

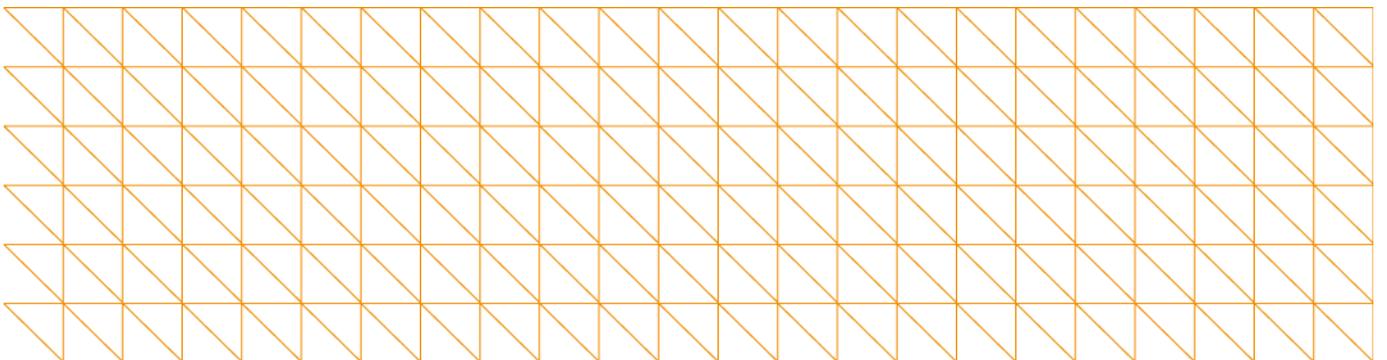


Cost Protection for Litigants in Environmental Judicial Review Claims

Outline proposals for a cost capping
scheme for cases which fall within
the Aarhus Convention

Response to Consultation CP(R) 16/11

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Ministry of
JUSTICE

Cost Protection for Litigants in Environmental Judicial Review Claims

Outline proposals for a cost capping scheme for
cases which fall within the Aarhus Convention

Response to consultation carried out by the Ministry of Justice.

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk**

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Costs Protection for Litigants in Environmental Judicial Review Claims
Response to public consultation

Introduction and contact details

This document is the post-consultation report for the consultation paper, *Cost Protection for Litigants in Environmental Judicial Review Claims*.

It covers:

- the background to the consultation;
- a summary of the responses;
- responses to the specific questions raised in the consultation; and
- the next steps.

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Costs Protection for Litigants in Environmental Judicial Review Claims
Response to public consultation

Background

The consultation paper *Cost Protection for Litigants in Environmental Judicial Review Claims* was published on 19 October 2011. It invited comments on Government proposals to implement the UK's obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention") and Directive 2003/35/EC ("the Public Participation Directive" or "PPD"), in relation to England and Wales (separate consultations are being undertaken in Scotland and Northern Ireland).

The Aarhus Convention requires parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In particular, it requires parties to ensure the public have access to a procedure to challenge decisions subject to the public participation procedures and contraventions of national law relating to the environment and specifies that those court procedures should, amongst other things, not be 'prohibitively expensive'. Both the UK and the EU are parties to the Convention.

The PPD implements, in part this requirement and aims to improve public participation in the making of certain decisions affecting environmental matters. In particular, the Directive amends Directives on Environmental Impact Assessments and Industrial Emissions to require Member States to permit members of the public to have access to a court procedure to challenge decisions subject to the public participation procedures and specifies that those court procedures, amongst other things, should not be 'prohibitively expensive'.

Over a number of years the courts have been developing mechanisms known as Protective Costs Orders (PCOs), which are designed to limit the exposure of claimants to defendant's costs. Case law has now moved to develop a strong presumption that a PCO will be granted where an environmental case is brought in the public interest. The case of *Garner* defined cases that fell within the PPD as automatically within the public interest, therefore there is effectively no public interest test to be met in such cases. However, the courts still retain a large amount of discretion around the granting of a PCO, in particular around the amount of the order and the question of what test should apply in determining the level at which a particular PCO should be set.

The Government has accepted for some time that it would be in the interests of applicants in environmental judicial review cases to provide greater clarity about the level of costs through a codification of the rules on PCOs which sets out the circumstances in which a PCO will be granted and the level at which it will be made.

