

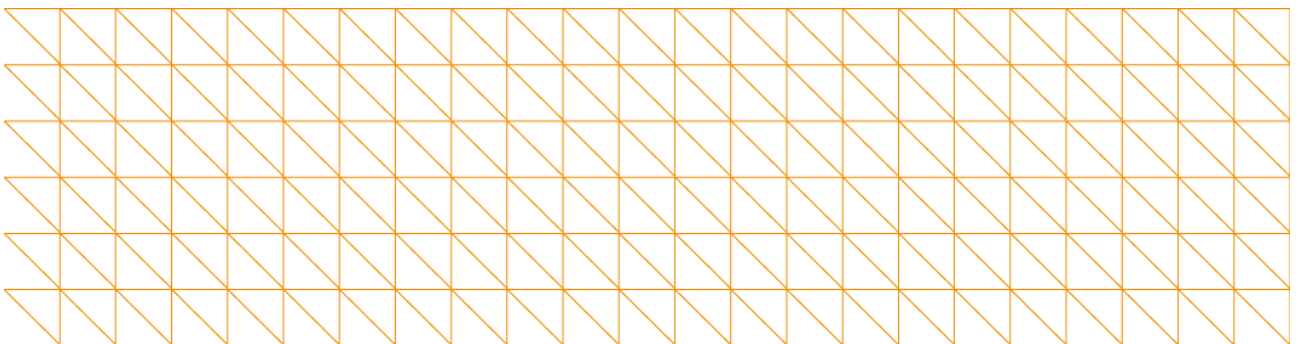


Ministry  
of Justice

# Costs Protection in Environmental Claims

The government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges

November 2016



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of Justice

### **Costs Protection in Environmental Claims**

The government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**



## **Contents**

<b>1. Introduction</b>	<b>3</b>
<b>2. Conclusion and next steps</b>	<b>5</b>
<b>3. Summary of responses</b>	<b>14</b>
<b>4. Equalities Statement</b>	<b>26</b>
<b>5. Consultation principles</b>	<b>27</b>
<b>Annex A – list of respondent organisations</b>	<b>28</b>

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## 1. Introduction

1. The UK is required to make sure that the costs of bringing certain environmental challenges are not ‘prohibitively expensive’<sup>1</sup>.

2. The government took steps to address this issue for England and Wales in April 2013 by introducing an Environmental Costs Protection Regime (ECPR), which capped the costs that a court could order an unsuccessful claimant to pay to other parties. The rules fixed that liability at £5,000 for individuals and £10,000 for organisations. Defendants’ liability for claimants’ costs were similarly capped, at £35,000. All of these amounts were fixed – the rules do not allow for variation in individual cases.

3. The European Court of Justice (CJEU) gave its judgment in a 2014 case<sup>2</sup> that the costs regime that had existed in 2010 (before the new ECPR had been put in place) was insufficient to comply with EU law. In the light of that ruling and other judgments by the CJEU and the United Kingdom Supreme Court, the government proposed amendments to the ECPR in England and Wales. That consultation took place between 17 September and 10 December 2015, and this is the government’s response.

4. While the CJEU’s judgment concerned the position before the introduction of the ECPR, the government has concluded in the light of consultation that some measured amendments to the 2013 ECPR should be implemented. These changes should put its compliance with EU law beyond doubt, and should improve the operation of the ECPR for both claimants and defendants.

5. The changes the government proposes to implement are:

- to extend the ECPR to environmental reviews under statute engaging EU law, as well as judicial reviews;
- allowing a ‘hybrid’ regime so that, in appropriate cases, the financial caps can be varied;
- introducing more certainty that appropriate claimants will have grants of costs protection in appropriate cases in the Court of Appeal, and inviting the Supreme Court to amend its rules to do likewise;
- introducing more of a level playing field so that defendants are not unduly discouraged from challenging a claimant’s entitlement to costs protection; and
- clarifying certain issues, including: that the ECPR can only be used by claimants who require costs protection because of EU law or the Aarhus Convention; the

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<sup>1</sup> As a result of the amendments made by the EU Public Participation Directive (2003/35/EC) which have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU) and being a Party to 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.

<sup>2</sup> Case C-530/11 *European Commission v. UK* [2014] 3 WLR 853.

factors for a court to consider in ECPR cases when deciding whether to require a cross-undertaking in damages for an interim injunction; and that a separate costs cap applies to each claimant or defendant in cases with multiple parties.

6. This document summarises the responses to the consultation and sets out the government's conclusions and next steps.

7. Further copies of this report and the consultation paper can be obtained by contacting Tajinder Bhamra at the address below:

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This report is also available at <https://consult.justice.gov.uk/>

Alternative format versions of this report can be made available on request from the address above.



## 2. Conclusions and next steps

### Conclusions

8. Since the ECPR was introduced in April 2013, there have been a number of judgments which have a bearing on the EU law requirement that the costs of certain environmental cases should not be prohibitively expensive. As a result, the government considered there to be scope to make measured adjustments to the ECPR within the framework of the relevant EU Directives. The aim of the proposals was to provide greater flexibility, clarity of scope and certainty within the ECPR and to align it with recent developments in case law.

9. The government has considered all of the responses to the consultation very carefully. It has decided to proceed with most of the proposed amendments to the rules set out in the consultation. In some instances, however, the government has recognised that some of the proposals would benefit from further clarification. The government also sought views on a number of areas for possible change without including firm proposals in the consultation but has decided not to proceed with changes in those areas. The detailed plans, including the government's views in relation to specific concerns raised in the consultation responses, are set out below.

10. The government believes that the changes will not prevent or discourage individuals or organisations from bringing meritorious challenges. By extending the ECPR to certain reviews under statute, the changes may encourage more challenges to public authorities. Other changes should, however, deter unmeritorious claims which cause delay and frustrate proper decision making, without undermining the crucial role which judicial reviews and reviews under statute can have as a check on public authorities. Finally, by allowing the courts to vary the costs caps, based in part on claimants' financial resources, the changes recognise that some claimants are financially better resourced than others. Further details are set out in the Impact Assessment published alongside this consultation response.

#### *Definition of 'Aarhus Convention claim'*

11. The government notes that whilst there was general support for the extension of the ECPR to reviews under statute, there were concerns that the proposals did not go far enough. The majority of respondents wanted costs protection to be extended to reviews under statute which engage Article 9(2) or 9(3) of the Aarhus Convention and not solely those engaging Article 9(2) as proposed. Some respondents also wanted the ECPR extended to other types of cases, including those brought against private persons, such as private nuisance claims, and not just challenges against public authorities; and to appeals as well as first instance proceedings.

12. The focus of this consultation was to consider the changes that could be made within the EU law framework and it proposed extending the ECPR to those reviews under statute covered by EU law (those that engage Article 9(2) of the Aarhus Convention). The government has concluded that it is appropriate to extend the ECPR to these cases.

