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9 December 2015

Dear Sirs

Consultation on Costs Protection in Environmental Claims

We write in relation to the above consultation.

This firm specialises in planning and environmental law and has extensive experience of the costs protection provisions in relation to the Aarhus Convention, related directives, and domestic application in the CPR and otherwise.

Our response is attached. If you have any queries in relation to the above please do not hesitate to contact us.

It is right to highlight in this cover letter that the way the government has gone about the costs consultations ie. in relation to the general costs provisions over judicial review closing on 16 September 2015 and this one opening on 17 September 2015 appears to us to be procedurally unfair. There is a considerable degree of overlap between the two and they should have been run together.

We also believe that the proposals as put are unlawful and likely to lead to challenge either generally or in specific instances which are likely to arise if the proposals are implemented.

Overall the proposals do not reflect a bona fide attempt to implement the Aarhus Convention or the (mandatory) provisions of the EU directives to which those rules are directly imported.

Yours faithfully

Richard Buxton Environmental & Public Law

CONSULTATION RESPONSE OF
RICHARD BUXTON ENVIRONMENTAL & PUBLIC LAW SOLICITORS

General comments

1. Before answering the specific consultation questions some general relevant comments are provided.

2. The Aarhus Convention was ratified by the UK and the EU in February 2005. The UK was required to transpose it in relation to the application of the EIA and IPPC directives by 25 June 2005 "at the latest" (Article 6, PPC directive 2003/35/EC). It manifestly failed to do so and the current proposals if implemented will leave it more seriously in breach than it has been in the past few years following belated implementation in the CPR.

3. The UK has had 10 years to ensure that its obligations under article 9 of the Aarhus Convention are fulfilled, namely that all legal proceedings within the scope of the Convention are 'fair, equitable, timely and not prohibitively expensive'. While it is recognised that there may be a number of interests at stake in legal proceedings relating to the environment, meeting the obligations of the Aarhus Convention and related directives should not be complex, nor should it be an onerous task on government or other interested parties. Indeed simplicity is a cornerstone of appropriate implementation, so that people can know where they stand and exercise their rights with certainty. The current proposals introduce an extraordinary and wholly unnecessary level of uncertainty and complexity.

4. At its simplest, the obligations on the UK are to ensure that the purposes of the Convention are met in a fair, equitable, timely and affordable manner. The purposes of the Convention include, e.g:

> the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development, ...

> that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,
>
> that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
>
> that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights, ...
>
> recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection, ...

5. One way of meeting this provision is make public funding (legal aid) more widely available to those who cannot afford the costs involved in proceedings. Another is to adopt the proposal in the Jackson Costs Reform proposals of providing Qualified One Way Costs Shifting (QUOCS) as has been made available in relation to personal injury cases. There is no sensible reason why similar provisions cannot apply to environmental cases.

6. All parties interested in environmental proceedings would benefit from these relatively simple procedures by ensuring certainty, simplistic and ensuring equality of arms – something that is sought in e.g. the overriding objective of Part 1 of the Civil Procedure Rules.

7. Article 9(5) of the Convention also requires the UK to:

> ... ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

UK non-compliance with international and EU obligations on costs

8. The UK has failed to comply with Article 9(4) and 9(5) since 2005 and it continues to do so. This is clear from:

1) Decision IV/9i on non-compliance by the UK approved and adopted by the Meeting of the Parties (July 2011) by

(a) By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned failed to comply with article 9, paragraph 4, of the Convention;
(b) The system as a whole was not such as "to remove or reduce financial [...] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider;
(c) By not ensuring clear time limits for the filing of an application for judicial review, and by not ensuring a clear date from when the time limit started to run, the Party concerned failed to comply with article 9, paragraph 4 of the Convention;
(d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned also failed to comply with the article 3, paragraph 1 of the Convention; ...