The consultation included questions about the proposed limit and the appropriate level of the cross-cap. It also sought views about the

circumstances in which it might be appropriate to depart from the cap and whether it should be capable of being raised as well as lowered. It also asked similar questions about the cross cap and about whether the granting of a cap should be linked to the granting of a cross cap.

The consultation period closed on 18 January 2012 and this report summarises the responses, including how the consultation process influenced the final shape/further development of the policy/proposal consulted upon.

A list of respondents is at Annex A.

Summary of responses

1. A total of 22 responses to the consultation paper were received. These can be aggregated into the following groups
 - 9 were from NGOs (i.e organisations representing environmental concerns, usually on a charitable basis)
 - 3 were from public bodies, including local authorities
 - 7 were from legal practitioners including bodies representing them
 - 1 was from a member of the judiciary
 - 1 was from an individual respondent
2. As well as answers to the specific questions account was taken of respondents' overall views on the proposals. This included whether they thought that the proposed approach gave proper effect to the Convention and the PPD, and for any evidence relating to both the extent to which a non-codified PCO regime (i.e. the status quo) has a "chilling" or deterrent effect and the impacts of the introduction of PCOs along the lines proposed, including potential increases in caseload.
3. Not all the respondents chose to answer all the questions and some respondents opted to submit their response in the form of an extended letter or article without necessarily directly answering some or all of the questions. In those cases where particular references are clearly to particular questions in the consultation paper those references have been treated for the purposes of analysis as answers to those questions.
4. In general respondents welcomed the proposals to codify the PCO regime, set out in the paper. Most were of the view that they represent an improvement over previous proposals and the status quo. However, many of the NGO respondents expressed reservations about whether the proposals went far enough and whether they were fully compliant with the requirements of the Aarhus Convention.
5. There was not, however, unanimity on the reasons for this or on the way forward. Some respondents took the view that a system of one way cost shifting or qualified one way cost shifting would be superior to PCOs. Indeed one NGO expressed, very forcibly, the view that PCOs would be non-compliant and only a system of one way cost shifting would be compliant. This was based mainly around the view that the proposed cap level of £5,000 was too high for some, and that the proposed PCO regime still relied too heavily on judicial discretion, particularly on the proposals to allow challenges to the cap. The view was that this created insufficient

legal certainty for claimants and that legal certainty was a fundamental requirement of EU law.

6. There were a number of reservations around the cap level and the proposals for challenge amongst other respondents, though the introduction of one way cost shifting was not necessarily seen as the way forward by all respondents from these groups. The risk of satellite litigation surrounding a PCO regime was a theme raised by a number of respondents and indeed this risk, with its tendency to create delay and drive up costs substantially was seen as a severe flaw by many. One respondent suggested that the solution would be to reconstitute the proposals into the form of a fixed costs regime, which would overcome many of the uncertainties surrounding the grant of PCOs and the application process itself.
7. There were also concerns expressed about the lack of costs protection for the permission stage of a judicial review (so called '*Mount Cook*' costs), because the current proposals would not provide costs protection prior to the application for permission (at which time the PCO application would also be made).
8. Others had concerns about the level of claimants' own costs. They had concerns that it was expensive to bring a judicial review already and most applicants would be unable to qualify for legal aid. In this context there was concern that the proposals to introduce a cross cap, limiting what applicants could recover if their review succeeded, would be a further barrier to justice and would mean that NGOs would not be able to compete with Government and its agents who might be better resourced.
9. The above issues will be covered in more detail in the sections relating to particular questions. There were however, a number of additional issues raised, mainly by NGOs, but also some legal practitioners, about the scope of the consultation. A number expressed the view that it was insufficient to cover judicial review alone and that statutory appeals, and other forms of statutory applications should also be eligible for codified PCOs. Some of these respondents also took the view that private law cases covered by the convention should also be eligible for PCOs. Other consultees commented that the consultation also needed to address issues surrounding how claimants fund their own legal advice and representation.

Responses to specific questions

- 1. Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.**

There were 11 responses to this question, and out of those 9 respondents said that they would either be deterred themselves or (in the case of legal representatives) knew of potential litigants who had been deterred from bringing judicial review applications because of the perceived risk of high costs.

One respondent referred to a survey (conducted by the World Wildlife Fund) that found that 76% of respondents were aware of good arguable cases that did not proceed because of concerns about exposure to costs.