13. The government has considered whether to extend the scope of the ECPR even further so that it would apply to reviews under statute which engage Article 9(3) of the Aarhus Convention or more widely. The government notes the support amongst the majority of respondents for extending costs protection further than proposed. We are also aware of the UK's wider obligations under Article 9(3) of the Aarhus Convention and of the Court of Appeal judgment in the case of *Secretary of State for Communities and Local*

*Government v. Venn*<sup>3</sup>. This case considered an Article 9(3) challenge and the Court of Appeal stated that the ECPR is not Aarhus Convention compliant insofar as it is confined to applications for judicial review, and does not apply to reviews under statute. Notwithstanding this judgment, however, the government does not propose to extend the ECPR to Article 9(3) reviews under statute at this stage because it wishes to consider more fully how best to address these cases, including whether there might be an alternative way of ensuring that the costs of these cases are not prohibitively expensive for claimants.

14. Further, the government does not intend to bring forward any changes to extend the ECPR to private nuisance cases or to other types of cases which could be brought against private individuals. This is because the ECPR was not designed with these types of cases in mind. Defendants in these cases are not necessarily public authorities, meaning the costs cap model would not necessarily be appropriate. The government will continue to consider how best to address these cases.

15. The government does not intend to implement respondents' proposals to extend the ECPR to cases covering legislation affecting the environment more generally, or to list in detail the types of cases to which the ECPR applies. The government considers that its approach of linking eligibility to benefit under the ECPR to the Aarhus Convention will make sure that relevant challenges are captured, and that making a list of relevant cases subject to the ECPR risks inadvertently omitting a claim which should fall within its scope.

#### *Appeals*

16. A number of respondents advocated applying the ECPR to appeals. There are rules in place in both the Court of Appeal and the Supreme Court which allow judges to grant claimants costs protection in appeals of Aarhus Convention claims, limiting a claimant's potential liability to pay a defendant's costs. The courts already use these provisions to grant costs protection in appeals where this is required by EU law. The government intends to invite the Civil Procedure Rule Committee to amend the Civil Procedure Rules to provide greater certainty that the Court of Appeal should award a claimant costs protection in an appeal of an Aarhus Convention claim where this is necessary to prevent the proceedings from being prohibitively expensive for the claimant. Prohibitive expense would be assessed by applying the principles set out by the CJEU in *Edwards v. Environment Agency*.<sup>4</sup> Similarly, the government will invite the Supreme Court (which makes its own rules) to make corresponding provision for the appeals it hears.

#### *Eligibility – types of claimant eligible for costs protection under the ECPR*

17. The government notes the concerns raised by the majority of respondents about the approach taken in the draft rules to making it clearer that, as the government maintains has always been the case, only certain types of claimant can use the ECPR. Respondents were concerned that the drafting might make the approach to eligibility narrower than under EU law and the Aarhus Convention, potentially excluding some claimants in circumstances where the provisions of EU law and the Aarhus Convention would suggest the ECPR should apply.

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<sup>3</sup> *Secretary of State for Communities and Local Government v. Venn* [2014] EWCA Civ 1539.

<sup>4</sup> Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914, parts of which were reiterated by the Supreme Court in the same case: *R (Edwards) v. Environment Agency* (No.2) [2014] 1 W.L.R. 55.

18. This was not the intention of this proposal. The intention was to use the term ‘member of the public’ to make it clearer that the only claimants who are eligible to benefit under the ECPR are those described by the relevant provisions of the Directives and the Aarhus Convention.

19. As a result of the concerns, the government believes it would be beneficial to clarify in the rules what is meant by ‘member of the public’ and proposes to do so.

*Permission to apply for a judicial review or review under statute*

20. The consultation also sought views on whether or not costs protection should only be awarded in those cases where permission to proceed with the claim is given. This would bring the ECPR into line with the approach that is now taken to costs protection in non-environmental judicial reviews. The government notes the lack of support for this approach. Whilst it would be relatively rare for claimants to incur significant costs prior to permission, the government does accept that there are real concerns amongst respondents that the element of uncertainty around costs protection could potentially have a deterrent effect on some claimants. The government will not be taking this proposal forward.

*Level of costs protection available: varying the costs caps*

21. The consultation proposed moving away from the current, fixed-costs-cap model, under which there is no ability to vary the costs caps. The government notes some respondents’ concerns that variable caps might lead to less certainty about levels of costs protection and would involve increased complexity, and it recognises the EU law requirement that the costs of bringing Aarhus Convention claims must not be prohibitively expensive. Since the current ECPR was introduced in 2013, however, the CJEU has in the *Edwards*<sup>5</sup> case set out principles regarding the approach to determining what level of costs would be prohibitively expensive in any particular case. These principles have been reiterated by the Supreme Court in the same case. The principles are that the costs of 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. The current fixed-costs-cap model does not allow for costs caps to be varied to take account of what prohibitive expense means in an individual case, based on an application of these *Edwards* principles. Accordingly, the government proposes to introduce a power to vary the costs caps, both upward and downward.

22. The government considers that its proposed ‘hybrid’ model, although more complex than the current fixed-costs-cap model, would nevertheless provide claimants with sufficient certainty about costs protection and how the courts would determine the level of a costs cap. The model would do this first by setting default starting points for costs caps (at the same levels as now), which would remain in place unless the court considered that they should be varied. Secondly, it would provide a clear process for the courts to follow whenever they determined whether to vary a costs cap. It is an important safeguard that, at whatever stage of the proceedings an application to vary was brought, costs caps could not be varied in a way which made the costs of the proceedings prohibitively expensive for the claimant. The government considers that these factors mean the introduction of the ‘hybrid’ model will not deter meritorious claims. The model provides some flexibility in the levels of costs caps, accommodating the CJEU’s approach to assessing prohibitive expense from *Edwards* and recognising that different claimants will have different financial resources.

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<sup>5</sup> *Edwards*, see footnote 4 above.

23. The government recognises that respondents were concerned that the proposed model, whereby either party could seek to vary the level of a costs cap, would lead to additional hearings. It considers, though, that the number of additional hearings would be minimised by the approach taken in the proposed rules and by the general principles governing who pays the costs of hearings. First, those applying to vary the costs caps will need to demonstrate clearly to the court that they have a valid case for a variation. Secondly, the draft rules include provision that it should be exceptional for the court to vary the caps to give a claimant more costs protection: the court would have to be satisfied that, without the variation, the costs of the case would be prohibitively expensive for the claimant. Thirdly, parties who are unsuccessful in asking the court to vary a costs cap should expect to pay the costs of that application. Together, these factors should deter parties from making unmeritorious or speculative applications to vary costs caps. In addition, almost all defendants in these types of cases are publicly-funded bodies and would need to be satisfied that they had sufficient grounds to justify spending public money on seeking a variation.

24. The government has considered the suggestions of alternative models for determining the levels of costs caps. These suggestions included the model used in Scotland which allows claimants to apply to have their costs caps lowered or the defendant's costs caps increased; a model under which the parties can only apply to have their own costs caps varied; and a qualified one way cost shifting (QOCS) model. It was suggested that these models would reduce the likelihood of claimants having increased costs liability and would avoid the need for claimants to provide financial information to defendants.

