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Costs Protection in Environmental Cases

Proposals to revise the costs capping scheme for eligible environmental challenges

Summary of Responses and Way Forward

Contents

1. Introduction

1.1. This paper provides a summary of the responses received to the consultation paper '*Costs Protection in Environmental cases; Proposals to revise the costs capping scheme for eligible environmental challenges*' published by the Department on 25 November 2015. It also sets out the Department's response to the consultation findings.

1.2. The consultation paper set out the Department's proposals to improve the current scheme relating to costs protection in those environmental cases governed by the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 ('the Regulations'). The consultation period was extended for four weeks and ended on 17 February 2016.

1.3. Copies of this summary and the consultation document can be accessed at https://www.justice-ni.gov.uk/If you would like a copy of this summary in another format please contact;

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2. Responses to the consultation paper

2.1. Ten responses were received to the consultation from stakeholders which included environmental groups, residents' associations, the legal profession and some individuals. As such, the responses tended to reflect the views of applicants, rather than respondents, to the relevant environmental challenges. A list of respondents to the consultation is set out in section 8.

2.2. A response questionnaire was provided to consultees. This was completed by two of them. Most, however, preferred to provide a response by way of a written submission. The nature of these submissions varied. The majority, however, provided comments which broadly correlated to the subject of the questions posed in the consultation. Some provided more detailed discussion on those proposals that were of particular interest to them.

2.3. The total number of respondents to each question varied. Therefore, where a reference is made in the summary to a particular quantity of respondents (e.g. 'majority/most/some'), it should be read as a reference to the respondents to the particular question concerned rather than respondents to the consultation generally.

2.4. All of the responses were recorded in a database and analysed carefully. Some comments required interpretation in order to ensure that as many of the respondents' submissions as possible were considered in the analysis. Some respondents endorsed the responses provided by others and their views have been inferred from the relevant endorsed response.

2.5. This document aims to summarise as many of the points raised as possible. It is not, however, possible to give details of all specific points made by individual respondents within the confines of this summary.

3. Key findings and summary of Department's response

3.1. There was widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigants. The key findings from the responses received are summarised below;

Eligibility

- Majority of respondents opposed the proposal that the Regulations should make it clear that only an applicant who is '*a member of the public*' is entitled to costs protection;

Level of available costs protection

- Almost all respondents disagreed with the proposal to introduce default cost caps for applicants and respondents that could be increased and decreased;
- All of those that commented opposed the proposal that an applicant should be required to submit its finances in all Aarhus cases;
- All respondents disagreed with the proposal that the Regulations should provide that, in cases involving multiple applicants or respondents, a separate costs cap applies to each applicant or respondent;
- Nearly all respondents considered that the draft Regulations attached to the consultation paper did not properly reflect the *Edwards* criteria;
- Most agreed that it was appropriate for the courts to apply the *Edwards* principles to decrease an applicant's liability for costs (but not to increase it);
- There were mixed views about the level at which costs protection should be set;

Costs of challenging status

- Nearly all respondents opposed the proposal that costs for unsuccessful challenges to the status of Aarhus cases should be ordered on the standard basis;

Cross undertakings in damages

- Most respondents who commented did not support the proposed revisions to the cross undertaking in damages provisions of the Regulations.

  [A cross undertaking in damages is where an applicant for an interim injunction gives an undertaking to the court that they will compensate the respondent and, if relevant, and third parties, for losses caused by the injunction, should it transpire that it was wrongly granted.]

DEPARTMENTAL RESPONSE

3.2. The Department has listened to and carefully considered the views expressed in response to the consultation. Following its analysis, it has revisited its initial proposals and made some significant changes to them. The outcome of the Department's considerations is detailed at section 5. In summary, its revised proposals are as follows;

Eligibility

- The Regulations should be amended to;
    - reflect that only an applicant who is '*a member of the public*' is entitled to costs protection; and
    - define the term 'the public' with reference to the definition provided by the Aarhus Convention.

Level of available costs protection

- an applicant's costs cap should be set at a default limit of £5,000 where an applicant is an individual and £10,000 in all other cases and a respondent's cross-cap should be set at a default limit of £35,000;
- an applicant should be able to apply to the court for it's cap to be reduced and the respondent's cap to be increased where the default limits would make the proceedings prohibitively expensive for the applicant;
- the court should apply the principles set out in *Edwards* when considering whether the default limits are 'prohibitively expensive' for the applicant;
- a separate default cap should apply to onward appeals. It should be set at the same level as at the first instance proceedings and be variable on the same basis.

