The Rt Hon. the Lord Trefgarne,
Secondary Legislation Scrutiny Committee,
House of Lords,
London SW1A OPW.

Email: hlseclegscrutiny@parliament.uk

8th February 2017

Dear Lord Trefgarne,

Re: The Civil Procedure (Amendment) Rules 2017 - 2017 No. 95 (L. 1)

The above Statutory Instrument (SI) introduces amendments to the Civil Procedure Rules in respect of the Costs Rules for Environmental (Aarhus) Cases. We understand that it will be scrutinised by the Secondary Legislation Scrutiny Committee on 21st February 2017. We also understand that, as part of that process, the Committee welcomes letters from the public, particularly representative organisations, who may want to present a different view on the proposed legislation.

We respectfully request the Committee takes this evidence into account when scrutinising the SI. It is submitted on behalf of [ClientEarth, Friends of the Earth and the Royal Society for the Protection of Birds].

Please note that the following evidence relates only to the sections of the Statutory Instrument dealing with the costs rules for environmental cases (Section VII *Costs limits in Aarhus Convention claims*, Rule 45.41 up to (and including) Rule 52.19A).

Introduction

Judicial Review (JR) is an essential foundation of the rule of law and the main mechanism for civil society to challenge unlawful decisions affecting the environment and achieve a remedy in the courts. While the Government has previously recognised the importance of JR in checking the potential abuse of power[1], we believe the practical impact of these proposals will be to seriously undermine the public's ability to progress legal action on environmental issues of strategic public importance (including, for example, on issues such as air quality, airport capacity and new infrastructure).

We have submitted evidence to the Joint Committee on Statutory Instruments to demonstrate how this SI will return England and Wales to non-compliance with relevant EU and international law on access to justice. The intention of this evidence is to clarify how these unsubstantiated proposals, which come into effect on 28th February 2017, manifestly fail to

[1] See the Ministerial Foreword to Consultation Paper on "*Reform of Judicial Review - Proposals for the provision and use of financial information*" available at: https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf

achieve their stated policy objectives and are almost comprehensively opposed by those responding to the public consultation exercise.

Background

In 2005, a number of environmental organisations (including some of those submitting this evidence) submitted a complaint to the European Commission alleging that the UK was in breach of the access to justice provisions of the Public Participation Directive (PPD). At around the same time, ClientEarth submitted a Communication to the Aarhus Convention Compliance Committee alleging that the UK was in breach of corresponding provisions in Article 9(4) of the UNECE Aarhus Convention covering all environmental cases.

Following lengthy infraction proceedings by the European Commission[2] and findings against the UK by the Aarhus Convention Compliance Committee in 2010[3], the Ministry of Justice (MoJ) introduced bespoke costs rules for environmental Judicial Reviews into the Civil Procedure Rules[4] (CPR) in April 2013. The 2013 Rules capped the costs that an unsuccessful party to litigation is required to pay in JR proceedings to £5,000 where the Claimant is an individual and £10,000 in all other cases[5]. The Defendants' liability for Claimants' costs were similarly capped, at £35,000. These amounts are fixed: the rules do not allow for variation in individual cases.

On 17th September 2015, the MoJ proposed amendments to the Costs Regime for Environmental Cases in England and Wales in a public consultation "*Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges*" (the Consultation)[6]. The Consultation Paper stated that the proposals contained in the consultation were aimed at "*providing greater flexibility, clarity of scope and certainty within the regime*".

The Government received 289 responses to the Consultation Paper from individuals, businesses, academic institutions, community and civil society groups, practising lawyers and NGOs. Members of Wildlife & Countryside Link submitted a lengthy and detailed response to the Consultation[7], the contents of which were echoed by representative bodies such as the Bar Council[8], the United Kingdom Environmental Law Association[9] (UKELA) and specifically endorsed by the Civil Justice Council[10].

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

3 The findings can be found here: https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf

4 Part 45, Section VII of the Civil Procedure Rules

5 CPR r. 45.43

6 Consultation Paper available here: https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonsultationpaper.pdf

7 See http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf

8 See http://www.barcouncil.org.uk/media/407914/bar_council_response_to_the_ministry_of_justice_consultation_paper_-_costs_protection_in_environmental_claims.pdf

9 See https://www.ukela.org/content/doclib/291.pdf

10 See https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-response-on-environmental-costs-protection.pdf

The MoJ's response to the consultation (the Response), together with an Impact Assessment (IA) was published in November 2016[11]. The Response held that the proposed changes "*should put its compliance with EU law beyond doubt, and should improve the operation of the ECPR* [Environmental Costs Protection Regime] *for both Claimants and Defendants*".