25. The government has concluded that it would not be appropriate to adopt another model. The number of cases in Scotland is much lower than in England and Wales, and the model used in Scotland would not necessarily be appropriate for the larger number of cases in England and Wales. Moreover, any model which limits or removes a defendant's ability to ask the court to consider reducing the claimant's costs protection could lead to unnecessary public expense. Defendants in these challenges will almost always be publicly-funded bodies so, if a claimant receives unnecessarily generous levels of costs protection (in the sense that costs caps do not need to be set at that level to avoid the proceedings being prohibitively expensive) or the defendants are unable to recover their costs if they win (as would be the case for the proposed QOCS model), this could impact adversely on the public purse. The principal feature of the QOCS regime in personal injury cases is that a losing claimant generally does not have to pay any costs to a winning defendant. This model was introduced largely as a matter of practicality for personal injury cases: there is a substantial number of claims each year, the majority of which succeed. It was thought inappropriate to introduce any form of means test in these circumstances. The position is different for the much smaller number of environmental claims where the government considers that defendants should be able to challenge the level of a claimant's costs cap, if there is evidence to support this, to make sure that claimants do not benefit from unnecessary costs protection at public expense. The government believes that its 'hybrid' model is best suited to deliver this.

#### *Edwards principles*

26. The government proposed that the revised ECPR should require courts to apply the *Edwards* principles when deciding whether to vary a costs cap. This would align with the CJEU's approach to determining prohibitive expense and provide the parties to the litigation with clarity about the factors that the courts would take into consideration.

27. Many of the respondents considered that, to comply with *Edwards*, a court would have to take into account both a subjective and an objective assessment of prohibitive expense.

They considered that this was not the approach taken in the draft rules set out in the consultation document because they provided that proceedings would be considered prohibitively expensive if their likely costs either exceeded the claimant's financial resources or were objectively unreasonable.

28. The government agrees that, in order to comply with *Edwards*, the costs of proceedings must neither be subjectively prohibitively expensive (they must not exceed the financial resources of the claimant) nor appear to be objectively unreasonable. If the costs of the proceedings do not pass either the subjective or the objective assessment, they should be considered prohibitively expensive for the purpose of *Edwards*. This means that, for the purposes of the draft rules, courts will not have to carry out both assessments in every case. If the proceedings do not pass the first assessment carried out by the court, the proceedings will be considered prohibitively expensive regardless of what the outcome of the second assessment would be.

29. Some respondents expressed concern about the clarity of the proposed criteria to which the courts would have regard when considering whether costs of proceedings were objectively unreasonable. The government does not consider the criteria to be unclear. It is of the view that parties will understand the natural meaning of these terms and notes that courts already apply the criteria in some cases outside the scope of the ECPR. These criteria were set out by the CJEU in its judgment in *Edwards* and the government considers that incorporating them directly into the ECPR in this way is necessary to make sure the ECPR is properly aligned with the CJEU's approach.

30. The government notes some respondents' concerns that, when considering whether the costs of proceedings might be prohibitively expensive, the court should consider the claimant's own costs as well as their potential liability to pay the defendant's costs. The government does not agree with this view, not least because it has no control over the costs incurred by claimants which is a matter for claimants and their legal representatives.

31. The government does accept, however, that claimants' liability to pay court fees should be taken into account by the courts when considering whether the costs of proceedings might be prohibitively expensive. The government is of the view that the courts would have taken court fees into account in this way when applying the draft rules annexed to the consultation paper but, to put this beyond doubt, it intends to adjust the rules to include an express reference to court fees. The government notes, though, that this may not be relevant for all claimants because some claimants may be eligible to pay reduced court fees or no court fees at all under the existing remission scheme for court fees.

32. The government also notes that some respondents considered that we have taken a one-sided approach by stating that it would be 'exceptional' for a claimant to be given more costs protection than is provided by the default costs caps, but not stating that it would be 'exceptional' for claimants' costs protection to be reduced. We take the view that claimants in very few, if any, cases will require additional costs protection (as evidenced by the levels at which we have set the costs caps under the current ECPR), so consider that it will be exceptional for there to be an increase in costs protection. We note, though, that this would not limit the courts' ability to provide more costs protection in any exceptional cases where this was necessary to avoid proceedings being prohibitively expensive.

33. In summary, the government intends to take forward the 'hybrid' model as proposed in the consultation paper, with an adjustment to make express reference to the need for courts which are considering varying a costs cap to take account of court fees payable by the claimant.

### *Level of costs caps*

34. The government also sought views on whether it would be appropriate to set the default costs caps at different levels from the current costs caps. The government has considered carefully the views of respondents. It notes that setting the default costs caps at too high or too low a level could result in an unnecessary number of hearings to vary the levels of costs protection, which could result in additional delays and higher costs for all parties. The government has therefore decided to set the default costs caps at the levels of the current caps. The government may revisit this area in the light of practical experience of the new regime.

### *Financial disclosure*

35. Under the proposals, a court would not be able to make a decision about varying a costs cap without information about the claimant's financial resources. This is because, in order to apply the *Edwards* principles, the court would have to consider whether the likely costs of proceedings exceeded the financial resources of the claimant. In order to make sure that defendants would be in a position to assess whether a variation might be appropriate and, if so, whether to make an application to the court, the government proposed that claimants would have to file and serve a schedule of their financial resources at the start of the proceedings. The government is aware that some respondents considered that both sides should provide this information, but takes the view that there is no benefit in the defendant providing this information as it would not be used by the court when making decisions about whether to vary costs caps.

36. While some respondents agreed that, in order for the court to apply the *Edwards* principles, disclosing financial information was essential, the majority of respondents, particularly NGOs, raised concerns about this proposal. Some respondents raised concerns about the level of detail that might be required and charities were concerned that requiring disclosure about donors could deter donations. Other concerns included that the procedure would be onerous, complex and have a chilling effect on challenges. Some respondents suggested alternative approaches to disclosing information, such as providing the information only to the court, providing the information only when a claimant is making an application to vary the costs caps, or only when a defendant brings an application to vary.

37. The proposal in the consultation paper is similar to the approach taken where some other forms of costs protection are available: when considering whether to grant protective costs orders in accordance with the *Corner House* case,<sup>6</sup> courts have regard to the claimant's financial resources; and the new Judicial Review Costs Capping Order regime<sup>7</sup> includes an express requirement that claimants file and serve evidence summarising their financial resources. The government's proposed approach recognises that almost all defendants in these challenges will be public bodies and that the costs of defending such claims will be borne by the public purse. The government therefore considers it desirable to make sure that costs protection is not set at an inappropriately high level and considers that this can be achieved by enabling defendants to apply to the court in appropriate cases to ask for a claimant's costs protection to be reduced.

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<sup>6</sup> *R (on the application of Corner House Research) v. Secretary of State for Trade & Industry* [2005] 1 WLR 2600

<sup>7</sup> Section VI of Part 46 of the Civil Procedure Rules and paragraph 10 of Practice Direction 46

38. Turning to respondents' concerns over the complexity of the process, privacy issues and the potential chilling effect of disclosing financial information, it is not and has never been the intention that the level of detail that claimants will be required to provide should be unnecessarily burdensome. Information will only be required which the government anticipates will allow the court and the defendant to determine whether a costs cap variation might be appropriate. As to concerns about privacy, the government notes that hearings can be in private if they involve confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.