Costs of challenging status

- Unsuccessful challenges to the status of Aarhus cases should continue to be ordered on the indemnity basis;

Cross undertakings in damages

- The provisions in the Regulations relating to cross-undertakings in damages should only apply to an applicant for an interim injunction who is a member of the public as defined with reference to the definition in the Aarhus Convention;

- The court should apply the *Edwards* principles when considering whether continuing with proceedings would be prohibitively expensive for the applicant.

4. Summary of responses

ELIGBILITY

<u>Question 1</u>: Do you agree with the proposed changes to the wording of the Regulations regarding eligibility for costs protection? If not, please give your reasons.

- 7 respondents disagreed [1 inferred]
- 2 respondents agreed [1 inferred]

4.1. The majority of respondents who answered this question opposed the proposal to change the wording of the Regulations regarding eligibility for costs protection. There was a general concern that the proposal could narrow the scope of the costs protection afforded by the scheme. Respondents considered that the change might mean that only individuals would qualify for protection whilst Non Governmental Organisations (NGOs), trusts, charities and companies would be excluded. Although some respondents accepted that this may not have been the Department's intention, they considered that uncertainty arose because there was no proposal to define what is meant by the term '*a member of the public*' in the proposed draft Regulations.

4.2. A number of respondents referred to the definition of '*the public*' in the Aarhus Convention which they argued was intended to be broad in scope and argued that any exclusion of NGOs and their like would breach the Convention. Reference was also made to domestic and Convention case law which it was contended indicated that local authorities should not be excluded from costs protection when not acting in the capacity of decision-maker.

4.3. The risk of satellite litigation about whether or not an applicant was a member of the public and its tendency to create delay and increase costs was another issue raised by respondents. Some respondents advocated the withdrawal of the proposal or, in the alternative, recommended that the term '*the public*'

should be defined with reference to the definition in the Aarhus Convention. Those respondents who agreed with the proposal did not elaborate on their reasoning.

LEVEL OF AVAILABLE COSTS PROTECTION

<u>Question 2</u>: Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps? If not, please give your reasons.

- 8 respondents disagreed [3 inferred]
- 1 agreed

4.4. All but one of those respondents who expressed a view on this question disagreed with the proposed hybrid model to cost caps. The main reason for opposition was the perception that it would cause uncertainty over costs liability. Some respondents considered that it would mean that an applicant would not know the extent of its costs exposure before it issued proceedings. Others suggested that the proposal was contrary to the European Union ('EU') principles of certainty and effectiveness. It was generally considered that the uncertainty over costs exposure generated by the proposal would deter the bringing of Aarhus cases.

4.5. Most of those respondents who disagreed considered that the uncertainty caused was compounded by the proposal to allow the costs caps to be varied at any time during the proceedings. They argued that, to comply with EU law, the level of protection afforded needs to be ascertained early on in the proceedings. Requiring applications to vary the caps to be made at the pre-leave stage in judicial review cases and within four weeks for statutory reviews was suggested as an appropriate timescale.

4.6. Almost all of those who disagreed with this proposal were of the view that it would promote lengthy and costly satellite ligation on costs liability. Some considered it probable that an applicant would seek to raise the respondent's

cap at the start of all proceedings. The view was also held that enabling the respondent to apply to increase the applicant's cap would give rise to satellite litigation on the merits of a case in advance of the hearing. The only consultation respondent to agree with this proposal did not provide a reason but indicated no objection provided that it did not create unnecessary satellite litigation disproportionate to the costs saved by the public purse.

4.7. Some respondents recommended as an alternative hybrid approach that an applicant's costs cap should be capable of being reduced where it can demonstrate that it is prohibitively expensive. It was suggested that this would be consistent with the objective limb of the *Edwards* test. Although some respondents to the consultation advocated as their first preference the removal of the respondent's cross-cap in its entirety, there was also support, in the alternative, for permitting a respondent's cross cap to be increased on cause shown. The position in Scotland where applicant and respondent caps can be only be decreased and increased respectively was highlighted as an option by some respondents to the consultation.

Question 3: Do you agree that the criteria set out at proposed regulation 3A(4) at Appendix 1 properly reflect the principles from the *Edwards* cases? If not, please give your reasons.

