default costs caps be set? Please give your reasons.

Q10. What are your views on the introduction of a range of default costs caps in the future?

Costs of challenges and of applications to vary costs caps

49. The Government also proposes amendment of the provisions regarding the costs of defendants' challenges to claimants' assertions that they are entitled to costs protection under the Environmental Costs Protection Regime. Currently, a claimant is protected if it wrongly asserts that its claim is an Aarhus Convention claim because CPR 45.45(3)(a) provides that no order for costs will normally be made where this is the case. However, where the defendant wrongly asserts a claim is not an Aarhus Convention claim, costs will normally be awarded against it on the indemnity basis, whether or not this would increase its costs exposure above the level of its costs cap (CPR 45.45(3)(b)).
50. These provisions were introduced because of concerns that defendants might be encouraged to bring weak challenges if there was no penalty for contesting that a case engaged the Environmental Costs Protection Regime, and that without some sanction this would lead to unnecessary satellite litigation. The Government is of the view that this has created an uneven playing field, and now considers it necessary to equalise the position. It is proposed that the provision that defendants normally be ordered to pay costs on the indemnity basis in these situations is replaced with one for defendants normally being ordered to pay costs on the standard basis (see proposed rule 45.45(3)(b) at **Annex A**). This would not, however, prevent a court from making an indemnity costs order if it considered it appropriate.

Q11. Do you agree that where a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

Q12. Do you think the Environmental Costs Protection Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the rules take?

Cross-undertakings in damages

51. Practice Direction 25A contains provisions relating to cross-undertakings in damages for interim injunctions in Aarhus Convention claims. In summary, when a court considers whether to require an applicant to give a cross-undertaking in damages in an Aarhus Convention claim, it will have particular regard to the need for the terms of the relevant order not to be such as would make continuing with the claim 'prohibitively expensive' for the applicant.
52. The Government proposes an amendment to Practice Direction 25A to provide additional clarity in relation to how courts assess whether a cross-undertaking in damages would make continuing with a claim 'prohibitively expensive' for an applicant. The amendment would direct the courts to apply the *Edwards* principles when considering whether continuing with proceedings would be 'prohibitively expensive' (see proposed paragraph 5.1B(3) of Practice Direction 25A at **Annex A**).
53. The Government also proposes an amendment to provide additional clarity for claims involving multiple claimants. This amendment provides that in a multi-claimant case the court will have regard to the combined financial resources of those claimants when applying the *Edwards* principles to make a decision about a cross-undertaking in damages (see proposed paragraph 5.1B(4) of Practice Direction 25A at **Annex A**). The intention is to avoid a situation where a court took into account the financial

resources of some but not all of the claimants, even though all of the claimants could potentially be liable under the cross-undertaking. When the court looks at the financial resources of any claimant, the Government proposes that it should have regard to any financial support which a third party has provided or is likely to provide to the claimant (proposed paragraph 5.1B(5) of Practice Direction 25A at **Annex A**).

54. The Government proposes a further amendment, to make it clearer on the face of Practice Direction 25A that the provisions relating to cross-undertakings in damages in Aarhus Convention claims apply only to an applicant for an interim injunction who is a member of the public (see proposed paragraph 5.1B(1) of Practice Direction 25A). As above, this is because the relevant obligations arising under the Directives and Article 9 of the Aarhus Convention only apply in relation to a member of the public.

Q13. Do you have any comments on the proposed revisions to Practice Direction 25A?

Other forms of review

55. The scope of the relevant Directives is narrower than the approach in the Aarhus Convention generally. For instance, there is potential for the subject matter of a claim to mean it constitutes a challenge to contraventions of national law relating to the environment and therefore fall within the scope of Article 9(3) of the Convention. The Government would be interested in the views of consultees as to whether there are any such types of legal challenge to which the Environmental Costs Protection Regime should be extended.

Q14. Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Q1. Do you agree with the revised definition proposed for an 'Aarhus Convention claim'. If not how do you think it should be defined? Please give your reasons.

Q2. Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection? If not, please give your reasons.

Q3. Should claimants only be granted costs protection under the Environmental Costs Protection Regime once permission to apply for judicial review or statutory review (where relevant) has been given? If not, then please give your reasons.