39. The government is proposing a similar approach to that which it adopted when implementing the recent Judicial Review Cost Capping Order reform, whilst recognising that there are different requirements in the context of the ECPR, where a key consideration is that the costs of challenges should not be prohibitively expensive. Unless the court ordered otherwise, the claimant would provide information on significant assets, income, liabilities and expenditure. This information would take account of any third-party funding which the claimant had received. It is anticipated that this approach would limit the burden and intrusion on the claimant and, alongside the possibility that hearings could be held in private, means the approach would not deter claims. It is not intended that charities should provide details of individual donors or individual donations.

40. The government has carefully considered respondents' proposed alternative approaches for disclosing financial information but does not consider them to be appropriate. Providing financial information to the court only and not to the defendant would mean the defendant would not be in a position to assess whether it was appropriate to bring an application to vary a costs cap. This would defeat the objective of placing defendants in a position where they could make sure that costs protection would be set at an appropriate level. That approach would give rise to other difficulties because it would be unusual to provide that one party and the court have access to information which another party does not.

41. There are also difficulties with the suggestions that financial information should only be filed and served in the event that a claimant or defendant sought to vary a costs cap. Without access to this information upfront, defendants would not know whether it was appropriate to seek to vary a costs cap in the first place. As with the previous suggestion, this approach would defeat the object of placing defendants in a position where they could make sure that costs protection would be set at an appropriate level and could mean those claimants with recourse to greater financial resource would benefit from unnecessarily high costs caps.

42. The government therefore proposes to take forward the changes as proposed in the consultation paper, with clarification about the type of financial information which will be required.

#### *Range of stepped default caps*

43. The government sought views about the possibility of introducing a range of default costs caps in the future. It recognises that the lack of ability to vary the costs caps under the current ECPR means that there is currently very limited data to inform the development of any such scheme. We will however keep this under review and revisit in when data about the variation of costs caps under the new hybrid model is available.

#### *Costs caps claims involving multiple claimants or defendants*

44. The consultation proposed clarifying that, in cases involving multiple claimants or defendants, a separate costs cap should be applied to each individual party. The

government notes that respondents were concerned that this could lead to complexity and that the proposal could lead to proceedings becoming prohibitively expensive if the cumulative level of the claimants' costs liability was objectively unreasonable. The government does not consider this approach to be unnecessarily complex and is of the view that, when carrying out the objective assessment under the hybrid model, courts would take account of claimants' cumulative costs liability when making sure that costs caps were not set at levels which were prohibitively expensive.

45. Some respondents pointed out that, under the proposal, if three claimants were required to pay costs up to the level of their default costs caps, their total costs liability would be £15,000 while, if the same case had been brought by an organisation, its total costs liability under its default costs cap would be £10,000. Respondents considered this to be unfair. The government disagrees and considers this potential outcome to be justified. First, it notes that the purpose of costs caps is to make sure that the amount of costs which might be payable by a claimant is linked to their ability to pay; and, secondly, it notes that costs caps could be varied in appropriate cases.

46. The government considers that the proposal in the consultation paper is consistent with the broad policy aim of making sure that each party has its costs capped at an appropriate level and that there are safeguards within the proposed rules to address the concerns of respondents.

#### *Costs of challenges*

47. Defendants can challenge whether a case is an Aarhus Convention claim and the ECPR should apply at all. Where a defendant brings a successful challenge and the court decides at a hearing that the claimant was wrong to assert that the case is an Aarhus Convention claim, the claimant will not normally be ordered to pay the costs of that hearing. Currently, however, where the defendant brings an unsuccessful challenge and the court upholds the claimant's assertion that the case is an Aarhus Convention claim, the court will normally order that the defendant pays the costs of the hearing on the higher, 'indemnity' basis. This provision was introduced because of concerns that defendants might be encouraged to bring weak challenges if there was no penalty for contesting a case and that, without some sanction, there could be 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 proposes replacing the existing provision with one which would mean unsuccessful defendants could still expect to be ordered to pay costs, but normally on the lower, 'standard' basis.

48. The government recognises that respondents are concerned that this proposal could lead to defendants bringing more challenges and could deter claimants from bringing claims. The government takes the view that an adverse costs award assessed on the standard basis would still provide an appropriate disincentive against unmeritorious challenges, and notes that the courts would still have the ability to choose to impose costs on an indemnity basis. A further factor is that almost all defendants are publicly-funded bodies and they would need to be satisfied that they had sufficient grounds to justify spending public money on bringing a challenge. For these reasons, the government intends to proceed with the changes as proposed in the consultation paper.

#### *Costs of applications to vary costs caps*

49. The government sought views as to whether there should be specific costs rules for applications to vary the levels of costs caps. The majority of respondents were against this



approach for various reasons, some of which derived from concerns over moving to a model which allowed costs caps to be varied. The government recognises that, as some respondents have suggested, the courts have procedures in place to deal with applications for costs and that judges would be able to make decisions about the costs of applications on a case-by-case basis. It agrees that it might not be appropriate to apply a one-size-fits-all approach to all cases and does not propose introducing specific costs rules.

### *Cross-undertakings in damages*

50. A cross-undertaking in damages is a promise to the court given by the claimant to pay damages subsequently due to the defendant or a third party if the interim injunction obtained by the claimant turns out not to have been justified. The current Practice Direction<sup>8</sup> provides that, when the court considers whether to require an applicant to give a cross-undertaking in damages in Aarhus Convention claims, 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. The proposed amendments to the Practice Direction would direct the court to apply the *Edwards* principles in their consideration of what would be prohibitively expensive for the claimant.

51. The government has considered the responses and the reasons why the majority of respondents do not agree with the suggestion. The current Practice Direction already contains provisions for the court to have particular regard in these cases to the need for the terms of the relevant order not to be such as would make continuing with the claim prohibitively expensive. It seems unlikely, therefore, that the proposed change – adding a definition of ‘prohibitively expensive’ to the existing provision – would have a deterrent effect on the types of cases being brought or on claimants seeking injunctive relief. The proposed approach would provide claimants with greater certainty about whether a cross undertaking in damages might be required by setting out the factors which the court would have to take into consideration in these cases. The government therefore intends to proceed with the changes as proposed in the consultation paper, subject to clarifying what is meant by the term ‘member of the public’.

### **Next steps**

52. The government intends to put proposals to amend the Civil Procedure Rules and Practice Directions to the Civil Procedure Rule Committee for consideration at the earliest opportunity and to invite it to make rule changes as soon as possible.

53. The government intends to review the impact and application of these changes, and to consider whether, in the light of experience, any other changes to the procedure for such cases should be made. This is expected to be within 24 months of implementation when sufficient data should be available.

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<sup>8</sup> Practice Direction 25A

### 3. Summary of responses

54. The consultation 'Costs Protection in Environmental Claims: proposals to revise the costs capping scheme for eligible environmental cases' was published on 17 September and closed on 10 December 2015.