Another respondent stated that costs limit the number of cases that can be taken at any one time and commented that when they are at capacity they do not take additional cases to the point where they could determine how arguable and winnable a case is. Another respondent referred to two studies by Defra '*Civil law aspects of environmental justice*' (ELF, 2003), which found that 31% of potential claimants who had been advised that they had a reasonable prospect of success in their claim did not pursue legal proceedings because of the cost and '*Costs Barriers to Environmental Justice*' (ELF & BRASS, 2009) which found that nearly half of environmental cases did not proceed beyond a preliminary advice stage because of exposure to costs by potential claimants. One respondent listed cases which he had not pursued owing to concerns about potential costs.

One of the respondents who had not been deterred recorded that they had nevertheless found the process stressful and time consuming. The other was not in the business of bringing challenges by way of judicial review.

- 2. Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons.**

There were 10 responses to this question, mostly from NGOs or legal practitioners representing potential applicants. None were from public bodies. 8 of the 10 responded positively to the question and a number explicitly stated that a codified PCO system would reduce the scope for

argument and increase legal certainty. However, whilst the majority of respondents broadly supported the proposition, many felt that the proposals either did not go far enough or were only a minor improvement to the status quo.

The main difficulties identified by various respondents are set out below:

- Costs exposure is still too high, and therefore potentially a deterrent.
- Permission stage is too late for a PCO application – costs protection is needed for the permission stage itself (*'Mount Cook'* costs) so a PCO needs to apply from the outset.
- Costs protection should also be available for the costs of making the PCO application.
- The rules should apply to other statutory challenges (e.g. challenges to planning decisions under section 288 of the Town and Country Planning Act 1990).
- PCOs only partly address the problem. The substantial cost of bringing a judicial review needs to be addressed and access to public or other funding improved.
- Lack of full recoverability of legal fees (because of the cross-cap) would potentially deter lawyers from taking cases on behalf of NGOs.
- PCOs will ultimately be at the discretion of the court and will not therefore provide absolute certainty.

3. Do you agree with the proposal to set the presumptive (i.e. default) PCO limit at £5,000? If not what should the figure be? Please give reasons.

There were 20 responses to this question. Of those 6 agreed with the figure of £5,000 and 14 did not. Suggestions for an appropriate figure ranged from zero (i.e. full one way costs shifting) to £10,000. Not all of those who disagreed with the proposed amount came from the NGO sector or were legal practitioners in this field. 2 of the 3 public sector respondents also disagreed, although they felt that the figure should be higher than £5,000 - both suggested that £10,000 should be the cap.

The most popular suggestion was for a cap around the £2,000-3,000 mark. This range was explicitly supported by 6 respondents, usually because it related closely to the contribution maximum of around £1800 under public funding, whilst another respondent referred to the disparity between this figure and the proposed cap without explicitly suggesting a figure.

Those who suggested a lower figure did so because, in summary, they took the view that the figure suggested in the consultation would still be prohibitively expensive for potential litigants with limited resources. One NGO reported that 60% of those approaching them for assistance earned less than £15,000 per year, and for those who did not qualify for public funding a costs cap of £5,000 would be prohibitively expensive. A number of other respondents referred to the difficulty faced by litigants who were not well off, but who nevertheless failed to qualify for public funding and who might be deterred by a cap of £5,000.

Others commented that account also needed to be taken of litigants' exposure to their own costs in addition to the £5,000 potential liability to the other side.

Of those who agreed with the figure, or thought it should be even higher (a total of 8 respondents) the main rationale was that they believed that applicants ought to make some contribution to costs and that Aarhus only required that cases not be 'prohibitively expensive'. One considered that £5,000 was a challenging amount, but was not unreasonable when balancing the interests of potential defendants. Another said that the figure genuinely reflected the cap levels imposed to date and that it at least provided a degree of certainty. Taking the certainty requirement further another respondent said that although he agreed with £5,000 it should be part of a fixed cost regime, which would provide the required degree of legal certainty.

One respondent who suggested a figure of £10,000 did so on the basis that it was more realistic than £5,000 based on recent expenditure; the other suggested that figure was the more appropriate unless the Government introduced an administrative process which does not need to go through the High Court and that there could be an administrative step for any party genuinely affected by the threshold (though no specific details were suggested).

4. Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?

18 responded to this question with 10 agreeing to challenges and 8 opposing. However, answers tended to be highly qualified on both sides and there was more unanimity on this point than the raw figures suggest, because there was real concern in both groups that challenges would undermine the legal certainty of a PCO regime and create the possibility for satellite litigation. A number of the 'yes' replies conceded the issue reluctantly and only in exceptional circumstances, whilst a number of the 'no' responses cited potential exceptions, whilst stating preference for a fixed cap. The differences in reply related to whether the possibility of being able to exclude the conspicuously wealthy from entitlement to a PCO would undermine legal certainty to a significant extent, or only slightly, and whether that slight risk was one worth taking. Some who felt

that challenge would be desirable in terms of fairness felt nevertheless that this should be overridden by the need for certainty.

However, a number of respondents were fairly unequivocal in support of challenges to the cap. In general this was because the discretion would allow for a fairer and more proportionate approach and that those who were wealthy enough to afford the litigation should do so without cost protection.

It should also be noted that in two cases the 'yes' replies related to the view that claimants themselves ought to be entitled to challenge the £5,000 presumption and apply for a lower cap.

One respondent felt that to permit challenges to the presumptive cap would not be compliant with EU law because ECJ case law shows that a discretionary practice cannot be regarded as sufficiently certain to be valid implementation. They took the view that if claimants were allowed to challenge they would do so, creating lengthy, expensive and unnecessary satellite litigation. This respondent also commented that if such provisions were implemented (as intended) via changes to the Civil Procedure Rules, the changes would themselves be vulnerable to judicial review on grounds of illegality.

5. If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendants to make applications to raise the cap? Please give reasons.

There were 11 responses to this question, of which only 2 supported the possibility that defendants should be entitled to apply for complete removal of the cap. 8 took the view that the defendant should be able to apply to raise but not remove the cap and 3 supported neither.

Of those who supported removal of the cap one response gave no reason for the view and the other said that applications to disapply should be in the context of a fixed costs regime. The consultation paper suggested that the cap should be capable of being removed rather than increased in order to maintain 'as straightforward a process as possible'.

Those who supported the possibility of the cap being increased did so on the whole because this seemed to them a more proportionate and fair way of proceeding than the simple alternative of a £5,000 cap or none at all. One respondent commented that to provide only for removal would 'introduce unnecessary confrontation'. Another observed that some claimants might be able to finance the litigation if the cap were to be raised, but not if it was to be removed. Another thought that an all or nothing approach might make it difficult to persuade the courts to make such an order.

All 3 of the public bodies who responded supported the possibility of varying the cap, whereas the NGOs and legal representatives were more split. However, only 2 of the respondents who supported the possibility of increasing the limit were NGOs.

Of course only those agreeing with the proposition in question 4 that it ought to be possible to challenge the presumptive limit were invited to answer question 5. Nevertheless 3 respondents took a further opportunity to express opposition to the ideas of a challenge and to reiterate the view that legal certainty and compliance with EU law would both be threatened, and complexity increased, if challenges were permitted.

6. In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?

Of the 16 responses to the question 7 agreed with the proposition that only publicly available information ought to be considered, 3 thought other information should be considered and 6 respondents either did not agree with challenges or did not express a clear preference. 2 respondents opposed to the idea of challenges commented that if a challenge were to be permitted on the basis of publicly available information then the claimant would be forced to produce private or confidential information in order to rebut the inference

Those who supported challenges only on the basis of publicly available information did so (where reasons were given) on the basis that it would be intrusive to permit the court to enquire into a claimant's means and that the risk of detailed and time consuming assessments would be reduced by permitting only public information to be considered. One respondent commented that there was often sufficient information in the public domain to mount a challenge and pointed, as an example, to information held by the Land Registry.

Only 2 of the 3 respondents who took the view that the court should be able to consider other information, gave reasons. One did so on the basis that it would be rare for an individual's financial information to be publicly available and that in order to permit a challenge information would need to be provided by the claimant. The analogy was drawn with legal aid applications where certain financial information is required from applicants. The other respondent expressed the view that the burden of proof should rest on any claimant who seeks to benefit from a PCO. The claimant should be required to demonstrate that a PCO was necessary in the light of their means and that the information which is required or admissible to determine this should be at the court's discretion, and should not be limited only to information which is publicly available.