The main change proposed to the costs regime for environmental cases for the purpose of this evidence is the introduction of a "hybrid" approach, whereby the costs cap would be set at an initial default level (equivalent to the current caps), which could be varied by the Court on the basis of information provided by the Claimant when issuing the claim.

Our main concern about the proposals is that they remove advance certainty as to financial liability on losing the JR currently provided for environmental Claimants. We believe their practical effect will be to deter all but the very rich from pursuing environmental cases. Those cases that are progressed are likely to suffer considerable delay as costly and time consuming satellite litigation around the issue of costs in itself detracts from the substantive issues. Our evidence to the Joint Committee on Statutory Instruments (JCSI) explains how these proposals conflict with our obligations under EU and International law regarding the requirement to ensure that legal action is affordable and fair.

This submission exposes the lack of evidential basis for any of the proposals, explains how the proposals fail to address the stated policy objectives and demonstrates the depth of public opposition to them across a wide spectrum of audiences including business, NGOs and community groups and practising lawyers.

The failure to achieve stated policy objectives

The Consultation Paper confirmed that the proposals are aimed at "*providing greater flexibility, clarity of scope and certainty within the regime*" and that they "*should put* [its] *compliance with EU law beyond doubt, and should improve the operation of the ECPR for both Claimants and Defendants*". We examine these objectives in turn.

Removal of advance certainty

We are perplexed by the assertion that the proposals aim to provide clarity of scope and certainty within the regime. The proposals quite clearly remove the element of advance certainty for Claimants as to their liability for the Defendant's legal costs should they lose and, as such, will be highly dissuasive to those contemplating legal action. The importance of certainty can be illustrated by reference to the Norwich Northern Distributor Road case-study below. This is just one of countless cases seen by our organisations that would be affected by the policy changes as proposed.

Norwich Northern Distributor Road

Norwich residents have repeatedly highlighted that the Norfolk County Council's (NCC) plans for a 20km Northern Distributor Road (NDR) would cause irreversible damage to the environment, including the destruction of countryside, farmland and wildlife habitats, an increase in noise, air and light pollution and an increase in carbon emissions. As the NDR represented an almost complete ring-road around Norwich, residents also believed that it would increase pressure for a final link from the A1067 – A47 Norwich Southern Bypass across the River Wensum, a Special Area of Conservation (a site of European Importance) and the River Tud.

[11] See https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/

In October 2015, Parish Councillor Andrew Cawdron launched a Judicial Review of NCC's decision to approve further funding for the scheme on behalf of the Wensum Valley Alliance (WVA). The basis for the case was that the Full Council meeting was provided with misleading information, including errors in the financial data and pricing trends in the construction market. Later that same month, the Council accepted its decision was unlawful and it was duly quashed by the High Court.

Councillor Andrew Boswell, also involved in the legal action, said: "*It would have been impossible for WVA to contemplate legal action without knowing the extent of their financial liability in advance. The Council immediately conceded that it had acted unlawfully in approving the decision. A direct consequence of the legal action is that the Council's decision-making processes came under public scrutiny: we hope that future decisions will be more informed, robust and environmentally sound.*"

The absence of an evidential basis for the proposals

Paragraph 33 (amongst others) of the Consultation Paper justifies the proposed changes on the basis that they would deter unmeritorious cases, which the Government claims are causing delay. Despite requests made under the Environmental Information Regulations 2004[12] and the submission of Parliamentary Questions[13], the Ministry of Justice has failed to adduce any evidence, data or even a credible narrative to support this assertion. There is also no basis for any argument that unmeritorious environmental cases frustrate economic recovery or clog up the Administrative Court. In fact, evidence obtained from the Ministry of Justice in 2015[14] confirms quite the opposite:

- **Number of environmental cases** - the number of environmental cases lodged annually in England and Wales did not increase following the introduction of the Aarhus costs rules in April 2013. The only published data covering environmental cases prior to 2013 can be found in the report of the Sullivan Working Group on Access to Environmental Justice[15]. This report concludes there were 163 cases in 2002 and 155 cases in 2007 and that this would appear to represent a reasonable estimate as to the average number of cases. Data obtained from the MoJ in 2015 confirms there were 118 Aarhus claims in March 2013-April 2014 and 153 in March 2014-April 2015[16]. This represents a very small (less than 1%) percentage of the total number of JRs lodged on an annual basis (some 20,000). There is therefore no argument to support the contention that the introduction of the costs rules has led to a proliferation of environmental litigation that needs to be stemmed. Notwithstanding the above, some increase in cases is to be applauded as it would demonstrate that the purpose of the Convention is being achieved[17];

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12 First requested on 1 September 2016, now referred to the Information Commissioner's Office for determination for perceived failures to comply with the EIRs 2004

13 Written Questions asked to the Justice Secretary by Kerry McCarthy MP, available at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&use-dates=True&answered-from=2017-01-23&answered-to=2017-01-24&member=1491

14 As a result of information requests under the EIRs submitted by Leigh Day – results summarised in Annex B

15 See paragraph 53 of the report, available at: http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf

16 See Annex B

17 See Recitals 7 and 8 and Article 1 of the Convention

- **Success rate of environmental cases** - between April 2013 and March 2015, nearly half (an average of 48%) of environmental cases were granted permission to proceed. This contrasts with a figure of 16% for all other Judicial Review cases in 2014 and 7% in the first quarter of 2015. Between April 2013 and March 2015, on average, a total of 24% of environmental cases were successful for the Claimant. This contrasts with a success rate of 2% for all cases in 2014. Thus, while environmental cases represent a very small proportion of the total number of cases, they have very high success rates when compared to JR as a whole. Environmental cases therefore play an essential role in upholding the rule of law, protecting the environment and improving the quality of life - they represent "good value for money" in comparison to other types of JR.

The Consultation Process

The lack of evidential basis for these proposals is exacerbated by the failure to properly take into account the public's overwhelming opposition to them.

The Government's Response maintains that it has considered all of the responses to the consultation very carefully, but has decided to proceed with most of the proposed amendments to the rules set out in the consultation. The Government's view is that the changes will not prevent or discourage individuals or organisations from bringing meritorious challenges, but will "*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*". Further details are set out in the Impact Assessment published alongside the Response.

However, on examining the responses to the Consultation Paper it is difficult to comprehend how the Government can justify going ahead with these proposals. The Government received a total of 289 responses to the Consultation Paper. Of these, 207 (around 70%) were from individuals and 82 were from businesses, campaign groups, professional bodies, public organisations, non-governmental organisations (NGOs), academic institutions, parish councils, law firms and representative bodies. The Response acknowledges that respondents largely disagreed with the package of proposals. On examination, the full extent of opposition to the proposals becomes apparent.

Question	% in support	% opposed
Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps?	1.7	98.2
Do you agree that the criteria set out at proposed rule 45.44(3) reflect the principles from the *Edwards* cases?	2.3	97.7
Do you agree that it is appropriate for the courts to apply the *Edwards* principles to decide whether to vary costs caps?	5.6	94.1
Do you agree with the requirement on all Claimants to file at court and serve on the Defendant a schedule	3.3	96.6

of their financial resources at the commencement of proceeding		
At what level should the default costs caps be set?	0.4 (higher than present)	97 (same level as present)

In response to the question "*Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps?",* the vast majority of respondents opposing the introduction of a hybrid model explicitly wanted the current fixed-cap model to be retained because the proposed model was considered too complex and removed certainty over costs liability for the Claimant. Respondents considered that the lack of certainty would be in breach of both EU law and the Aarhus Convention.

Concerning the requirement on all Claimants to file at court and serve on the Defendant a schedule of their financial resources at the commencement of proceeding, concerns raised by those in opposition were that Claimants could be deterred from bringing a challenge because of the need to disclose all assets. Other concerns and criticisms included:

- Many respondents argued that, as a general rule, having to provide financial information would add an inappropriate burden and complexity for Claimants, with little material benefit;

- NGOs and charities deemed the proposal unworkable due to the different ways in which they are funded. They also considered that members of the public would be deterred from making donations since they could be liable for litigation costs;

- The proposal was vague and lacked details of how schedules should be compiled and what type of information would be required. Some Claimants would have more complicated financial means than others.