55. A total of 289 responses to the consultation paper were received. Of these, 207 of the responses (around 70%) were from individuals. Half of these (103) used a template response prepared by Friends of the Earth and disagreed with the proposals in the consultation, as did the majority of responses received from other individuals. We also received 82 responses from businesses, campaign groups, professional bodies, public organisations, non-governmental organisations (NGOs), academic institutions, parish councils, law firms and representative bodies. They largely disagreed with the package of proposals, although for mixed reasons which will be outlined in further detail below. A full list of the organisations which responded to the consultation is attached at Annex A.

56. An impact assessment has been published alongside this document and we have also updated our assessment of the impact of these proposals on people with protected characteristics in an Equalities Statement which can be found at Section 4.

#### Responses to specific questions

**Question 1: 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.**

57. We received 262 responses to this question. Six respondents agreed with the proposed definition; 256 respondents disagreed.

58. Respondents who agreed with the proposal argued that the revised definition accurately described which claims qualified for environmental costs protection under EU law and would discourage unmeritorious claims, whilst not obstructing access to justice.

59. Those respondents who disagreed did so, not because they opposed the proposed extension of the environmental costs rules to include certain reviews under statute, but because they considered the proposals were too narrow. They also considered that the proposed definition did not address fully the UK's obligations under the Aarhus Convention, since the proposal was to extend eligibility only to reviews under statute falling within the scope of Article 9(2) of the Convention. Specific comments on the scope included:

- Costs protection should also be extended to those reviews under statute falling within scope of Article 9(3) of the Aarhus Convention in order to comply with the UK's wider obligations under the Convention and in light of the observations in the judgment in *Secretary of State for Communities and Local Government v. Venn*, which stated that the ECPR did not comply with the Convention because it does not apply to reviews under statute.
- The proposed definition only covered challenges against bodies exercising public functions and not claims against private persons. Article 9(3) applies to challenges to acts and omissions by private persons as well as public authorities.

- Costs protection should be extended to cases covering legislation impacting on the environment (environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships).
- The rules should set out precisely the subject matters of challenges that will fall within the ECPR so that claimants know when costs protection applies.

**Question 2: 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.**

60. We received 254 responses to this question. Five respondents agreed with the proposals; 249 respondents disagreed with them.

61. Those who agreed with the proposed change of wording thought it provided clarity as to eligibility. One respondent supported the clarification that those who choose to intervene in proceedings cannot benefit from costs protection under the ECPR. Other respondents who supported the proposals gave no reason.

62. The main concern for those opposed to this proposal was that the term 'member of the public' was too narrow and failed to include all those covered by the requirements of EU law and the Aarhus Convention. The prevailing view was that the proposed change to the wording in Rules 45.41 and 45.43 and the Practice Directions could give rise to legal arguments in relation to the definition of 'member of the public', which could result in NGOs, parish councils and community groups being refused costs protection. Respondents suggested this could lead to substantial satellite litigation as organisations sought to convince the court they should be eligible for costs protection, and could also be non-compliant with EU law and the Aarhus Convention.

63. In order to achieve the government's stated intention of aligning eligibility for environmental costs protection in the rules with its obligations under EU law and the Aarhus Convention, respondents suggested that the rules should describe those eligible for environmental costs protection not as a 'member of the public' but by reference to 'the public' and 'the public concerned' as defined in Article 2 of the Aarhus Convention.

**Question 3: 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.**

64. We received 255 responses to this question. Three respondents agreed with the approach outlined in the paper; 252 respondents disagreed with it.

65. Respondents who supported this approach argued that there was scope for the current ECPR to be misused since it could be used by some claimants to make unmeritorious claims in a low risk manner. They welcomed the introduction of an important screening mechanism that would prevent this. They drew attention to the serious implications that unmeritorious environmental challenges could have for local businesses and individuals, as well as for nationally significant infrastructure projects such as the construction of power stations. Limiting costs protection to those cases which have obtained permission for judicial review or review under statute should make sure that claimants give some consideration to the merits of their case and only bring claims where there is a genuine issue to be tried.

66. One respondent supporting the approach argued that the costs involved in reaching the permission stage make up a relatively small proportion of the costs likely to be incurred overall in a judicial review or review under statute. This respondent also pointed out that thresholds for obtaining permission were not excessive, and that limiting costs protection to situations where permission had been granted should not, therefore, deter claimants from bringing a claim where there was a real issue to be tried.

67. The majority of respondents to the question disagreed with the approach on the grounds that any delay in granting costs protection would introduce uncertainty. They considered that this would almost certainly breach EU law (and the Aarhus Convention) as the CJEU has stated that that citizens must have prior certainty in relation to their liability for costs. Such uncertainty, it was argued, would deter a large number of potential claimants from seeking permission for fear that they would be at risk of being ordered to pay (a high level of) costs if permission were not granted.

68. Respondents were also concerned that such an approach would remove all costs protection in cases where permission was not granted, regardless of an individual's financial resources. Respondents considered that this would run contrary to the decision of the CJEU in *Edwards*, in that there would be no assessment of whether costs would be subjectively or objectively prohibitively expensive.

69. Some respondents argued that, if this approach were introduced, defendants and interested parties might seek to exploit it by making matters more complex, submitting detailed and lengthy defence documents. This could lead to delays and additional costs which could in turn have a chilling effect on claimants seeking access to justice.

**Question 4: 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.**

70. We received 234 responses to this question. Four respondents agreed with the proposal; 230 respondents disagreed with it.

71. One respondent supporting this proposal argued that the judgment in the *Edwards* case meant that such an approach would be consistent with the requirements of the Aarhus Convention. Costs caps would be set at an appropriate level taking account of all the circumstances of the case. The courts should be free to decide whether to lower or increase the level of the costs cap, or impose no costs cap at all in appropriate cases, on a case-by-case basis.

72. Another respondent in favour of the proposal acknowledged that delays could occur as a result of disputes over the appropriate level of the costs cap. The respondent argued, however, that it was important that caps were set at an appropriate level so that neither party is unfairly disadvantaged. The benefits of being able to vary the level of the costs cap would be likely to outweigh the potential disadvantages caused by the delays.

73. The majority of respondents who opposed the introduction of a hybrid model wanted the current fixed-cap model to be retained. The main reasons for this were that the proposed model was considered too complex and removed certainty over costs liability for the claimant. Respondents considered that the lack of certainty would be in breach of both EU law and the Aarhus Convention. Other concerns included:

- The uncertainty over costs would be compounded by the fact that there could be lengthy and costly satellite litigation to determine the levels of costs caps;

- Allowing defendants and interested parties to apply to vary costs caps or remove a claimant's default cap, and allowing costs caps to be varied at any stage in the proceedings, removes certainty over costs and could act as a deterrent to challenges being made;
- The new model could lead defendants to make applications to vary costs caps in order to put undue costs pressure on claimants to withdraw their applications;
- The current caps on adverse costs awards of £5,000 or £10,000 do not apply to the claimant's total costs liability – court fees and the claimant's own legal costs routinely amount to £25,000 or more. It was unlikely that costs exposure of this magnitude could satisfy the requirement for costs to be objectively reasonable;
- Since it would be exceptional for the claimant to require more costs protection than is provided by the default costs caps, this could lead to an assumption that the vast majority of applications to vary would be from defendants seeking to increase costs caps by relying on the subjective limb of *Edwards* and the requirements set out in the draft Rule 45.44(4)(b)(i)-(vi). This, it was argued, would be a step back to the situation prior to the introduction of the ECPR, with lengthy and costly satellite litigation to determine a claimant's costs liability.