Beyond a reference to certain financial information, respondents did not give any specific examples of the type of additional information which should be taken into account.

7. Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons

Of the 12 who responded to this question, only 1 favoured confining challenges to individuals. 8 favoured permitting challenges against wealthy individuals and 3 did not favour challenges against either.

The respondent who favoured challenges against organisations only did so on the basis that challenges should not be permitted against NGOs which litigate for the benefit of the environment rather than for their own benefit, but only against profit-making commercial bodies.

The respondents who favoured challenges against both individuals and organisations and gave a reason, did so broadly on the basis that the relevant criterion should be the claimant's means rather than whether or not they were an individual or an organisation. One respondent commented that there should be measures which would enable the court to look behind an organisation at the financial circumstances of the people involved, particularly where the organisation had been set up as a device for bringing a claim.

Those who did not favour challenges did so for the reasons set out in response to earlier questions. One respondent made the additional point that even big and wealthy NGOs have tight budgets.

8. If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?

11 respondents answered this question and, of those, 8 said that they would be deterred by having to disclose financial information, but one of these responses was equivocal and the organisation concerned also reflected an alternative view expressed by other members that disclosure was proportionate and within the spirit of the convention. All but one of the respondents to this question were either NGOs or legal representatives.

Observations made by those who reported that disclosure would be a deterrent included the comments that financial affairs were private and people see no need to disclose them, especially to opponents; that it causes anguish (in one instance disclosures related to inheritances from a recent bereavement); and that there may be practical difficulties where

members' associations involving a lot of members were concerned. One respondent felt that it would be a significant deterrent factor and would act to undo the benefits of the proposed regime.

Of the 3 that did not believe that the requirement would be a deterrent one organisation pointed out that as a registered charity they were already required to disclose financial information, so this would have little bearing on the decision to seek a PCO. Another NGO said that although it would not be deterred, the process of assessing means would reduce the certainty around costs and reduce the taking of additional cases. In addition the concept has the potential for injustice because interpreting the capacity for expenditure on legal fees in a charity's account is an expert task and misreading the accounts is commonplace. A representative body said that it was incumbent upon any claimant who wished to benefit from a PCO to demonstrate that the PCO was necessary in terms of their means.

9. Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?

19 responded to this question, with 8 supporting the proposal and 10 opposing, and one representative organisation putting forward views both for and against the proposal on behalf of different members. Those who supported the proposal included 2 of the 3 public bodies. Reasons, where given, on the whole corresponded with the rationale set out in the Consultation Paper, i.e. that public bodies did not have unlimited funds and costs needed to be kept down generally. One respondent was generally in agreement with the figure for central government, but felt that for other public bodies the cap should be the same as for applicants. Another respondent felt that the idea and the level were right but in line with views expressed on previous questions that it should be implemented as part of a fixed costs regime. One respondent also expressed the view that the cross cap ought to be set as a presumptive cap at a level of £30,000 but on condition that it could be varied or removed on application of either party. It was also pointed out by another respondent that the basic sum would only represent £25,000 for claimants not registered for VAT and should therefore be £30,000 plus VAT.

Of the 10 respondents opposed to the proposal 9 were opposed in principle to the entire concept of a cross cap. This group consisted of environmental NGOs and legal representatives. Those who objected did so in summary for the following reasons; there is no basis in Aarhus or in EU law for a cross-cap, it is a legacy of the *Corner House* case which arose in a totally different situation; it will either inhibit the claimant from making a proper claim or will mean that not all costs may be recovered even if the claim succeeds; it will make it more difficult for a solicitor to act under a conditional fee agreement because they will face not only the risk of losing but the risk of not being able to recover full costs if successful; a low cross-cap will encourage defendants

and other interested parties to increase costs until the claimant can no longer accept the risk. In general this group took the view that a successful claimant's costs should be subject to normal cost assessment and otherwise unrestricted. The respondent who opposed the amount of £30,000 rather than the cross cap principle, a public body, believed that the cross cap should be set at a lower figure of £20,000 in order to avoid unnecessarily costly litigation.