On the question "*At what level should the default costs caps be set?*", only one response advocated that the default Claimant costs caps should be set at a higher level than the current costs caps (0.4%); 224 wanted the default costs caps to be set at the same level as the current costs caps (97%); and the remainder either suggested lower individual costs cap amounts between £500 and £2,000, that Claimants should have no costs exposure at all, or made no specific comment.

Failure to engage and provide reasonable time period for implementation

Finally, we would point out that we, as part of Wildlife & Countryside Link, have consistently and strenuously sought to bring the adverse implications of these proposals to the attention of the MoJ. Having seen the MoJ's Response in November 2016 and sought legal advice, we wrote again to the MoJ detailing our concerns, seeking clarification on a number of matters and requesting a meeting to discuss the proposals (letter dated 7th December 2016).

We then wrote a further letter to the Chair of the Civil Procedure Rules Committee, Sir Terence Etherton (copied to the MoJ) on 13th December 2016 on learning that the CPRC had discussed the draft SI. We received no substantive responses to either letter, despite chasing, although we were eventually informed that we may expect a response in the New Year. On 6th February 2017, we received an email from the MoJ confirming that the SI had been laid before Parliament on 2nd February and that the new regime will come into effect on 28th February

2017. The email confirmed that in light of this, the MoJ did not propose to address the substantive points raised in our letter.

We find it disappointing, particularly in light of the subject matter, that the MoJ has consistently refused our requests to meet in an attempt to resolve the issues in dispute before the SI was finalised. Moreover, we feel it is somewhat disingenuous of the Government to have suggested that we would receive a substantive response in the New Year and then inform us after the event that it had laid the SI before Parliament (which comes into effect less than a month later).

The changes dealt with in this evidence are the first of those included in the Statutory Instrument to come into force, on 28th February 2017. We believe that this is not enough time to allow for proper scrutiny, particularly given February recess dates in both Houses. There is a particular irony relating to these changes in that, if someone were to legally challenge the proposed changes, the judicial review case they would undertake would be subject to either the current or proposed costs regime depending on whether the changes had already come into force or not. By giving a very short window before changes come into force, the MoJ has therefore made it more difficult for these proposals to be properly scrutinised by the courts as well as by the House.

Conclusion

The foundations of an effective democracy require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful. In turn, a lawful process of decision making is a minimum requirement for environmental protection. In her keynote speech to the Conservative Party Conference in October 2016, Prime Minister Theresa May vowed to "*stand up for the weak and stand up to the strong*[18]". The extent to which civil society can rely on the law to protect a wide range of rights and freedoms, including the protection of the environment, is one litmus test for the realisation of that aim.

While the introduction of new costs rules for environmental cases in 2013 was a welcome improvement, ongoing restrictions to the process of JR generally and the changes to the costs regime for environmental cases in England and Wales introduced by this Statutory Instrument will, we feel, make environmental litigation impossible for many people. We fear the new regime will introduce a climate of uncertainty amongst Claimants with serious ramifications for environmental protection, access to justice and the rule of law.

We urge the Secondary Legislation Scrutiny Committee to draw this SI to the attention of the House of Lords on the basis that it is legally important and gives rise to issues of public policy likely to be of interest to the House. We have also detailed how the SI inappropriately implements European Union legislation, fails to achieve any of the stated policy objectives, is wholly unsubstantiated and is opposed by the vast majority of those responding to the consultation. We would be pleased to provide further information if required.

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18 See Transcript of full speech here: http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html

Annex A

Costs Protection in Environmental Claims

Aarhus Convention Claims Data

Table based on data provided by the MoJ in 2015 under the EIRs 2004 and the MoJ's Quarterly Statistics for Judicial Review January – March 2015[19].

Combined RCJ and District Registries Data (England and Wales)

Period	April 2013-March 2014	April 2014-March2015
No of Aarhus Convention Claims	118	153
No of claims granted permission to proceed	50	79
% success rate of claims granted permission to proceed	**43%**	**54%**
No of claims ultimately successful for the Claimant	26	37
% success rate of claims successful for Claimant (of the totals of 117 (2013-2014) and 145 (2014-2015))	**22%**	**26%**

For further information, please see Wildlife & Countryside Link's response to the MoJ consultation available here:

http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf

19 Available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/432070/civil-justice-statistics-jan-march-2015.pdf