Q4. Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps? If not, please give your reasons.

Q5. Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the *Edwards* cases? If not, please give your reasons.

Q6. Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed rule 45.44 at Annex A) to decide whether to vary costs caps? If not, please give your reasons.

Q7. Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

Q8. Do you agree with the proposed approach to the application of costs caps in claims involving multiple claimants or defendants? If not please give your reasons.

Q9. At what level should the default costs caps be set? Please give your reasons.

Q10. What are your views on the introduction of a range of default costs caps in the future?

Q11. Do you agree that where a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

Q12. Do you think the Environmental Costs Protection Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the rules take?

Q13. Do you have any comments on the proposed revisions to Practice Direction 25A?

Q14. Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?

Q15. From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

Thank you for participating in this consultation exercise.

List of Consultees

Links to the consultation paper are being sent to:

Airport Operators Association
The Association of British Insurers
The Bar Council
British Air Transport Association
British Chambers of Commerce
British Ports Association
Campaign for the Protection of Rural England
Chartered Institute of Legal Executives
Civil Aviation Authority
Client Earth
Coalition for Access to Justice for the Environment
Confederation of British Industry
Design Council
Environment Agency for England and Wales
Environmental Justice Foundation
Environmental Law Foundation
Federation of Small Businesses
Friends of the Earth
Greenpeace
Health and Safety Executive
Highways Agency
Law Society
Local Government Association
Master of the Rolls
Master of the Crown Office
Mayor of London/Greater London Authority
National Air Traffic Service
National Farmers Union
National Infrastructure Planning Association
Network Rail
Northern Ireland Environment Link
Planning Advisory Institute

Planning Aid

Planning and Environmental Bar Association

Planning Officers Society

Renewable UK

Royal Institute of Chartered Surveyors

Royal Society for the Protection of Birds

Royal Town and Planning Institute

Scottish Environment Link

The Planning Inspectorate

Town and Country Planning Association

UK Business Council for Sustainable Energy

UK Environmental Law Association

UK Major Ports Group

Wales Environment Link

Welsh Local Government Association

Wildlife and Countryside Link

WWF-UK

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Annexes

Annex A

Proposed amendments to Section VII of Part 45 of the CPR, paragraph 5 of Practice Direction 45, paragraph 5 of Practice Direction 25A and paragraph 26.1 of Practice Direction 52D

In this annex, proposed additions are denoted as follows: proposed addition (underlined text which is in blue in the electronic version of this document) and proposed deletions are denoted as follows: ~~proposed deletion~~ (struck-through text which is in red in the electronic version of this document).

Proposed amendments to Section VII of Part 45 of the CPR

VII COSTS LIMITS IN AARHUS CONVENTION CLAIMS

Scope and interpretation

45.41

(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

~~(2) In this Section, 'Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.~~

(2) In this Section, 'Aarhus Convention claim' means a claim brought by a member of the public—

(a) by way of judicial review which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(1) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998;

(b) by way of judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(2) of that Convention; or

(c) by way of judicial review which challenges the legality of any act or omission of a body exercising public functions and which is within the scope of Article 9(3) of that Convention.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out

45.42

Rules 45.43 to ~~45.44~~ 45.45 do not apply where the claimant –

(a) has not –

(i) stated in the claim form that the claim is an Aarhus Convention claim; ~~or and~~

(ii) filed and served with the claim form a schedule of the claimant's financial resources; or

(b) has stated in the claim form that –

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

(Part 22 requires schedules of claimants' financial resources to be verified by a statement of truth.)

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43

(1) Subject to rule ~~45.44~~, 45.45 –

(a) ~~a party to a claimant in~~ an Aarhus Convention claim who is a member of the public;
and

(b) a defendant in an Aarhus Convention claim.

may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45 or as varied in accordance with rule 45.44.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1)(a) according to the nature of the claimant.

Varying the limit on costs recoverable from a party in an Aarhus Convention claim

45.44

(1) The court may vary the amount exceeding which a party to an Aarhus Convention claim may not be ordered to pay from that prescribed in Practice Direction 45.