2) Decision V/9n on non-compliance by the UK approved and adopted by the Meeting of the Parties (July 2014) by

(a) By not taking sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive and, in particular, by not providing clear legally binding directions from the legislature or the judiciary to this effect, the Party concerned continues to fail to comply with article 9, paragraph 4, of the Convention;

(b) In the light of the above finding that the Party concerned has failed to take sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5;

(c) By still not ensuring clear time limits for the filing of all applications for judicial review within the scope of article 9 of the Convention in England and Wales, Scotland and Northern Ireland, nor a clear date from when the time limit started to run, the Party concerned continues to fail to comply with article 9, paragraph 4, of the Convention;

(d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned continues to fail to comply with article 3, paragraph 1, of the Convention;

3) The decisions of the Court of Justice of the European Union (CJEU) in Case C-260/11 *Edwards v Environment Agency* [2013] 1 WLR 2914, and Case C-530/11 *Commission v UK* [2014] 3 WLR 853.

4) By a number of Aarhus Convention Compliance Committee (ACCC) findings including e.g. ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2008/ (... etc) to ACCC/C/2013/85 & 86.

5) By a finding of the Court of Appeal in *Secretary of State for Communities & Local Government v Venn* [2014] EWCA Civ 1539 and that:

> "34. ... In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK ... it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles upon which it may be challenged, but upon the identity of the

> decision-taker, is systemically flawed in terms of Aarhus compliance.
>
> 35. This Court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters ... That review will be able to take our conclusions in this Appeal, including our conclusion as to the scope of Article 9(3), into account in the formulation of a costs regime that is Aarhus compliant."

9. It is particularly disappointing in the light of the *Venn* judgment to find that the UK has produced a consultation paper which fails to address the non-compliance findings as above other than in relation to EU law related matters. Moreover, it seems that any certainty that the Government was seeking to achieve in its 2011 Consultation Paper relating to judicial review (and the subsequent amendments to the CPR) has been ignored; without any evidential basis.

10. The Government is simply failing to respond to the concerns and findings of the Compliance Committee, the CJEU and the Court of Appeal. It is not acting or proposing to act in accordance with the requirements of the Convention or the applicable directives. We do our best to highlight these errors below.

11. Finally by way of introduction, in assessing "prohibitive expense" it is essential to appreciate not only the costs to opponents to which a claimant is exposed, but also own-side costs. It is not right to rely on conditional fee agreements (CFAs) as a mechanism for providing access to justice. The system is simply unsustainable and even where legal advisers do work to reduced rates, partial or even whole CFAs, a claimant's costs are still significant in the context of e.g. Court fees (now close to £1,000 to bring a JR through to a substantive hearing let alone appeal) and other out of pockets. The government should recognise that many people have hardly any money to spare (despite not being eligible for legal aid).

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.

12. No. It is encouraging that the Government are seeking to include some statutory review procedures within the definition of an Aarhus Convention (the Convention) claim. However, the definition as proposed only seeks to allow statutory review to decisions that fall within article 9(2) of the Convention. This therefore leaves a gap in the types of claims that can be brought in accordance with articles 9(1) and 9(3) of the Convention. There is no explanation or justification for this restriction of statutory review procedures only to those which fall under article 9(2).

13. In effect, the proposal appears improperly to focus on the precise nature of the judicial process and identify of the decision-maker to define what a claim is. It is important to define an Aarhus claim, but an error to seek to narrow this to something less than the scope of the Convention. This has already been identified by the Court of Appeal in *Venn*, referred to above.

14. An 'Aarhus Convention claim' should be what its title suggests – a claim that falls within the scope of the Aarhus Convention having regard to the wide scope and purpose of the Convention. There is no possible logic in attempting (in effect) to exclude some types of statutory review cases. These are subject to almost identical (especially in the light of the recently introduced permission stage) judicial procedures and consideration.