- 6 respondents disagree [2 inferred]
- 1 respondent agrees [in part]

4.8. The majority of respondents considered that the draft Regulations attached to the consultation paper did not properly reflect the *Edwards* criteria. Most of the discontentment expressed appeared to be about the proposed hybrid approach rather than the suggested criteria itself. There was, however, criticism of the proposal to provide that the court take into account the prospect of success or frivolity of a case. It was argued that, in judicial review cases, this would overlap with the test applied at the leave stage of proceedings and give rise to increased costs. It was also suggested that allowing an applicant's cap to be lowered or respondents' cap increased in

cases of exceptionality only would constrain the implementation of the *Edwards* principles.

4.9. Some respondents considered it unnecessarily prescriptive to set out the *Edwards* principles in the Regulations given the court's knowledge of them and the possibility that further principles might emerge in future cases. The one respondent who partially agreed with this proposal did not elaborate on the reason for support but, amongst other things, commented on the need for an upper cost limit to be set to comply with the objective limb of the *Edwards* test.

Question 4: Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed regulation 3A(4) at Appendix 1) to decide whether to vary costs caps? If not, please give your reasons.

- 5 respondents agreed in part [2 inferred]
- 3 respondents disagreed [1 inferred]

4.10. Most of the respondents who gave a view on this question agreed that it was appropriate for the courts to apply the *Edwards* principles to decrease an applicant's liability for costs but not to increase its liability. It was, however, suggested that uncertainty might arise from the subjective nature of some of the criteria and that guidance would assist applicants. Discontentment to this proposal appeared to arise from objections to the more general proposal to allow caps to be varied.

Question 5: Should all applicants be required to file at court and serve on the respondent a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

- 9 respondents answered in the negative [1 inferred]
- 0 respondents answered in the affirmative

4.11. Respondents to this question unanimously agreed that applicants should not be required to submit a schedule of their finances in Aarhus cases. They were of the opinion that the proposal would deter an applicant from bringing environmental cases because of reservations regarding the privacy of its personal financial information. Some suggested that the deterrent effect would be felt most amongst those applicants minded to form a group (such as a residents' association) as there would be concern that others in the group would be made aware of their private financial affairs.

4.12. The other reasons for opposition to this proposal cited in the responses were that it would;

- give respondents an unfair advantage in that they would know the limits on applicant's resources and could use this information to
  - prolong cases until the exhaustion of those resources; and/or
  - inform its position on other cases against it involving the same applicant;
- give rise to contested hearings on the information provided and, thereby, prolong the proceedings and increase costs;
- place an onerous administrative burden on both the parties and courts; and
- breach the access to justice requirements in the Convention.

4.13. Some respondents also noted that there is no general requirement for an applicant in other civil proceedings to declare its financial resources and suggested that the proposal would, therefore, mean that environmental cases would be treated less favourably than other cases. The requirement that an

applicant should have to declare its financial means in every case before they could avail of costs protection attracted criticism. There was a suggestion by one respondent that the information should only be required in instances where an application to vary the cost cap had been made.

4.14. There was particular hostility to the proposal that details should be provided of any financial support which any person has provided or is likely to provide to an applicant. It was suggested that this aspect of the proposal would;

- dissuade donors and charities from providing financial support to cases;
- be unworkable given the myriad of grants, donations, legacies and membership subscriptions received by environmental NGOs;
- give rise to the publication of the personal details of children and vulnerable adults where they are members of the applicant organisation or funders;
- require applicants to speculate on potential support; and
- create satellite litigation about whether a person 'is likely' to provide financial support.

Question 6: Do you agree with the proposed approach to the application of costs caps in cases involving a number of applicants or respondents? If not please give your reasons.

- All 10 respondents disagreed [2 inferred]

4.15. There was unanimous opposition to this proposal amongst respondents to the consultation. Some commented that the proposal was unfair to applicants because;

- there is rarely more than one respondent in the relevant cases;
- it could potentially render an applicant's liability for costs higher than that of the respondent; and
- it penalised applicants for combining forces.

4.16. Other reasons cited for opposition to the proposal were that it;

- would increase costs for multi-applicant cases and, thereby, deter environmental litigation;
- was incompatible with the Convention because of the potential level of the resulting combined costs;
- could create an additional burden on the courts by encouraging less meritorious, individual applications; and
- could lead to artificial practices in the framing of groups or associations to bring challenges.