74. Some respondents suggested alternative models. These included:

- A model where the only type of variation would be on an application by a claimant to reduce the level of their costs cap. In such circumstances it was argued that an application from a very wealthy individual or group/organisation should be refused; but where a claimant could demonstrate that the default caps made the proposed claim prohibitively expensive, then the court should lower the costs cap;
- A model similar to that in place in Scotland, which allows a claimant to apply to reduce the level of their costs cap and have the reciprocal costs cap increased;
- A model under which it would only be possible for a claimant or defendant to apply to vary their own costs cap, not the other party's costs cap. This, the respondent noted, would negate the need for financial information to be provided to the court and other parties at the outset (it would only be provided by a party when applying for a variation to their own costs cap); and
- The introduction of the qualified one way costs shifting (QOCS) model. It was argued that this approach has been adopted in many other cases and would mean claimants not having to face the risk of paying opponents' costs if unsuccessful, but being able to recover their own costs if successful.

**Question 5: Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A<sup>9</sup> properly reflect the principles from the *Edwards* cases? If not, please give your reasons.**

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<sup>9</sup> Of the consultation paper

75. We received 221 responses to this question. Five respondents agreed that the criteria reflected the principles from the *Edwards* cases; 216 respondents disagreed.

76. Many of those respondents who disagreed with the criteria did so on the grounds that they opposed the proposed introduction of a hybrid model. Those respondents who commented on the criteria raised the following concerns:

- They considered the proposal for varying costs caps meant that either a subjective assessment or an objective assessment of whether costs would be prohibitively expensive would take place. Respondents considered this to be at odds with *Edwards*, which they understood requires both a subjective and objective assessment of whether costs of proceedings would be prohibitively expensive.
- The objectively unreasonable limb at draft Rule 45.44(4)(b) failed to focus on the question of whether the costs were prohibitively expensive, in an objective sense, for a typical member of the public. It was not clear why prohibitive expense should depend on factors listed at draft Rule 45.44(4)(b)(i) – (vi). These were matters which go to costs assessments generally, not to whether the costs are prohibitively expensive.
- Detailed criteria were not needed and would make the process too complex.
- The criteria should reflect those set out in the CJEU and Supreme Court judgments.
- The proposed criteria reflected a one-sided interpretation of the *Edwards* principles that would favour defendants over claimants. For example, draft Rule 45.44(3) provided that the principles in draft rule 45.44 would only be met for *increasing* a claimant's costs protection in 'exceptional' cases; whereas there would be no such requirement for cases to be 'exceptional' when considering whether to reduce a claimant's costs protection.
- The *Edwards* case confirmed that costs must be assessed as a whole.
- The judgment of the CJEU and the Opinion of the Advocate General concerning case C-260/11 both referred to the 'capacity to pay' and the 'financial situation' of the claimant. This was quite different from the 'financial resources' of the claimant – the terminology used in proposed Rule 45.44(4). To consider financial resource alone would be unfair as it would discriminate against those claimants with greater liabilities. In order for there to be a proper analysis of the claimant's capacity to pay, an assessment of the claimant's liabilities must also be taken into consideration.
- Any element of court discretion which does not benefit the claimant will not comply with the requirements of EU law and the Aarhus Convention.
- Draft rule 45.44(4)(b)(i) was deemed to be too vague and should be removed.
- It was difficult to understand what was meant by draft rule 45.44(4)(b)(iv) on the basis that a localised issue may be just as important as a challenge to a major project in terms of the objectives of the Aarhus Convention.

**Question 6: Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed rule 45.44 at Annex A<sup>10</sup>) to decide whether to vary costs caps? If not, please give your reasons.**

77. We received 224 responses to this question. 13 respondents agreed with the proposals; 211 respondents disagreed with them.

78. Respondents in favour of the hybrid model agreed it was appropriate to apply the *Edwards* principles. Some respondents who had expressed concerns about the proposed hybrid model agreed that it would be appropriate to apply the principles but only to lower the costs caps for claimants and only if both a subjective and objective assessment was carried out.

79. Those respondents who did not agree it was appropriate cited similar concerns to those raised about the hybrid model and the *Edwards* principles more generally - that the proposals would lead to an overly complex procedure which would be non-compliant with EU law and the Aarhus Convention, and that they could also lead to more satellite litigation.

80. Respondents also raised concerns about how appropriate it was for the courts to be involved in difficult questions of assessment, interpretation and judgment to determine whether varying a costs cap would result in proceedings being prohibitively expensive for claimants.

81. Respondents also considered that this proposal flouted basic principles of justice on the basis that financial resources available to the claimant had no relationship to the validity of a claim. Only the least well off would benefit from the basic cap: by definition, such people would already feel unable to risk this level of expenditure. Anyone else would then be automatically disadvantaged by ever-increasing levels of expenditure.

**Question 7: 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.**

82. We received 239 responses to this question. Eight respondents agreed with the proposal; 231 respondents disagreed with it.

83. Those respondents in favour pointed out that disclosing financial information would be essential if there was to be a subjective element to the test for varying the levels of costs caps, and the system could not be properly implemented if claimants were not required to provide this information. Moreover, the identities of any financial backers or behind-the-scenes participants should also be identified. This would address the problem of lobbying groups selecting the individual with the lowest financial means to bring a claim in order to reduce the amount of costs that could be recovered from the claimant.

84. Some respondents also suggested that hearings regarding the levels of the costs caps could be held in private to make sure that sensitive financial information did not become publicly available. Their view was that this would limit any potential concerns a claimant could have about providing information about their financial circumstances, whilst allowing

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<sup>10</sup> Of the consultation paper

the court to implement properly the hybrid approach to costs caps. It was also suggested that, if a claimant was not willing to provide this information, the court should have the power to direct that the ECPR should not apply to that particular case.

85. The main concerns raised by those respondents who opposed this proposal were that claimants could be deterred from bringing a challenge because of the need to disclose all assets. They cited the Court of Appeal judgment in *R (Garner) v. Elmbridge Borough Council*<sup>11</sup> which stated that “*the more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions*”. A further deterrent was the possibility that, under the proposed hybrid model, costs protection could be reduced as a result of the financial information submitted. Other concerns and criticisms included:

- Many respondents argued that, as a general rule, having to provide financial information would add an inappropriate burden and complexity for claimants, with little material benefit.
- NGOs and charities deemed the proposal unworkable due to the different ways in which they are funded. They also considered that members of the public would be deterred from making donations since they could be liable for litigation costs.
- The proposal was vague and lacked details of how schedules should be compiled and what type of information would be required. Some claimants would have more complicated financial means than others.
- One respondent was of the view that requiring claimants to file and serve a schedule of their financial resources at court would mean disclosing personal and revealing information about themselves to the defendant, interested parties and to the court, with no such disclosure from the other parties. This, it was claimed, contradicted the principle of equality of arms and, considered alone, was a significant reason not to require such disclosure.
- There was a privacy concern over sensitive financial information being publicly available or of the defendant deliberately or accidentally disclosing the information provided by the claimant.