(2) In varying such an amount under paragraph (1), the court may remove altogether the restriction provided for by rule 45.43 on the amount of costs which a party to an Aarhus Convention claim may be ordered to pay.

(3) The court may vary such an amount under paragraph (1) only if it is satisfied–

(a) that to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and

(b) for a variation which would decrease the amount exceeding which a claimant may not be ordered to pay or increase the amount exceeding which a defendant may not be ordered to pay, that the case is exceptional because without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

(4) Proceedings are to be considered ‘prohibitively expensive’ for the purpose of this rule if their likely costs either–

(a) exceed the financial resources of the claimant; or

(b) are objectively unreasonable having regard to–

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(5) An application for the court to vary an amount under paragraph (1) must be supported by evidence.

(Rule 39.2(3) makes provision for a hearing (or any part of it) to be in private if it involves

[confidential information \(including information relating to personal financial matters\) and publicity would damage that confidentiality.\)](#)

Challenging whether the claim is an Aarhus Convention claim

45.44 [45.45](#)

(1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless –

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8–

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant’s grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim –

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant’s costs of those proceedings on the **indemnity standard** basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45 [or as varied in accordance with rule 45.44.](#)

Proposed amendments to paragraph 5 of Practice Direction 45

~~Limit on costs recoverable from a party in an Aarhus Convention claim: Rule 45.43~~ **Costs limits in Aarhus Convention claims: Rules 45.41 to 45.45**

5.1 Rules 45.41 to 45.45 govern the restrictions on the amount of costs which are recoverable from certain parties to Aarhus Convention claims.

5.2 A schedule of a claimant’s financial resources under Rule 45.42 must take into account any financial support which any person has provided or is likely to provide to the claimant.

[5.3](#) [Rule 45.43 and paragraphs 5.4 and 5.5 of this Practice Direction set out default amounts of costs, exceeding which certain parties to Aarhus Convention claims may not be ordered to pay unless varied by the court.](#)

~~5.1~~ [5.4](#) ~~Where~~ [Subject to rule 45.44, where](#) a claimant [who is a member of the public](#) is ordered to pay costs, the amount specified for the purpose of rule 45.43(1)(a) is –

(a) [£5,000] where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) in all other cases, [£10,000].

~~5.2~~ [5.5](#) ~~Where~~ [Subject to rule 45.44, where](#) a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1)(b) is [£35,000].

[5.6](#) [In a claim with multiple defendants or multiple claimants who are members of the public, the amounts specified at paragraphs 5.4 and 5.5 of this Practice Direction apply in relation to each such defendant or claimant individually.](#)

[5.7](#) [Rule 45.44 provides that the court may vary the amount exceeding which a party may not be ordered to pay from the default amounts specified at paragraphs 5.4 and 5.5 of this Practice Direction. The court may vary the amounts up or down and may remove altogether the restrictions on the amount of costs which are recoverable from a party.](#)

[5.8](#) [When a court considers the financial resources of the claimant for the purpose of rule 45.44, it will have regard to any financial support which any person has provided or is likely to provide to the claimant.](#)

[5.9](#) [A court may exercise its powers under rule 45.44 on application or on its own initiative at any time.](#)

[5.10](#) [These rules do not apply to appeals other than to appeals brought by virtue of sections 289\(1\) or \(2\) of the Town and Country Planning Act 1990 or section 65\(1\) of the Planning \(Listed Buildings and Conservation Areas\) Act 1990, on the basis that paragraph 17 of Practice Direction 52D provides that such appeals are to be treated as if they are reviews under statute for the purposes of rules 45.41 to 45.45.](#)

Proposed amendments to paragraph 5 of Practice Direction 25A

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

- (1) subject to paragraph 5.1B, an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.
- (2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable,
- (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present,
- (4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day, and
- (5) if made before issue of a claim form –
 - (a) an undertaking to issue and pay the appropriate fee on the same or next working day, or
 - (b) directions for the commencement of the claim.

5.1A Subject to paragraph 5.1B, when the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.

5.1B

- (1) If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by ~~the~~ [an](#) applicant [who is a member of the public](#) to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking–
 - (a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and
 - (b) make such directions as are necessary to ensure that the case is heard promptly.