15. At least three problems are bound to arise with the proposed scheme. First, there will be uncertainty in relation to case where it is said that the directives apply but there is argument about that (and it can be the core of the dispute). In this connection see *McMorn v Natural England* [2015] 3297 (Admin). Secondly, for some reason some types of statutory review do not appear to be included eg. under s.113 Planning and Compulsory Purchase Act 2004. Thirdly, while it is clear that the provisions of Article 9 apply as a matter of law in cases involving the EIA and IPPC directives, the CJEU has stated it would be "inconceivable" if the same rules did not apply in other cases where EU law is involved: see Case C-240/09 *Lesoochranárske zoskupenie VLK* [2011] (there, as often, the Habitats Directive, but see also in particular cases concerning the directive 2001/41/EC on strategic environmental assessment).

16. The Government has given no explanation and has provided no evidence, why it persists with this absurd distinction. This is the correct juncture at which to remove this anomaly, as the aim of the proposed changes is to 'improve' the

rules and bring about increased "clarity of scope and certainty within the regime".

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.

17. No. The proposed changes to the wording of the rules and Practice Directions are too restrictive and go against the purpose of the Convention. The point of the Convention is to ensure that review proceedings are open to "members of the public". The suggested changes (with the exception of seeking to include some statutory reviews) will not ensure this but rather seek to limit is application and who may apply. It is clear from the Convention, the ACCC guidance and a growing body of jurisprudence that the Convention is intended to confer 'wide access to justice' see e.g. *R (Halebank PC) v Halton BC* [2012] EWHC 1889, *R (HS2 Action Alliance Ltd Sec of State for Transport* [2013] EWCA Civ 920, and *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin). The EIA directive has a "wide scope and broad purpose" (see eg. Case C-72/95 *Kraaijeveld* [1996] at paras 31 and 39. In any event it is not clear what the amended wording seeks to achieve: if it is that (for example) parish councils or other representative bodies are ineligible for protection, that would be likely to be struck down.

18. The consultation document does not identify any examples as to where it is felt that the current rules have been interpreted contrary to the Aarhus convention. The convention does not use the term 'member(s) of the public". The consultation document refers at paragraph 30 to Article 2 of the convention, which defines "the public" and the "public concerned". The definition of the former is extremely broad, covering "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups." It clearly is not limited to 'members of the public' in the sense normally connoted in English, ie individual natural persons.

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

19. No. As a preliminary point, the Government is unduly limiting the scope of this question to judicial review and statutory review and it is clear from the ACCC,

C-23 and C85 & 86 and also the Court of Appeal in *Austin v Miller Argent* [2014] EWCA Civ 1012 that costs protection goes far beyond this.

20. It is essential to know the position at the outset. People need certainty. If that is not provided, it is unlikely they will be able to take part in those proceedings at all. Individuals and community groups are reluctant to embark on litigation without costs protection and limitation on their adverse costs exposure. The permission stage can be highly contentious (especially if an oral hearing or, worse for these purposes, a rolled up hearing is involved) and the costs exposure obviously prohibitive. High costs claims from opponents are also even made for paper responses (for example, £19,989 was claimed for an acknowledgement of service filed in June of this year (*R (Kverndal) v LB Hounslow*); this was in an Aarhus claim where costs protection applied from the outset). Considerable investment is required by claimants at the permission stage. This cannot lawfully be inhibited by complete uncertainty in relation to opponents' costs. It would run completely counter to the purpose of the Convention and access to justice.

21. The government correctly recognises at para 33 of the consultation that the proposed approach would increase uncertainty and be a deterrent to bringing claims.

22. The current position in practice in relation to recoverability of costs at the permission stage is that Defendants and Interested Parties are only entitled to the acknowledgement of service costs. There is often dispute about the entitlement of IPs (who in particular tend to put in large claims, often exceeding the £5,000 cap, and where making such claims is inconsistent with the rules in *Bolton MBC v Secretary of State for the Environment* [1996] 1 All ER 184). The Courts tend to be restrictive about making awards, this is very unpredictable. At least at the moment one can be assured it will be less than £5,000 in total. In ACCC C-77 the Compliance Committee found that costs before permission can also be prohibitively expensive.

23. The proposal only to grant costs protection once permission has been granted would only work if a preliminary costs cap is placed on the Defendant and Interested Parties' overall recoverability of costs, at say £1,000, and then increasing once permission has been granted. This will ensure costs protection is available to claimants at all stages of the proceedings as the Convention requires.

