

Observations on Defra's Response to the Aarhus Convention Compliance Committee – England and Wales (May 2017)

The RSPB, Friends of the Earth and Client Earth

Questions

1. *In order to access costs protection claimants must serve “a schedule of the claimant’s financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant”. It is unclear what this specifically requires. What guidance, if any, will be provided to potential claimants on the level of detail to be included in the schedule of financial resources so that they can understand what is required?*

Defra Response: The Government’s policy in relation to financial disclosure was set out in its response paper published on 17 November 2016. The Government stated that it would adopt a similar approach to that implemented for the recent Judicial Review Cost Capping Order reform. Unless the court ordered otherwise, the claimant would provide information on significant assets, income, liabilities and expenditure. This information would take into account of any third-party funding which the claimant had received.

The RSPB, FoE, CE Observation: The information required in respect of Judicial Review Costs Capping orders set out in Practice Direction 46 (paragraph 10.1) is set out below:

“(a) the applicant’s significant assets, liabilities, income and expenditure; and

(b) in relation to any financial support which any person has provided or is likely to provide to the applicant, the aggregate amount—

(i) which has been provided; and

(ii) which is likely to be provided”.

We remain concerned that the absence of Guidance specifying the type and extent of financial information required, and the nature and level of any third party support received (or likely to be received), will act as a deterrent to those contemplating JR. We also believe that it will lead to unhelpful and costly satellite litigation in order to determine the extent of information required (see below).

2. *Does the UK consider that this rule on financial disclosure could lead to satellite litigation on what should be included in the schedule of financial resources, and consequently impact on the eligibility of claimants for costs protection in Aarhus Convention claims after they have initiated proceedings?*

Defra Response: The Government acknowledged in its accompanying impact assessment, which was published alongside the Government response paper, that some claimants may be dissuaded from bringing a claim if they find it intrusive to disclose their financial information. However, there is no evidence to suggest that the rule on financial disclosure itself will encourage satellite litigation.

The RSPB, FoE, CE Observation: Firstly, we note the Government’s acknowledgement that the requirement to disclose financial information when applying for JR may, in itself,

dissuade claimants from bringing legitimate claims. This seems nonsensical in the context of a scheme intended to facilitate access to environmental justice.

With regard to the assertion that there is no evidence to suggest the rule on financial disclosure itself will encourage satellite litigation, we refer the Committee to the current Protected Expenses Order (PEO) regime in Scotland. The Scottish Civil Justice Council is currently conducting a consultation (see [here](#)) on reforms to the PEO regime in response to judicial concern about the disproportionate amount of time and resources devoted to the level at which costs caps should be set. See, for example, the judgment of Lord Menzies' judgment in *Gibson*¹ (below):

“[71] By way of postscript we express our concern about the length of time that this application for a PEO has taken, and the expense incurred by the lengthy hearings before the Lord Ordinary and this court. Applications for a PEO have been few and far between in Scotland, but we consider that in the particular circumstances of this case, a more expeditious disposal should have been achieved. Looking to the future, we express the hope that such applications can be disposed of much more quickly...”

The 2013 Aarhus costs regime was introduced in response to domestic and international concerns that Protected Costs Orders (following *Corner House*²), and the satellite litigation around them, failed to ensure that legal proceedings were not prohibitively expensive. As such, we find it extraordinary that the MoJ has chosen to move away from a costs regime providing certainty and clarity (which dispensed with the need for any satellite litigation) to a scheme characterised by ambiguity and uncertainty, such as that currently under review in Scotland. By way of example, we anticipate significant satellite litigation around the following issues:

- the precise meaning of “significant assets, liabilities, income and expenditure”, including whether this applies to funding available for litigation or more generally;
 - whether or not sufficient information has been supplied in order to qualify for costs protection at all. A defendant may challenge disclosure, for example if they think the claimant has more assets or has provided a poor quality submission;
 - the nature and extent of information required around third party support, with particular regard for Crowd Funding and major donors; and
 - the correct course of action following a change in the claimant’s financial position part-way through the proceedings.
3. *How will the hybrid caps scheme (whereby costs protection can be varied multiple times during the proceedings) provide claimants with certainty that their costs’ liability will not be prohibitively expensive?*

Defra Response: It is important to note the changes to the Environmental Costs Protection Regime (ECPR), which came into force on 28 February 2017, apply to those who are privately funded. Legal aid remains available for these cases for those who qualify; legally aided claimants will be unaffected by the new regime. In relation to varying the costs caps, it is not unreasonable for the cap for wealthy claimants to be higher than for poorer claimants,

¹ [2016] CSIH 10

² *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600

always provided, as the new rules explicitly require (and accordingly render certain), that in any case the costs of the proceedings should not be ‘prohibitively expensive’ for the claimant.