4.17. The suggestion that having a number of applicants increased the costs or length of a case was repudiated by reference to the general tendency for applicants to pool legal resources. Queries were also raised about whether, under the proposal, the respondent would be liable to pay each applicant £35,000 in a case successfully taken by a number of applicants and the position in cases involving multiple applicants and respondents. One respondent recommended that the court should have discretion to regulate the position in multiple applicant and respondent cases but that the Regulations should make it clear that unincorporated associations are to be treated as one applicant for the purpose of cost protection.

Question 7: At what level should the default caps be set? Please give your reasons.

- 8 respondents commented

4.18. There were a number of different views expressed by respondents on the level at which default caps should be set. In commenting, some respondents reiterated their objections to the very idea of having default, as opposed to fixed, caps.

4.19. Some respondents considered that the current level of the caps seemed appropriate. Others suggested that the cap for applicants should be reduced. A range of figures were suggested. Some, for example, recommended that an applicant's cost cap should be reduced by 50% whilst there was also a

suggestion that a cap of £500-£1000 would be sufficient. One respondent suggested that a cap of £5,000 (inclusive of Value Added Tax) should be set for applicants with an income below £35,000 and net assets of less than £200,000.

4.20. There was opposition to any suggestion that an applicant's cap should be increased and the respondent's cap decreased as it was argued that this could give rise to an increase in total costs liability for applicants which could be in breach of the Convention and the objective limb of *Edwards* test. There was also a recommendation that a cap of £5,000 should be set for all applicants because it was considered that higher caps for groupings can deter their formation.

Question 8: What are your views on the introduction of a range of default cost caps in the future?

- 6 respondents commented

4.21. All but one of the respondents who commended opposed the future introduction of a range of default costs caps. The reasons given were that it;

  - would add complexity to the system;
  - was unnecessary;
  - would discourage environmental litigation without conferring any substantial costs advantages to respondents given the number of cases involved;
  - increase uncertainty for applicants; and
  - impede access to justice.

4.22. The only respondent to support the introduction of a range of default caps considered it acceptable provided that the upper limit was modest and satellite litigation discouraged.

COSTS OF CHALLENGING AND APPLICATIONS TO VARY

Question 9: Do you agree that where a respondent unsuccessfully challenges whether a case is an Aarhus Convention case, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

- 8 respondents disagreed [2 inferred]
- 1 respondent agreed

4.23. Nearly all respondents who answered this question were opposed to the proposal that costs for unsuccessful challenges to the status of Aarhus cases should be ordered on the standard basis. The one respondent to indicate support for this proposal considered it appropriate that the receiving party should be able to justify its claim for costs.

4.24. Most respondents were, however, of the opinion that the proposal would encourage respondents to bring challenges regarding the status of claims. There was concern expressed that this would increase costs and uncertainty for applicants and further deter access to justice. Reference was made to the low number of challenges that had been brought in England and Wales (where statistics are available) and it was suggested that awarding costs on the indemnity basis there had deterred respondents from bringing weak challenges. The opinion was also held that awards on the indemnity basis are necessary to address resource imbalances between the parties. It was suggested that the proposed change would result in further non-compliance with the Convention.

Question 10: Do you think the Regulations should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the Regulations take?

- 6 respondents commented

4.25. Almost all of those who commented on this question did not answer it. Rather, they reiterated their opposition to the proposal to allow the caps to be varied. Although opposed to the introduction of the hybrid model proposed, one respondent conceded that if the model was to be introduced provision should be made for costs in variation applications to be awarded on an indemnity basis to protect applicants from prohibitive cost.

CROSS-UNDERTAKINGS IN DAMAGES

Question 11: Do you have any comments on the proposed revisions to the provision in the Regulations dealing with cross-undertakings in damages?

- 6 respondents commented

4.26. Most respondents who commented did not support the proposed revisions to the cross-undertaking in damages provisions in the Regulations. There were concerns that the proposal to;

- provide the provisions should only apply to applicants who are members of the public would exclude NGOs;
- direct the court to apply the *Edwards* principles when considering whether or not to order a cross-undertaking would create uncertainty; and
- provide that the court should have regard to the combined financial resources of applicants in multi-applicant cases when considering a cross-undertaking would raise costs exposure and deter litigation.