(2) 'Aarhus Convention claim' has the same meaning as in rule 45.41(2).

(3) Proceedings are to be considered 'prohibitively expensive' for the purpose of paragraph 5.1B of this Practice Direction if their likely costs, having regard to the amount of any cross-undertaking in damages as well as any protective costs order granted under Part 45, either –

(a) exceed the financial resources of the claimant(s); or

(b) are objectively unreasonable having regard to –

(i) the financial situation of the party or parties whose interests would be protected by the cross-undertaking in damages;

(ii) the situation of the parties;

(iii) whether the claimant has a reasonable prospect of success;

(iv) the importance of what is at stake for the claimant;

(v) the importance of what is at stake for the environment;

(vi) the complexity of the relevant law and procedure; and

(vii) whether the claim is frivolous.

(4) When a court considers whether proceedings are 'prohibitively expensive' for the purpose of paragraph 5.1B of this Practice Direction in a claim with multiple claimants, it will have regard to the claimants' combined financial resources.

(5) When a court considers the financial resources of the claimant for the purposes of paragraph 5.1B of this Practice Direction, it will have regard to any financial support which any person has provided or is likely to provide to the claimant.

5.2 An order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order.

5.3 Any order for an injunction must set out clearly what the respondent must do or not do.

Proposed amendments to paragraph 26.1 of Practice Direction 52D

Appeals under s 289(6) of the Town and Country Planning Act 1990 and s 65(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 26.1

26.1

(1) An application for permission to appeal to the High Court under section 289 of the Town and Country Planning Act 1990 ('the TCP Act') or section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the PLBCA Act') must be made within 28 days after notice of the decision is given to the applicant.

(2) The application –

(a) must be in writing and must set out the reasons why permission should be granted; and

(b) if the time for applying has expired, must include an application to extend the time for applying, and must set out the reasons why the application was not made within that time.

(3) The applicant must, before filing the application, serve a copy of it on the persons referred to in sub-paragraph (12) with the draft appellant's notice and a copy of the witness statement or affidavit to be filed with the application.

(4) The applicant must file the application in the Administrative Court Office with –

(a) a copy of the decision being appealed;

(b) a draft appellant's notice;

(c) a witness statement or affidavit verifying any facts relied on; and

(d) a witness statement or affidavit giving the name and address of, and the place and date of service on, each person who has been served with the application. If any person who ought to be served has not been served, the witness statement or affidavit must state that fact and the reason why the person was not served.

(5) An application will be heard–

(a) by a single judge; and

(b) unless the court otherwise orders, not less than 21 days after it was filed at the Administrative Court Office.

- (6) Practice direction 54D applies to applications and appeals under this paragraph.
- (7) Any person served with the application is entitled to appear and be heard.
- (8) Any respondent who intends to use a witness statement or affidavit at the hearing –
- (a) must file it in the Administrative Court Office; and
 - (b) must serve a copy on the applicant as soon as is practicable and in any event, unless the court otherwise allows, at least 2 days before the hearing.
- (9) The court may allow the applicant to use a further witness statement or affidavit.
- (10) Where on the hearing of an application the court is of the opinion that a person who ought to have been served has not been served, the court may adjourn the hearing, on such terms as it directs, in order that the application may be served on that person.
- (11) Where the court grants permission –
- (a) it may impose terms as to costs and as to giving security;
 - (b) it may give directions; and
 - (c) the relevant appellant's notice must be served and filed within 7 days of the grant.
- (12) The persons to be served with the appellant's notice are –
- (a) the Secretary of State;
 - (b) the local planning authority who served the notice or gave the decision, as the case may be, or, where the appeal is brought by that authority, the appellant or applicant in the proceedings in which the decision appealed against was given;
 - (c) in the case of an appeal brought by virtue of section 289(1) of the TCP Act or section 65(1) of the PLBCA Act, any other person having an interest in the land to which the notice relates; and
 - (d) in the case of an appeal brought by virtue of section 289(2) of the TCP Act, any other person on whom the notice to which those proceedings related was served.
- (13) The appeal will be heard and determined by a single judge unless the court directs that the matter be heard and determined by a Divisional Court.