The representative body that put forward a nuanced view on this issue expressed the view that if there was to be a cross cap at all then the figure should be £35,000, because this was the figure determined in the *Garner* case. The members who objected expressed views on the above lines, i.e. concerns about access to justice, compliance with Aarhus, and failure to take proper account of the differing complexity of cases. Those in favour took the view that there was a public interest in lifting excessive burdens on the public purse. One additional point raised was that a claimant may succeed on one ground and not another and that increasingly courts award costs proportionately and therefore any applicable cost cap should be applied after any reduction rather than before (see e.g. *Warley v Wealden DC*).

10. Should it be possible to challenge the cross cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.

There were 15 responses to this question of which 11 said that it should be possible to challenge the suggested cross cap of £30,000, 3 that it should not and 1 answered more equivocally. Those who gave views on the basis of a challenge tended to agree that it should apply in circumstances where £30,000 would be inadequate to cover a claimant's reasonable costs, one respondent suggested that the decision on this could be made by a costs judge rather than a judge from the Administrative Court. One respondent took the view that a cross cap ought to be removed entirely where the claimant was prepared to opt out of a cap on his or her own costs.

The reasons for enabling a challenge were, as might be expected, fairly similar to the reasons given above for opposition to the idea of a cross cap in the first place, that if there was to be a cross cap it needed to be challengeable in order to enable more complex cases to be brought and properly remunerated especially where conditional fee agreements were in place. Of those who disagreed entirely with the idea of challenge 2 did so on the grounds that a challenge mechanism would encourage satellite litigation. The other respondent gave no reasons.

11. Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?

There were 15 responses to this question, of which 4 agreed with the proposition that a challenge to the cross cap should automatically trigger a

review of the claimant's £5,000 cap and 11 did not. Those who supported the proposition included 2 public bodies, but in general did not give detailed reasons (the question did not specifically ask for them). One respondent said that it would deter satellite litigation, whilst another said that the cross cap should only be lifted on condition that the claimant agree to forgo the £5,000 cap.

Those who disagreed did not in general agree that there was or ought to be any link between the cost protection afforded to the claimant and the cross cap. They therefore saw no need for the applicant's cap to be put at risk in the event of a challenge to the cross-cap. The view that a cross-cap was non-compliant with Aarhus was again expressed by some respondents, and one respondent said that it was essential for there to be an absolute cap on the claimant's liability. Another commented that the PCO is the costs exposure which is not prohibitive to the claimants bringing cases. Any cross cap could only be set at the level of costs reasonably incurred by the claimant's lawyers.

Appeals

12. Should the default cap as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?

13. If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.

14. Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?

17 respondents answered the first question and 12 supported the application of the £5,000 default cap to all proceedings, including those on appeal, while 5 did not support it. Support for the application of the default cap to all proceedings was based on the view that if £5,000 was all that claimants could reasonably be expected to afford/contribute to their costs then that should apply to the whole proceedings including any appeals (and also, in the view of one respondent, costs of other interested parties as well as the defendant), because it was unreasonable to presume that a claimant could afford an additional sum at the appellate stage. The cap represents the level above which litigating would be prohibitively expensive for a citizen or an organisation on an objective basis. One respondent felt that a zero cap with no cross cap should apply on appeal, but only where the appeal was by the defendant; where the claimant chooses to appeal it was felt that zero liability should not apply. However, this issue will be covered in more detail in relation to question 14 below.

One respondent who supported the application of the default cap to appellate proceedings said that if the Government were minded to set a cross cap then

this should be increased to cover the costs of the appeal, to ensure that appellants are able to fund their legal costs under a conditional fee agreement. Another respondent said that court fees could amount to £6,000 in the Supreme Court and that this was an important factor for claimants.

Of those who opposed the continuance of the default cap, one said that the new CPR provisions relating to appeals from fixed costs provisions should apply. These provisions would enable the court to exercise its discretion in such circumstances, taking account of the means of the parties, the circumstances of the case and the need to ensure access to justice.

There were 9 responses to question 13 on additional applications relating to appeal proceedings. However, of those, 3 answered in the negative because they had supported the application of the default cap to all proceedings as set out in the previous question. The 5 who supported the proposal had opposed the application of the default cap for all proceedings. Of this group 3 supported a presumptive limit and 2 supported a limit to be set by the court. Only one respondent suggested a figure for this limit; £5,000 with the ability to reduce it, including to zero. In addition to the above 5, the respondent who suggested that the default cap should only apply to appeals by the defendant supported a presumptive default cap of £3,000 for appeals made by the claimant, with a cross cap of £20,000 to reflect the fact that appeal proceedings should in theory be shorter and less costly because factual disputes will have been resolved at first instance. The cap would apply at each stage and so would be cumulative.