24. Finally, in its 2011 Consultation Paper CP16/11, the Government noted that only granting costs protection at permission stage would not provide sufficient certainty for those seeking to rely upon it. The position has not changed since.

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

25. No. A hybrid system removes the certainty of costs protection and introduces complexity into what should be a straightforward and easy regime. To allow Defendants and Interested Parties to apply to vary both their costs caps could lead to them making such applications to frustrate and put undue costs pressure on a claimant in an attempt to have them withdraw proceedings.

26. In Case C-530/11 *Commission v UK* [2014] the CJEU affirmed that legal proceedings must 'neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable'. This does not then suggest any need for a hybrid model such as propose in new CPR 45.44(4).

27. The proposals are unnecessarily complicating the provision of costs protection; something contrary to Article 9(5) of the Convention.

28. The government should recognise that the sorts of provisions it proposes here (and elsewhere in the consultation) are likely to lead to increased disputes about costs and court time and overall frustrate the purposes of the Convention. It has to be said that a combination of the Garner decision and the CPR has hugely reduced the time spent and costs associated with arguing about costs in judicial reviews. This should be built upon rather than destroyed by the opportunities the proposals would give to opponents. Given that one of the government's professed aims is to speed up planning judicial reviews, (re)introducing 'satellite litigation' about costs is clearly antithetical to that.

29. There is however a problem with the CPR system in England and Wales (cf. Scotland), namely that it is inflexible in coping with people who cannot afford the £5,000 cap and/or the £35,000 reciprocal cap is unfair where the costs are very large. There should be scope, which would be consistent with the convention, for these limits to be increased if required. The lower limit is a particular problem for people on the edge of legal aid eligibility. It is not in

accordance with the Convention (nor the findings of the CJEU in *Commission v UK*) to permit such state of affairs.

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

30. No. In Case C-260/11 *Edwards* the Court held at §46 that:

> "It must therefore be held, that where the national court is required to determine in the context referred to in paragraph 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime."

31. The criteria set out at proposed 45.44(4), Annex A do not reflect the principles set out in *Edwards*. This is because the proposed test requires either a subjective test or an objective test to be applied to varying costs caps when *Edwards* requires all factors (both objective and subjective) to be looked at when considering whether proceedings are prohibitively expensive. This point is made in answer to Q4 and again, in any event applying the Edwards criteria will be adding unnecessary complexity to the consideration of costs protection.

32. The decision in *Commission v. UK* is to the same effect (see paras 47-51). One must consider whether the costs are both subjectively and objectively not prohibitively expensive.

33. Overall we do not just disagree with the proposals; we believe they are unlawful.

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.

34. No. Adopting the *Edwards* criteria will add unnecessary complexity to what should be a simple application to vary the costs protection cap. An Aarhus Convention claim should not be prohibitively expensive and an applicant seeking to vary the standard costs cap would only do so if proceedings would be prohibitively expensive at the standard costs caps.

35. Requiring applicants to submit all financial information about themselves and their fundraising efforts as well as requiring them to meet all of the *Edwards* criteria places a burden which will add to their own costs causing proceedings to be even more prohibitively expensive. Again, as above recall the requirement for objective non-prohibitive expense (and having regard to own-side costs). Persons applying for costs protection are usually apprehensive about issuing legal proceedings in the first place, and uncertainty about what the costs cap may turn out to be has further chilling effect.

36. The problem already arises to some extent on appeals, both to the Court of Appeal and Supreme Court, where usually additional (ie. increased) costs caps are imposed further exposing the claimant to originally unexpected costs. That at least arises at a separate procedural stage. Arguably it is unlawful given the need to know the position at the outset. The CJEU's views on the point are set out at para 51 of *Commission v UK* and it follows that if it is unlawful to increase costs exposure even at different stages of appeal it must also be unlawful to do so during the course of initial proceedings.

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.