86. Some respondents who had reservations recognised that financial information needed to be provided once an application to vary the default caps was made.

87. One respondent highlighted the need for a balance to be struck in the way this particular proposal would be delivered. On the one hand, they noted that the requirement to provide financial information must not be overly onerous for the claimant. On the other hand, they acknowledged that, if information was not provided, then there would be no way of the defendant knowing whether or not the subjective element of the ‘prohibitively expensive’ criterion was met. This respondent suggested a variety of options to strike this

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<sup>11</sup> *R (on the application of Garner) v. Elmbridge Borough Council and Others* [2010] EWCA Civ 1006



balance including, for example, financial information only being required if the defendant challenged the claimant's entitlement to costs protection; information being provided directly to the court; or courts taking an active role in requesting the information, where necessary.

88. Another respondent suggested that a schedule of financial resources should only be required where a claimant sought to vary the costs cap, and that it should be provided only to the court in the first instance, for the court to determine whether it should also be provided to the defendant in light of the facts and circumstances of the case.

**Question 8: 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.**

89. There were 234 responses to this question. Nine respondents agreed with the proposal; 225 respondents disagreed with it.

90. Respondents who supported this proposal agreed that a separate costs cap should be applied to each claimant and that, where there is an application to vary the levels of caps, the financial resources of each individual claimant should be assessed so that their caps are set at levels appropriate to their situation. This would make sure that there was clarity about what the potential liability of each claimant would be.

91. One respondent agreed with the proposal provided that the potential costs exposure for each individual claimant did not result in the proceedings being prohibitively expensive for that claimant.

92. Another argued that the court would still have the power to vary the value of the costs cap, and so have the ability to make sure that the total amount of costs awarded against claimants was not prohibitively expensive in the circumstances of the case.

93. The majority of respondents who disagreed were concerned that, in certain cases involving multiple claimants, the cumulative effect of the proposal could lead to costs being objectively unreasonable and therefore prohibitively expensive.

94. Respondents also thought that such an approach would give rise to complex procedures to ensure fairness between the parties and would require disclosure of personal financial information about individual claimants and organisations which would in turn deter them from bringing or supporting others in bringing environmental claims.

95. Others considered that it should be possible for members of the public to join in bringing a claim without each and every one of them being exposed to £5,000 in costs and that, unless the additional claimants introduced new or different arguments, it would not make sense to apply the cap separately.

96. Some respondents were concerned about the fairness of the proposal. They noted that the costs liability for three claimants would be £15,000 if individual costs caps were applied, but only £10,000 for an organisation, and considered this to be unfair. Other respondents referred to the Aarhus Convention Compliance Committee findings that costs awards, and the way in which costs should be allocated between multiple claimants, should be fair and not prohibitively expensive.

**Question 9: At what level should the default costs caps be set? Please give your reasons.**

97. 231 responses were received to this question. Of these, only one response advocated that the default claimant costs caps should be set at a higher level than the current costs caps; 224 wanted the default costs caps to be set at the same level as the current costs caps; and the remainder either suggested lower individual costs cap amounts between £500 and £2,000, that claimants should have no costs exposure at all, or made no specific comment.

98. The overwhelming view of respondents was that there was no evidence presented to justify setting the default costs caps for claimants at a higher level than the current claimant costs caps, or for setting the default costs caps for defendants at a lower level than the current defendant costs cap. It was the widely held view of many respondents that setting the default costs caps for claimants at a higher level than the current claimant costs caps would not only add significantly to a claimant's financial exposure, but also would not satisfy the requirement for costs to be "objectively reasonable". In other words, this would set claimants' potential costs liability at too high a level to satisfy the subjective limb of the *Edwards* test for prohibitive expense, putting the UK in breach of EU law and the Aarhus Convention. One respondent also considered that any upward movement beyond inflation would be in breach of EU law and the Aarhus Convention.

99. Those respondents in favour of fixing the default caps at the levels of the current caps argued that costs were already too high for individual members of the public and for charities representing them, and that default claimant costs caps should be at a lower level than the current claimant costs caps in order to reduce the deterrent effect on bringing arguable cases.

100. Many respondents favoured setting the default costs caps at the levels of the current costs caps with the option for claimants' default costs caps to be lowered or having defendants' default costs caps increased in suitable cases, similar to the arrangements in Scotland and discussed above in relation to question 4.

**Question 10: What are your views on the introduction of a range of default costs caps in the future?**

101. There were 217 responses to this question. Five respondents agreed with the approach discussed in the paper; 212 respondents disagreed with it.

102. Those respondents who agreed considered that this was an approach for the future when evidence was available to inform how it could work, although they thought that it could be challenging to introduce. One respondent suggested that an extended range of default costs caps with reference to a claimant's means would be better than the current fixed costs caps.

103. Those who opposed the proposal cited similar arguments to those made in opposition to the proposed hybrid model: that the introduction of a range of default caps would lead to more complexity and uncertainty for claimants and, as a result, would be in breach of both EU law and the Aarhus Convention. Additional concerns included the lack of detail about how the proposal would operate in practice, and that costs caps dependent on financial means would infringe the objectivity requirements from the *Edwards* case.

**Question 11: 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.**

104. There were 220 responses to this question. Nine respondents agreed with the proposal; 211 respondents disagreed with it.

105. One of the respondents who supported the proposal considered that the current situation was unfair because a defendant's ability to recover their costs in the event that their defence is ultimately successful is limited. This could deter defendants from challenging whether a claim is an Aarhus Convention claim, even when they have a strong case, because the risks that they are exposed to are too high.

106. Other respondents who supported the proposal did so on the understanding that the usual judicial discretion would apply, ensuring that the court could order costs on an indemnity basis if it considered this appropriate. They considered that the possibility of having to pay costs would still discourage defendants from unnecessary challenges, even if the costs they were ordered to pay (if unsuccessful) were on the standard rather than the indemnity basis.

107. The respondents who disagreed with the proposal suggested that the current provisions had in fact been quite successful in discouraging defendants from challenging the designation of a claim as an Aarhus Convention claim without very good grounds for doing so. They added that this disincentive to challenge without good reason avoids blocking up the courts with unmeritorious challenges. It was contended that the removal of the indemnity provision would open up the potential for more opportunist satellite litigation as defendants would be more likely to challenge claimants' assertion of entitlement.

**Question 12: 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?**

108. There were 214 responses to this question. 198 of the respondents considered that there was no need for specific rules, or made no direct comment other than to indicate their opposition in principle to the introduction of applications to vary costs caps more generally. 16 respondents thought there should be some provision in the rules.

109. Some of the respondents who did consider there to be a need for some provision suggested that there should be no order as to costs for unsuccessful applications that would have benefitted the claimant (applications to reduce claimants' costs caps and/or raise defendants' reciprocal costs caps).. Others suggested that costs should never be awarded against claimants who applied to vary costs caps. Other more general suggestions were that the rules should allow for a simple, quick determination of costs on paper.