(14) The court may remit the matter to the Secretary of State to the extent necessary to enable the Secretary of State to provide the court with such further information in connection with the matter as the court may direct.

(15) Where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court.

(16) The court may give directions as to the exercise, until an appeal brought by virtue of section 289(1) of the TCP Act is finally concluded and any re-hearing and determination by the Secretary of State has taken place, of the power to serve, and institute proceedings (including criminal proceedings) concerning –

(a) a stop notice under section 183 of that Act; and

(b) a breach of condition notice under section 187A of that Act.

[\(17\) An appeal brought by virtue of sections 289\(1\) or \(2\) of the TCP Act or section 65\(1\) of the PLBCA Act will be treated as if it is a review under statute for the purposes of rules 45.41 to 45.45 and may therefore be an Aarhus Convention claim for the purposes of those rules, provided it meets the relevant requirements.](#)

Annex B

Current Section VII of Part 45 of the CPR, paragraph 5 of Practice Direction 45, paragraph 5 of Practice Direction 25A and paragraph 26.1 of Practice Direction 52D

Section VII of Part 45 of the CPR

VII COSTS LIMITS IN AARHUS CONVENTION CLAIMS

Scope and interpretation

45.41

(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, 'Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out

45.42 Rules 45.43 to 45.44 do not apply where the claimant –

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or

(b) has stated in the claim form that –

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43

(1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

Challenging whether the claim is an Aarhus Convention claim

45.44

(1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless –

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8 –

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim –

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

Paragraph 5 of Practice Direction 45

Limit on costs recoverable from a party in an Aarhus Convention claim: Rule 45.43

5.1 Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) in all other cases, £10,000.

5.2 Where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is £35,000.

Paragraph 5 of Practice Direction 25A

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

- (1) subject to paragraph 5.1B, an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.
- (2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable,
- (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present,
- (4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day, and
- (5) if made before issue of a claim form –
 - (a) an undertaking to issue and pay the appropriate fee on the same or next working day, or
 - (b) directions for the commencement of the claim.

5.1A Subject to paragraph 5.1B, when the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.

5.1B (1) If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking –

- (a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard promptly.

(2) 'Aarhus Convention claim' has the same meaning as in rule 45.41(2).

5.2 An order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order.

5.3 Any order for an injunction must set out clearly what the respondent must do or not do.

Paragraph 26.1 of Practice Direction 52D

Appeals under s 289(6) of the Town and Country Planning Act 1990 and s 65(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 26.1

26.1

(1) An application for permission to appeal to the High Court under section 289 of the Town and Country Planning Act 1990 ('the TCP Act') or section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the PLBCA Act') must be made within 28 days after notice of the decision is given to the applicant.

(2) The application –

(a) must be in writing and must set out the reasons why permission should be granted;
and

(b) if the time for applying has expired, must include an application to extend the time for applying, and must set out the reasons why the application was not made within that time.

(3) The applicant must, before filing the application, serve a copy of it on the persons referred to in sub-paragraph (12) with the draft appellant's notice and a copy of the witness statement or affidavit to be filed with the application.

(4) The applicant must file the application in the Administrative Court Office with –

(a) a copy of the decision being appealed;

(b) a draft appellant's notice;

(c) a witness statement or affidavit verifying any facts relied on; and

(d) a witness statement or affidavit giving the name and address of, and the place and date of service on, each person who has been served with the application. If any person who ought to be served has not been served, the witness statement or affidavit must state that fact and the reason why the person was not served.

(5) An application will be heard—

(a) by a single judge; and

(b) unless the court otherwise orders, not less than 21 days after it was filed at the Administrative Court Office.

(6) Practice direction 54D applies to applications and appeals under this paragraph.

(7) Any person served with the application is entitled to appear and be heard.

(8) Any respondent who intends to use a witness statement or affidavit at the hearing –

(a) must file it in the Administrative Court Office; and

(b) must serve a copy on the applicant as soon as is practicable and in any event, unless the court otherwise allows, at least 2 days before the hearing.

(9) The court may allow the applicant to use a further witness statement or affidavit.

(10) Where on the hearing of an application the court is of the opinion that a person who ought to have been served has not been served, the court may adjourn the hearing, on such terms as it directs, in order that the application may be served on that person.