37. No. This will have a very obviously chilling effect. Further, where continued fundraising will be required it would be wholly impracticable. It would be further complicated where people pledge to cover costs of others. It would also effectively turn judges into forensic accountants, attempting to work out whether a claimant 'can afford' the defendant's costs. What if one claimant has a relatively large cash reserve but is intending to purchase his or her first home with that? Or a claimant who is retired and has a low fixed income but owns a house in a relatively expensive area? Which of these persons is more able to afford the costs of a judicial review? Would a judge order in effect that a claimant should either forego his chance at buying a first home (clearly contrary to the government's aims in other respects) or should a pensioner be

forced to sell his house (again how does this aid the public)? All in order to pursue their rights to ensure that public authorities make decisions in a lawful manner? It is difficult to see how this coincides with the government's professed priorities or is a fair way in which to treat its citizens.

38. The requirement to provide financial information places an undue burden upon applicants and any supporters and is likely to act as a deterrent to bringing justified proceedings. This point was made by the Court of Appeal in *Garner v Elmbridge,* §52:

> "52 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."

39. The Government is reminded that the rights conferred by the Convention is to further its purposes and objective. In that sense, proceedings may be pursued which do not primarily a private or personal benefit to a person seeking costs protection. Using costs and scrutiny of a person's financial means is not the correct way to seek to limit or somehow discourage frivolous claims. In judicial review there is a permission stage to achieve that aim. In other proceedings, there is e.g. early active case management.

40. A further problem with providing all financial information is that if there is an objective cap set (eg. as at present £5,000) there is no objective reason for requiring any more information than to satisfy the Court that the costs can be covered, and the requirement would thus infringe human rights requirements.

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.

41. No. This will make bringing proceedings prohibitively expensive. It is often the case that those seeking costs protection often struggle as it is to provide funding for one costs cap. There are various permutations to the proposal but all of them involve escalating uncertainty. For example there are often good reasons to have two claimants (indeed, often a husband and wife wish to be claimants) or more than one person has other reason to be involved in a claim. However that is no reason for the costs exposure to increase as the effort involved in defending the claim does not increase with the number of

claimants. Unlike in other forms of civil litigation, there is no chance of an increase in damages resulting from successful multiple claimants.

42. Similarly it is unfair for costs exposure to increase depending on the number of defendants, indeed this would usually infringe *Bolton* [1996] 1 All ER 184 principles, but the removal of certainty is wholly unsatisfactory. Usually the underlying support eg. from the community is the same. On the other side of the coin, it is not clear if the government is proposing that each defendant would be liable for the full eg. £35,000 cap – but in such case the claimant(s) would not know the extent of their potential recovery as costs are not usually awarded against more than one defendant. The proposal infringes the Convention on one hand in sheer quantum potential, and on the other hand for uncertainty and thus making proceedings prohibitively expensive for its chilling effect.

43. Further, in ACCC C-27 the Compliance Committee found that apportioning costs among multiple claimants was unfair as well as the costs order imposed upon the claimants in the associated case.

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

44. Any default costs cap should not exceed the present limit of £5,000 and £10,000 and, if anything, should be lowered or at least be capable of being lowered if circumstances require, Best would be to have a QUOCS system (see above). There are unfortunately, many occasions where individuals and/or groups have been dissuaded from taking legal action because the existing limits in CPR 45.41-44 are too high and cannot be afforded or because there is uncertainty by the courts in its approach, in instances where there were, *prima facie* reasonable prospects of success.

45. Suggesting an increase in the cap for applicants to £10,000 and £20,000 is further restricting Convention Rights without any evidential basis whatsoever to ensure that costs are not prohibitively expensive. The suggested claimant exposure is far too high for most people and indeed organisations subjectively let alone objectively speaking especially when considering own-side costs as well. But on the other hand the more limited recovery (see below) means that the claimant effectively ends up paying costs that should be being recovered.

46. Applicants often cannot afford the £5,000 current limit and often have to rely on fundraising in the community for not only adverse costs but also to cover their own costs and expense and this is with their legal representatives working on conditional fee agreements (CFAs) to ensure that their own costs are affordable.