The RSPB, FoE, CE Observation:

This response fails to address the question. The pivotal issue relates to the timing of any decision to vary away from the defaults and the lack of knowledge over the level at which the cap will end up.

We are concerned that the 2017 Amendment Rules allow that discretion to be exercised at any point in the proceedings, including more than once, and including well after the defendant or other party in the case has incurred costs well above the default cap limits (which it might then seek to recover from the claimant). This opens up the risk of a claimant being unexpectedly exposed to costs at a level which they would not have been willing to risk had they known of them, and of that creating a chilling effect on environmental claims (which goes against the principle of wide access to environmental justice which the EC Public Participation Directive and the Aarhus Convention seek to ensure).

We believe it is essential that claimants are given certainty as to their costs exposure as soon as possible in the proceedings and that once that figure has been set, it should not be possible to depart from it unless very exceptional circumstances in favour of the claimant apply.

Finally, as an aside, we again note that legal aid is not widely available, is often contingent on a significant community contribution and is not, in any circumstances, available to environmental NGOs.

4. *Does the UK have evidence that the hybrid costs scheme will deter unmeritorious cases, and not deter meritorious cases, and will it share that evidence to justify its changes?*

Defra Response: The Government’s policy and justification for introducing a variable costs cap regime is set out in the Government consultation and response paper, including the accompanying impact assessment.

The RSPB, FoE, CE Observation: We have set out the references to the potential effect of the new costs regime on meritorious claims in the Government Consultation Paper, Response to the Public Consultation and accompanying Impact Assessment (IA) in Annex A (below).

It is evident from these references that the Government has not conducted, or considered, any evidence (in the form of research, statistical data, case studies or otherwise) to determine the potential impact of the new costs regime on meritorious claims and, thus, the UK’s ability to comply with the access to environmental justice provisions of the EC Public Participation Directive and/or the Aarhus Convention.

We would also draw the Committee’s attention to 25th Report of the House of Lords Secondary Legislation Scrutiny Committee³ (February 2017), the summary of which concluded: “*The Aarhus Convention (implemented in EU law by a series of Directives) requires Contracting States to make sure that the costs of taking certain environmental challenges through the courts are not prohibitively expensive. This instrument, among*

³ See <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecleg/114/11403.htm>

other things, introduces a revised costs protection regime for Aarhus Convention claims, that provides more discretion for the court to put cost caps up or down according to the claimant's resources. The very negative response to the consultation exercise raised a number of concerns including how the claimant's resources were to be assessed and the risk of satellite litigation to settle disputes over ancillary matters. Respondents' key concerns were that the changes were likely to increase the claimants' uncapped legal costs and would deter claimants from pursuing genuine claims. A submission from Client Earth, Friends of the Earth and the RSPB, published on our website, further illustrates these concerns. The Explanatory Memorandum that the Ministry of Justice has provided gives no evidence-based justification for the proposed changes or for the effect that they are assumed to produce, in consequence, our Report suggests a number of questions that the House may wish to pursue. We have also written to the Minister to express our concerns over the way that this policy change was presented." (own emphasis added)

5. *What monitoring system has the UK set up to assess and report on the impact of the rule changes over the next 12 to 24 months? If it is not yet set up, when will it start?*

Defra Response: The Ministry of Justice is in discussions with the Administrative Court Office about monitoring the impact of the ECPR.

The RSPB, FoE, CE Observation: This response conflicts with the position outlined by Mr Tajinder Bhamra of the MoJ in an email dated 16th May 2017 in response to a request from the RSPB, FoE and CE for the number of JRs and statutory reviews seeking Aarhus costs protection following the introduction of the new costs regime on 28th February 2017 (see below):

"I wanted to let you know straightaway that unfortunately I will not be able to provide you with the data you have requested on environmental JRs and statutory appeals in the High Court for March or April 2017. This is because we cannot identify Aarhus environmental JRs specifically from the Administrative Court Office Case Management System (COINS). The case descriptions held on this database ('topic'), is not detailed enough to identify such cases, so we will need carry out a manual trawl of the data held by Administrative Court Office. The overall JR statistics for January-March are published in June and the April figures will be published in September. I am happy to send that you once it has been published, but given the amount of work that will be required to separate the Aarhus JRs from the published JR figures, that will not be for some time."