(11) Where the court grants permission –

(a) it may impose terms as to costs and as to giving security;

(b) it may give directions; and

(c) the relevant appellant's notice must be served and filed within 7 days of the grant.

(12) The persons to be served with the appellant's notice are –

(a) the Secretary of State;

(b) the local planning authority who served the notice or gave the decision, as the case may be, or, where the appeal is brought by that authority, the appellant or applicant in the proceedings in which the decision appealed against was given;

(c) in the case of an appeal brought by virtue of section 289(1) of the TCP Act or section 65(1) of the PLBCA Act, any other person having an interest in the land to which the notice relates; and

(d) in the case of an appeal brought by virtue of section 289(2) of the TCP Act, any other person on whom the notice to which those proceedings related was served.

(13) The appeal will be heard and determined by a single judge unless the court directs that the matter be heard and determined by a Divisional Court.

(14) The court may remit the matter to the Secretary of State to the extent necessary to enable the Secretary of State to provide the court with such further information in connection with the matter as the court may direct.

(15) Where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court.

(16) The court may give directions as to the exercise, until an appeal brought by virtue of section 289(1) of the TCP Act is finally concluded and any re-hearing and determination by the Secretary of State has taken place, of the power to serve, and institute proceedings (including criminal proceedings) concerning –

(a) a stop notice under section 183 of that Act; and

(b) a breach of condition notice under section 187A of that Act.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 10 December 2015 to:

Michael Anima-Shaun

Ministry of Justice

Post Point 3.38

102 Petty France

London SW1H 9AJ

Tel: 020 3334 3189

Email: michael.animashaun@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from michael.animashaun@justice.gsi.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

An impact assessment is not required for this consultation because rules of court are not generally within the definition of regulation by reference to which the requirement for such an assessment is determined.

Equality Statement

Equality duties¹⁷

Section 149 of the Equality Act 2010 (the Equality Act) requires Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act;
- Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

Paying ‘due regard’ needs to be considered against the nine “protected characteristics” under the Equality Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Equality considerations

As part of this obligation, we have made an initial assessment of the estimated impact of these proposals on people with protected characteristics.

Direct discrimination

Our initial assessment is that the proposals are not directly discriminatory within the meaning of the Equality Act as they apply equally to all court users irrespective of whether or not they have a protected characteristic; we do not consider that the proposals would result in people being treated less favourably because of the protected characteristic.

¹⁷ Section 149 of the Equality Act 2010 places a duty on Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
- Advance equality of opportunity between different groups (between those who share a protected characteristic and those who do not); and
- Foster good relations between different groups (between those who share a protected characteristic and those who do not).

Paying ‘due regard’ needs to be considered against the nine “protected characteristics” under the Equality Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Indirect discrimination

We do not collect comprehensive information about court users generally, or specifically those involved in judicial review proceedings, in relation to protected characteristics and there does not appear to be any evidence available to suggest that people with protected characteristics are particularly disadvantaged. This limits our understanding of the potential equality impacts of the proposals for reform. More information is being sought, through responses to this engagement exercise, to fill this gap and determine whether any of the proposed rule changes are likely to have a particular impact on judicial reviews brought on these grounds.

Discrimination arising from disability and duty to make reasonable adjustments

In so far as this proposal extends to disabled court users, we believe that the policy is proportionate, having regard to its aim. It would not be reasonable to make an adjustment for disabled court users so that they are out of scope of the proposals, but it remains important to make reasonable adjustments for disabled court users to ensure appropriate support is given.

Harassment and victimisation

We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

Advancing equality of opportunity

Consideration has been given to how these proposals impact on the duty to advance equality of opportunity by meeting the needs of court users who share a particular characteristic, where those needs are different from the needs of those who do not share that particular characteristic.

Fostering good relations

Consideration has been given to this objective that indicates it is unlikely to be of particular relevance to the proposals.

To help us fulfil our duties under the Equality Act, we would welcome information and views to help us gather a better understanding of the potential equality impacts that these proposed reforms might have.

Q13: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>



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Alternative format versions of this report are available on request from michael.animashaun@justice.gsi.gov.uk or 020 3334 3189.