47. Increasing the costs cap to £10,000 and £20,000 respectively will be prohibitively expensive and contravene Article 9(4) of the Convention.

48. Reducing the defendants' liability to claimants from £35,000 to £25,000 will only further seeks to discourage people from bringing proceedings in circumstances where there are reasonable prospects of success. In particular, in those cases where CFAs are made available to applicants to make their own costs affordable, lowering the defendant liability will place a greater burden on the applicants to cover their own costs of proceedings. At present the cap of £35,000 plus VAT often does not cover the costs of proceedings where a claimant has been successful. (NB clarity about recovery of VAT is required – the Civil Procedure Rules and the Courts usually accept that the amount should be plus VAT: see *R(Warley) v. Wealden BC* [2011] EWHC 2083 (Admin) at paras 164-5.

49. The government has put forward no evidence to show that defendant public authorities suffer hardship in paying costs up to the current cap of £35,000 or that lowering the cap on the claimant's recovery will achieve any real savings to the public purse given the relatively low number of successful claims in judicial review. It will however make a significant difference to whether bringing successful claims (where the Court has found that the decision was unlawful) are prohibitively expensive.

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

50. A range of default costs caps will create uncertainty in the granting of costs protection. It is also unclear as to how this will work in practice i.e. will there be different categories of caps and does it depend on the claimant's income or fundraising efforts as to which category they fall in?

51. There is as above one sensible default range of caps, namely to deal with the permission stage. For example there could be a default £1,000 at the

permission stage in judicial/statutory review to ensure costs of bringing proceedings are not prohibitively expensive. That would indeed be fairer and more logical than the current system whereby potentially all of the cap can be used at the permission stage.

52. Default caps dependent on means would anyway infringe the objectivity requirements of costs capping as set out above.

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.

53. No. Costs incurred in defending a challenge as to whether a claim should have costs protection is a waste of time and resources. Defendants may challenge costs protection applications to frustrate proceedings and, if so, they should be required to pay the full (ie indemnity) costs if their challenge is unsuccessful. The costs ordered should also be in addition to the costs cap on the claimant's recovery, as is the current practice. It is wrong and counter-productive to reduce the disincentive for such challenges.

54. The issue of such challenges further underlines why clarity and certainty in this area is essential. The Government's present proposals are likely to have precisely the opposite effect to the benefit of no one.

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?

55. The courts are already able to deal with these types of matters. The only point to clarify is that any application made to vary a costs cap should be dealt with (first on the papers) before any substantive hearing relating to the claim. It quite often happens that these costs issues are deferred to the substantive (even if interlocutory) hearing which can be terribly wasteful of resources eg. if the claimant has to abandon the claim at that point. Applicants must have certainty in costs before they pursue proceedings.

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

56. PD25A 5.1B is already a difficult provision to comply with, as often claims arise very urgently. For the same reasons as above in relation to Convention compliance generally is it wrong to restrict the concept of "member of the public".

57. In proposed paragraphs 5.1B(3) the consultation introduces the Edwards criteria which were not originally conceived in the context of interim injunctions. As injunctions are more likely to be "one off" than costs issues discussed above there is, arguably, likely to be more scope for consideration of the factors mentioned in 5.1B(3)(b). But these are the sorts of factors which would be weighed up in any situation even pre-Aarhus. The problematical provision relates to consideration of the claimant's or claimants' resources. This is wholly unacceptable. Individuals, even big NGOs, can practically never either actually cover an undertaking in damages, and/or be properly advised to so. It will normally amount to financial suicide. The same goes for multiple claimants. Some wealthy people may be prepared to risk £10,000 as part of a group claim including own-side costs. But none, even in concert with others, would sanely risk say £10,000,000 on an undertaking in damages that might be involved in preventing commencement of development for the sake of an argument as an interested member of the public exercising public law rights that the permission is unlawful.

58. It should also be noted that very often injunctions bring potential exposure to a second set of legal costs eg. of an interested party developer. It is important that these are covered by the costs limits discussed above, and not increase them.