4.27. Some respondents suggested that the current position with regard to interim relief breached EU law and the Convention. It was recommended that the requirement for a cross-undertaking in damages be removed in Aarhus cases and that there should be a rebuttable presumption in favour of granting interim relief where a failure to do so would result in significant and irreparable harm to the environment. It was suggested that the expedition of the case would prevent undue prejudice to any affected respondent or third party. There was, however, also an acknowledgment by some respondents that excusing applicants from undertakings could impose a heavy loss on respondents.

OTHER ISSUES

4.28. In addition to those identified in the consultation, some other broad themes emerged from responses;

Scope

Some respondents took the view that the remit of the costs protection scheme should be broadened to apply to private law cases in order to comply with the Aarhus Convention.

Totality of costs

Some respondents expressed the opinion that an assessment of prohibitive cost must take account of the totality of the applicant's costs exposure. They suggested that the caps are not representative of the extent of that exposure which also encompasses the court fees and an applicant's own legal costs.

Appeal costs

Some respondents argued that the same protection scheme that applies to cases at first instance should be applied to onward appeals. It was suggested that European case law indicates that applicants could not be exposed to a higher cap on appeal than at first instance and that any caps on appeal should be capable of being reduced where the imposition of the same cap would cause prohibitive expense.

Environmental court

There was also a suggestion that, given the specialist and complex nature of the environmental law, consideration should be given to establishing an environmental court.

5. Department's response and way forward

5.1. The Department has listened to the opposition expressed by respondents to its proposals and has carefully considered and analysed the issues they have raised. As a result, it has made a number of significant changes to its initial proposals. Its overall aim is to maximise the certainty provided to applicants regarding their costs exposure but, at the same time, provide the flexibility needed to take account of individual circumstances. The Departments proposals are detailed below.

ELIGIBLITY

5.2. The Department remains of the view that is necessary to specify the types of applicant eligible for costs protection under the relevant scheme. Having considered the responses received, it does, however, accept that providing that only members of the public are entitled to costs protection without defining the term 'public' in the Regulations may give rise to uncertainty as to eligibility. **The Department, therefore, proposes to amend the Regulations to reflect that only an applicant who is a '*member of the public*' is entitled to costs protection and define the term '*the public*' with reference to the definition given in Article 2 of the Aarhus Convention**. This will make it clear, as was always intended, that eligibility for costs protection under the regime is based not only on the nature of the case but also on the nature of the individual or body which would benefit from that protection.

LEVEL OF COSTS PROTECTION

5.3. The Department considers that it is not unreasonable to expect the losing party in a case to contribute towards the costs of the winning party and that a general requirement on an applicant to bear some liability is appropriate to discourage frivolous or vexatious litigation. However, it recognises concerns raised by consultees about the proposal to allow the court to raise an applicant's cap and or reduce a respondent's cap. In particular, it notes objections that this would not provide an applicant with the certainty it needs regarding its costs liability. The Department, however, remains of the view that an absolute fixed limit is too rigid and offers no flexibility in individual cases.

The Department, therefore, proposes that, in the interests of certainty and flexibility, **the maximum amount that can be recovered from an applicant if it loses should be £5,000 for individuals and £10,000 in other cases but an applicant should be able to apply for this limit to be reduced in cases where it would make the proceedings prohibitively expensive for it.** To clarify, it is proposed that the court should have the power to reduce (but not increase) an applicant's cost cap.

5.4. The Department has noted the objections of some consultees to the very existence of a cross cap for respondents. However, it is keen to ensure that some protection continues to be afforded to the public purse and that there is an incentive for applicants to keep costs down. **The Department, therefore, proposes to maintain a respondent's cross-cap at £35,000 but allow an applicant to apply to increase the cap in cases where it would make the proceedings prohibitively expensive for the applicant.** The court will, therefore, be able to increase but not reduce the respondent's cap. The Department considers that this revised approach will provide certainty to an applicant in respect of its maximum costs exposure if it is unsuccessful but also provides flexibility in cases where an applicant has extremely limited resources.

5.5. The Department has noted the reservations expressed by some respondents about how the *Edwards* principles have been reflected in the draft Regulations that were attached to the consultation paper. It remains of the view, however, that the draft Regulations accurately reflect those principles. **The Department, therefore, proposes that, the court should have regard to the principles set out in the draft Regulations when considering whether the default limits are 'prohibitively expensive' for the applicant.**

FINANCIAL DISCLOSURE

5.6. The Department had proposed that;

- an applicant should be required to lodge in court and serve on the respondent details of its financial means at the beginning of all Aarhus proceedings; and
- when the court considers the financial resources of an applicant, it should have regard to any financial support which a third party has provided or is likely to provide to it.