Despite assurances that the Government will review the impact and application of these changes⁴ (and to consider whether, in the light of experience, any other changes to the procedure for such cases should be made), there would appear to be no system in place to do so, nor (as suggested in Mr Bhamra's email to us) any plans to implement such a monitoring scheme.

21st June 2017.

⁴ See paragraph 53 of the Government's Response to the Public Consultation [here](#)

Appendix A – References to the possible effect of the new costs regime on meritorious claims included within the Government Consultation Document, Response Document and Impact Assessment (own emphasis added)

Consultation document – available [here](#)

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

Government Response Document – available [here](#)

“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.”

“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.”

“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.”

Impact Assessment – available [here](#)

KEY ASSUMPTIONS/SENSITIVITIES/RISKS

“In making our assessment, we have assumed that:

- The number of cases affected by and the costs/benefits resulting from the proposals are minimal.
- Case volumes will not change (for the purposes of illustration; in practice volumes may increase if costs protection renders court action more attractive to would-be claimants)
- The court will be able to determine the appropriate levels of costs protection where an adjustment to the default cost cap is assessed to be valid; and
- The number of LAA supported cases will not change as a result of the proposals.

The main risks are that:

- Some claims might be discouraged even though they are meritorious; this could have potential negative impacts on the environment (but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases).
- More legal challenges may be brought as a result of extending the regime to certain reviews under statute, although costs cap variation may discourage unmeritorious challenges due to possible higher claimant exposure.
- The proportion of additional claims which are successful are similar to the proportion of current claims that are successful.”

“Indirect Costs

47. Under option 2, it is unclear to what extent the volume of JRs may fall in response to the possibility that the claimant’s costs cap might be increased or the defendant’s costs cap might be decreased. Also under option 2, if the costs cap for defendants were lowered, claimants bringing meritorious claims might experience difficulty in obtaining legal representation as, even if successful, the amount the defendant pays might not cover all of the claimant’s legal costs. This could adversely impact on access to justice for claimants, particularly those with limited means and have wider, potentially negative, environmental impacts if meritorious claims are discouraged (but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases).”

LAA and Legal Service Providers

Indirect Costs

71. Under all the proposed options, and particularly options 2 and 4, legal service providers may experience reduced levels of business from any reduction in the volume of legal challenges as a result of any behavioural responses to the possibility of increasing the costs cap of the claimant, decreasing that of defendants or from having to disclose financial resources. It has been assumed that the legal service providers will be able to replace any lost business with other work of similar value and therefore would face a zero cost from the proposed options. Furthermore, the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases should mitigate the risk of discouraging meritorious claims.”

Overall impact of Option 1-9

117. There may be an increase in applications for statutory reviews and appeals as a result of extending the current ECPR. There may be a small increase in applications to the Court of Appeal due to the clarification that costs protection is available for those applications engaging EU law.

There is likely to be only a minimal impact on HMCTS and there may be benefits to wider growth from projects which might otherwise be delayed. There is a potential risk that some meritorious challenges might be discouraged that could have potential negative effects on the environment, but our analysis is this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases.

118. Overall, the costs and benefits of these proposals and the number of cases affected are expected to be minimal. The total expected monetised costs are £40,000 per year to defendants while the total expected monetised benefits are £40,000 per year to claimants. This is due to option 1 which would expand costs protection to the relevant statutory reviews and appeals.

Risks for of Option 1-9

119. Options 6-9 would address current ambiguities by clarifying the law regarding the factors to be considered in awarding cross-undertakings in damages. However, if the current ambiguities mean that, in multiple claimant cases, their combined financial resource is not taken into account, then injunction damages may increase. Furthermore, if

this means that each claimant and defendant do not currently get a separate costs cap, the amount each party pays could increase to the relevant cap. Finally, if these ambiguities allow claimants costs protection who are not entitled to it because of EU law, then additional clarity should remove this, meaning that defendants can recoup more of their costs in the event the claimant is unsuccessful.

120. These clarifications, along with option 2, may lead to an overall reduction in the number of legal challenges receiving costs protection at the current rates. The possibility to vary costs caps may incentivise or dis-incentivise claimants depending on the direction of variation they expect. The potential for the courts to be able to adjust costs caps in cases where claimants are well resourced and deemed capable of paying more than the current caps presents the potential risk that some meritorious challenges might be discouraged which could have potential negative effects on the environment, but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases (and the ability to increase the level of costs protection in appropriate cases) and, in any event, the costs and benefits of these proposals and the number of cases affected are expected to be minimal.