14 responded to the final question on whether the position should differ according to whether it is the claimant or defendant at first instance who is appealing. Of these the overwhelming majority, 11 representing a fair cross section of respondents to the consultation, did not believe that the position should differ. Not all gave reasons, but where reasons were given they were around the need for clarity from the outset and a desire not to see the claimant put at greater risk of costs in the event that the claimant should wish to appeal. There was also some stress on the importance of ensuring equality of arms and of avoiding complex scenarios where one party wins at first instance and the other in the Court of Appeal or Supreme Court.

Only two said that the position should differ according to who was appealing. One thought that the court should have the discretion to refuse an appeal from an appellant who was an unsuccessful claimant at first instance. As noted earlier the other supported a cap of £3,000 and cross cap of £20,000 to apply specifically in circumstances where the claimant appealed.

One respondent to the final question did not express a definitive view on the issue, but said that if a PCO limit was to be set for each stage then the 'rights of nature' principle should apply, i.e. if an appeal is in the wider public interest, and in particular of nature/environment then the presumption should be in favour of costs protection.

Conclusion and next steps

1. It is apparent that the majority of respondents both broadly welcome and support the broad thrust of these proposals. As noted earlier most respondents who answered the first question took the view that the prospect of high costs was a deterrent to bringing judicial reviews within the scope of the Convention. Whilst they may not deliver everything that every respondent would like, and some respondents might prefer other approaches such as some form of one way cost shifting, most respondents also agreed that the consultation proposals would make a significant improvement to the status quo and would permit those wishing to bring challenges within the scope of Aarhus and the PPD to do so with more certainty over exposure to the defendant's costs.
2. Nevertheless there remain concerns around the detail, most significantly around the cap levels, the introduction of a cross-cap and the proposals for challenge/general scope for uncertainty and the issue of cost protection for and prior to the application/permission stage. There were also concerns about other issues that did not fall directly within the ambit of this consultation, for example the issue of cost protection in various forms of statutory challenge and private law cases, and issues of legal funding for claimants.
3. The Government welcomes the broadly supportive tone of most responses to this consultation, but it also recognises that there are concerns about some issues. On the question of the level of the cap on the claimant's liability, it is clear that less than a third of respondents agreed with the proposed level of £5,000. However, there was no strong consensus around an alternative figure, with some respondents preferring a lower figure and others taking the view that the cap ought to be as high as £10,000. On the basis of the results of this consultation and the evidence of current practice in the courts, the Government takes the view that a cap of £5,000 is a proportionate amount to ask individual claimants to pay. On the same basis it believes that it is reasonable to make a distinction between the position of individuals and organisations and therefore proposes to set a cap of £10,000 for organisations.
4. It does however, recognise that part of the concern around the cap level surrounds the costs of the permission application and the cost of the application for a PCO. On the consultation proposals there would be no costs protection until the permission stage, and whilst it would be comparatively rare for significant costs to be incurred at this point, the Government does accept that there are real concerns on this point amongst some NGOs and that this element of uncertainty could have a potentially deterrent effect on some claimants. The Government therefore takes the view that costs protection should apply from the time the claim is issued, provided that the claim is clearly identified as being within the scope of the public participation provisions of the Aarhus Convention.

Therefore the cap will not be dependent on permission for the judicial review having been granted. If permission is refused the claimant's liability for *Mount Cook* costs will be capped at £5,000.