**Question 13: Do you have any comments on the proposed revisions to Practice Direction 25A?**

110. We received 202 responses to this question. 201 respondents disagreed with the proposed revisions. One respondent agreed with the proposals.

111. The respondent who agreed considered that the revisions provided greater clarity on how the courts assess whether a cross-undertaking would be prohibitively expensive.

112. Those respondents who opposed the revisions to the Practice Direction did so on the basis that they wanted the requirement for cross-undertakings in damages to be removed from the consideration of injunctive relief in environmental cases. This was due to the uncertainty caused to the claimant by the fact that they might have to pay damages under a cross-undertaking, the deterrent effect, and the high risk of irreparable damage to the environment in the absence of interim relief being sought and granted. They thought that the possibility of having to pay damages under a cross-undertaking should be removed and injunctions should be granted where there is evidence that a failure to grant relief would result in significant harm to the environment.

113. Respondents also considered that the low number of applications for interim relief suggested that there was no basis for the process to be changed, nor any need to include the reference to the *Edwards* principles since the courts would apply them anyway.

114. Finally, the use of the term a 'member of the public' in the Practice Direction raised similar concerns about eligibility for costs protection already expressed in relation to question 2 above.

**Question 14: Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?**

115. We received 208 responses to this question. 193 respondents were in support of the ECPR being extended to include other types of challenge, as indicated in their responses to question 1 above. The remainder either did not address the point directly or did not consider that it should be extended.

116. While the majority of respondents agreed that the ECPR should be extended, they differed as to how far it should be extended. The majority suggested extending to all environmental challenges within the scope of the Aarhus Convention. Others suggested that to be Aarhus compliant, it must be extended to all reviews under statute concerning environmental matters.

117. There was also support for the ECPR to be extended to private nuisance claims from many of the respondents, who referred to findings of the Aarhus Convention Compliance Committee regarding two communications against the UK<sup>12</sup> and a Court of Appeal judgment in *Austin v. Miller Argent (South Wales) Ltd*,<sup>13</sup> which found that private nuisance claims are capable of falling within the scope of the Aarhus Convention in certain circumstances.

118. In addition, a number of respondents argued that the ECPR should also be extended to apply to the Court of Appeal and the Supreme Court and not only in hearings at first instance.

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<sup>12</sup> ACCC/C/2013/85 and ACCC/C/2013/86

<sup>13</sup> *Austin v. Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012

**Question 15: 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?**

119. We received 171 responses to this question. The majority of respondents considered there would be a negative effect on individuals, particularly the poorest members of society with access to limited funds. This could mean that they were unable or were reluctant to challenge developments or non-compliance with legal obligations that could be harmful to their environment. Charities were also concerned that the financial disclosure requirements could lead to their membership being exposed to the costs of any challenges undertaken by the charity.

#### **4. Equalities Statement**

120. Under the Equality Act 2010, public authorities have an ongoing duty to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity and to foster good relations between those with and those without protected characteristics.

121. There is little centrally held data on court users and so, to help the government fulfil its duties under the Equality Act 2010, we asked in the consultation for information and views to help us gather a better understanding of the potential equalities impacts of the proposed changes to the ECPR.

122. The government considers that the proposals are unlikely disproportionately to disadvantage people with protected characteristics. The ECPR will apply to all cases, whether or not they are brought by those with protected characteristics. Claimants will still receive costs protection, but the level of that costs protection could be varied based on their financial means and the circumstances of their case, including in order to give claimants more costs protection if this is appropriate. This should be a fairer approach to costs protection than our current approach and in no case could costs protection be varied in a way which would make the proceedings prohibitively expensive for the claimant. The revised ECPR will provide claimants with sufficient certainty about costs protection by setting default starting points for costs caps, which would remain in place unless the court considered that they should be varied; by providing a clear process that the courts would undertake when determining whether to vary costs caps; and, as above, by requiring that, at whatever stage of the proceedings the application to vary is brought, costs caps could not be varied in a way which makes the costs of the proceedings prohibitively expensive.

123. We believe that, if there is any differential impact on those with protected characteristics, these proposals are a proportionate means of achieving the legitimate policy aim of increasing flexibility, clarity of scope and certainty within the ECPR and ensuring it is aligned with recent developments in case law.

## **5. 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>

## **Annex A – List of respondent organisations**

Balsall Parish Council

Bar Council

The Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust

Biofuelwatch

Blake Morgan LLP

Bricycles, the Brighton and Hove Cycling Campaign

Brighton & Hove Friends of the Earth

Campaign for Better Transport

Campaign for Better Transport (East Sussex)

Campaign for National Parks

Campaign to Protect Rural England (CPRE)

CPRE London

CPRE Oxfordshire

CPRE Surrey

Cherkley Campaign Ltd

Churnet Valley Conservation Society

The City of London Law Society

Civil Justice Council

Client Earth

Combe Haven Defenders

Continuity Systems

Dean Natural Alliance

Deighton Pierce Glynn Solicitors

East Kent Against Fracking

EDF Energy



English Voting Air and Water Users  
Environmental Law Foundation (ELF)  
Envirowatch.EU  
Federation of Private Residents Association (FPRA)  
Frack Free Group  
Frack Free Ryedale  
Frack Free Sussex  
Friends of Chestnuts Woods  
Friends of the Earth  
Friends of the Forest  
Global Justice Now  
Gloucestershire Vale Against Incineration  
Gravesham Friends of the Earth  
Halsall Against Fracking  
Halsall Parish Council  
Highways England  
Hills Sparkling Pools  
Horse Hill Action Group  
Home-Start Westminster  
Hugh James Solicitors  
KKWG (Keep Kirdford and Wisborough Green)  
Labour Land Campaign  
Lancaster Diocesan Faith & Justice Commission  
The Law Society  
Leigh Day Solicitors  
Manchester Friends of the Earth  
MWHG (Manhood Wildlife and Heritage Group)

National Farmers' Union (NFU)

No Fracking in Balcombe Society (No FiBS)

No Third Runway

North Yorkshire Moors Association

PAULA (Poynton Against Unnecessary Linkroads to the Airport)

Promotion of Environmental & Applied Studies (PEPAS)

Peredur Centre for the Arts

Planning & Environmental Bar Association (PEBA)

Porthcawl Environment Trust

Renewable Energy Alliance Lancashire

Residents Against Aircraft Noise

Richard Buxton Environment & Public Law Solicitors

Roseacre Awareness Group

RSS Construction Projects Ltd

SaFE Alliance

Sheffield Green Party

South Farnham Residents Association

STOP Campsfield Expansion

Stryx Consulting Limited

Teddington Action Group

Theydon Bois Action Group

Thorne & Hatfield Moors Conservation Forum

Troutsdale Farm

UK Environmental Law Association (UKELA)

United Kingdom Without Incineration Network (UKWIN)

University College London

University of Sheffield

University of York

Wildlife & Countryside Link

Winchester Friends of the Earth

We also received 207 responses from individuals who responded in their personal capacity. These included individuals who responded using the template response prepared by Friends of the Earth.



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