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?

59. Yes. Costs protection should be provided to any proceedings to which the Aarhus Convention applies having regard to its wide scope and purpose.

60. In *Austin v Miller Argent* the Court of Appeal affirmed that <u>private</u> nuisance actions were in principle capable of constituting procedures which fell within the scope of article 9.3 of the Aarhus Convention. This approach is being applied by some courts but not by others In *McMorn* [2015] EWHC 3297 (Admin), Ouseley J held that a challenge to Natural England's refusal to grant a

licence to kill or remove buzzards fell within the scope of the Convention irrespective of the result of the licensing decision and that

> "On the face of CPR Part 45.41, this claim falls within it. It is a claim for judicial review of a decision which is subject to the Aarhus Convention. It is subject to the Convention because the decision was made in respect of powers in national law relating to the environment - the WCA and the Birds Directive which, for the purposes of Article 9(3) of the Aarhus Convention, is also a national law relating to the environment.

61. He concluded that:

> 246. Besides, as [*Garner v Elmbridge BC* [2010] EWCA Civ 1006] pointed out, there is a significant public benefit in decisions on national environmental law being lawful, and therefore in their lawfulness being tested readily by individuals. The fact that the individual's livelihood or property value may also be at stake could not disapply the Convention or CPR, and there is nothing in the text of either to suggest that it does. The Convention is not just for the disinterested environmentalist or national body, but must have recognised that many individuals or ad hoc groups of individuals would be concerned with decisions which affected them personally, as it affected their enjoyment of their property, leisure, area or interests.

62. Moreover, a narrow approach in other matters is leading to unfairness and inequality of arms. In *Holden & others v Wells* [FTT 4.11.15] the First Tier Tribunal (Property Chamber) refused costs protection on grounds which, among other things, raised inequality of arms:

> I can dispose of this briefly by say that the inequality of arms that the Respondent asserts exists here is inevitable in a full costs-shifting jurisdiction if the parties are of unequal means. It is not arguable that that in itself enables, let alone requires, the tribunal to make a costs protection order.

63. This is a surprising but candid statement by the FTT (and subject to appeal). The concern is such 'inevitable inequality of arms' for any case within the scope of the Aarhus Convention (within which *Holden v Wells* falls because it relates to land ownership and use on an area designated a Special Area of Conservation

and Special Protection under EU Directives and also Ramsar site under international legislation) is that it is contrary to Article 9 of the Convention.

64. There are some unusual environmental claims where the Aarhus Convention and the relevant directives require costs protection but are in fact be brought in the Queens Bench or Chancery Divisions, in particular claims for damages in fraud cases involving the environment and Case C-224/01 *Kobler* [2003] claims.

65. Finally, the consultation identifies certain statutory reviews which currently are not afforded costs protection. It is agreed that the statutory reviews suggested by the Government should fall within the scope of the Convention (namely s.288, s.289(1),(2) of the Town & Country Planning Act 1990; and s.65(1) of the Planning (Listed Buildings Conservation Areas) Act 1990). But there is no reason given why other statutory appeals, e.g. s.113 of the Planning and Compulsory Purchase Act 2004, are not included or why all other proceedings within the definition of the Convention should not be included. To do so appears to be an error of law.

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?

66. Yes. All persons or groups who seek to use a review procedure envisaged by the Convention but cannot because it is unfair, inequitable, not timely or prohibitively expensive will be negatively affected by the proposals and also the Government's continuing failure to comply with its Convention obligations. Certainly it is possible to have claimants with a disability but nonetheless do not qualify for legal aid despite being on what is in any reasonable view a very low income deterred from pursuing a claim because of the costs implications.

67. The odd feature of this consultation is that it does not seek to tidy up the several good things about the current system so that it works smoothly and well for all concerned, for example in relation to permission exposure, to appeals, to people who are not quite eligible for legal aid, and to VAT. Instead it indulges in a series of highly controversial proposals which are bound to cause everyone a great deal of time and trouble, not least government and local authority defendants and the Courts themselves.