5. The Government has also taken note of the concern amongst respondents over the proposal to allow challenges to the cap by defendants on the grounds that no costs protection is necessary. The intention of this proposal was for it to be applied only in exceptional, very clear, cases. The concern is that challenges would be used more widely and, even if they were not, that the possibility might undermine legal certainty and promote satellite litigation thereby increasing the potential for delay in the challenge process. The Government is not persuaded that there would be sufficient cases where a clearly wealthy individual or organisation brought an Aarhus claim for it to be worth making provision for the exception which might serve to complicate matters in the general run of cases. It is therefore proposed that the cap on the claimant's liability will be fixed and there will be no provision to enable defendants to alter or remove this cap. This also removes the necessity to consider the issues surrounding what information is needed to challenge the cap and questions about whether challenges should be applied to individuals as well as organisations.
6. The Government has taken note of the comments made in respect of the cross-cap. Although there was a slight majority opposed to the specific proposal for a £30,000 cap, not all of those were opposed to the idea of a cross cap entirely. The Government sees value in limiting costs overall and an incentive to keep costs low will also serve the interests of unsuccessful claimants who will be liable for the entirety of their own costs. The Government recognises the concerns raised about the actual level of the cross-cap being lower than £30,000 because it will be subject to VAT and therefore recommends that the cross-cap should be set at £35,000. This is in line with the outcome in *Garner* and, as a central rationale for the consultation is to codify relevant case law, that will be a more suitable amount. It also takes the view that just as the scope for legal uncertainty and delay would be greater if a claimant's cap was capable of challenge, the cross-cap should similarly be fixed.
7. As the costs of both sides will be subject to caps that cannot be challenged the Government believes the proposals amount in effect to a system of fixed recoverable costs.
8. The similarity of the proposals to a fixed costs regime indicates in the Government's view, and as one respondent strongly argued, that it will be appropriate for appeals to be dealt with in accordance with the rule proposed by Lord Justice Jackson for appeals in cases to which a fixed or restricted costs regime applied at first instance. Under that rule, when it is implemented as part of the wider Jackson reforms, the judge considering whether to give permission to appeal in a case which was subject at first instance to a fixed or restricted costs regime will at the outset determine the appropriate costs limit or limits having had regard to the decisions in the lower court.

9. The Government will put proposals based on the above principles to the Civil Procedure Rule Committee for consideration at the earliest opportunity with the intention that, if possible, the rules should be included in the body of rule amendments planned for making in December 2012. For clarity the proposals are summarised below in bullet form:
- A fixed recoverable costs regime will apply in all cases where the claimant states in the claim form that the case is an Aarhus case and the reasons why this is so, subject only to the court determining that the case is in fact not an Aarhus case at all. It will not be dependent on permission having been granted.
 - The recoverable costs will be fixed as follows: the liability of the claimant to pay costs of the defendant will be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; and the liability of the defendant to pay the costs of the claimant will be capped at £35,000.
 - The fixed recoverable costs for both the claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Convention.
 - The rule proposed by Lord Justice Jackson for appeals for cases that have been heard under a fixed costs regime will also apply for appeals in cases brought under the Aarhus costs regime.
10. The Government intends to review on a regular basis the impact and application of these changes, including the level at which the caps have been set, and whether in the light of experience any other changes to the procedure for such cases should be made.
11. The Government also recognises that there are some concerns about costs in statutory procedures of various kinds (including some statutory appeal and statutory review procedures). However, further work is needed to identify whether and, if so, how and to what extent these procedures fall within the scope of the Convention and to identify whether the above approach is the appropriate way forward and, if so, what the impacts might be (having regard, for example, to the fact that the permission filter of judicial review is absent in such cases, and that they may involve appeals by developers as well as members of the public or NGOs). The issues surrounding what application the Convention might have in private law cases in particular are potentially more complex, since (as Lord Justice Jackson indicated in his review) costs protection for one party would potentially have a serious impact on the other party, who might well have very limited resources also.
12. The Government is therefore looking into these issues and, where necessary, will bring forward proposals separately, so as not to delay establishment of the scheme for environmental judicial review cases.

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact Sheila Morson on 020 3334 4498, or email her at: sheila.morson@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice

Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Terence Ewing

Northumberland County Council

Lord Justice Jackson

Environmental Law Foundation

Coalition for Access to Justice for the Environment (CAJE)

Richard Buxton

Richard Harwood

Bristol City Council

David Wolfe at Matrix Law

Wild Law UK

UK Environmental Law Association

SNR Denton

Friends of the Earth

Friends of the Earth Scotland and Environmental Law Centre Scotland

Client Earth

Leigh Day & Co (R Stein)

Buglife

CLARS Environmental Firm

The Law Society

Environment Agency

National Farmers Union

Envirowatch (Klaus Armstrong-Braun)

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Alternative format versions of this report are available on request from Judith Evers telephone 020 3334 3182 or e-mail judith.evers@justice.gsi.gov.uk