It does, however, accept that there are very real concerns amongst consultees that these proposals could deter some applicants and have a chilling effect on the provision of financial support to environmental litigation. On reflection, it considers that providing that an applicant's costs caps can be decreased and respondent's caps increased on the basis of the *Edwards* principles will, in any event, require the courts to have regard to the financial resources of the applicant, as this is the subjective element of the *Edwards* test. It is also satisfied that, without express provision, the court will retain its discretion to enquire into support provided or likely to be provided by third parties where it considers it appropriate. **The Department, therefore, does not intend to make provision to require an applicant to disclose its means or to require the court to have regard to third party support.**

MULTIPLE APPLICANTS

5.7. In cases involving a number of applicants and or respondents, the Department had proposed that a separate costs cap should be applied to each individual party. The intention was to enhance certainty regarding the protection afforded. It has, however, reflected on the reasons expressed for the resounding opposition to this proposal and decided that the courts should continue to have discretion to regulate the costs position in cases involving multiple applicants and or respondents. It is satisfied that this will provide the flexibility needed to allow account to be taken of the particular circumstances arising in individual cases.

COSTS OF CHALLENGES TO STATUS OF CASES

5.8. The Department has taken note of the opposition expressed by most respondent consultees to its proposal to provide that costs for unsuccessful challenges should normally be ordered on the standard basis (as opposed to the current indemnity basis). It acknowledges that the current rule provision was introduced to deal with concerns that respondents might be encouraged to bring weak challenges and notes that, given the small number of Aarhus Convention cases here, its proposal to change the basis on which costs are awarded is unlikely to give rise to any significant public sector savings. On reflection, **the Department proposed that the relevant costs on challenges to the status of Aarhus cases should continue to be awarded on an indemnity basis**.

CROSS UNDERTAKINGS IN DAMAGES

5.9. The Department has considered the comments made by consultees on its proposals regarding cross-undertakings in damages. However, it remains of the view that its proposals regarding eligibility and construction of what is 'prohibitively expensive' will bring additional clarity to the scheme. **The Department, therefore, proposes that the;**

- **court should apply the *Edwards* principles when considering whether continuing with proceedings would be prohibitively expensive; and**

- **provisions in the Regulations relating to cross-undertakings in damages should only apply to an applicant for an interim injunction who is a member of the public.**

The Department is satisfied that its proposal to define the term '*the public'* with reference to the Convention will ensure that there can be no suggestion that the provisions on cross undertakings in damages apply only to individuals and not to applicant NGOs or the like.

5.10. Having considered the objections raised by respondents, the Department has decided not to make express provision in the Regulations directing the court to have regard to the combined financial resources of applicants in multi-applicant cases when applying those principles to a decision about cross-undertakings in damages. The court will, of course, retain its discretion as to whether or not to enquire into such matters if it considers it appropriate.

APPEAL COSTS

5.11. Under the current scheme, a court dealing with an appeal in an Aarhus case can limit the costs of the appeal recoverable from both parties and, in deciding on that limit, must consider their means, all the circumstances of the case and the need to facilitate access to justice. There, is, however, no cap for the costs of an appeal like that which exists for first instance proceedings.

5.12. The Department has noted the concerns that conferring discretion on the court to determine the amount of appeal costs may not provide certainty over costs liability on appeal. It recognises that there may be different costs considerations on appeal to those at first instance. In the interest of certainty, however, the Department considers that separate default caps should apply to an appeal in an Aarhus case. It considers it proportionate for the caps on appeal to be set at the same level as is currently applied to first instance cases and for the appellate court to have the same flexibility to vary the caps as the lower court. **The Department, therefore, proposes that;**

- **the maximum amount that can be recovered from an applicant where it is unsuccessful in an onward appeal should be a £5,000 where the applicant acts as an individual and £10,000 in all other cases;**
- **a respondent's maximum costs liability on appeal should be capped at £35,000; and**
- **an applicant be able to able to apply for its cap on appeal to be reduced and the respondent's cap on appeal to be increased in cases where the default limits would make the appeal prohibitively expensive for the applicant; and**

- **the court should be required to have regard to the principles set out in *Edwards* when considering whether the default caps on appeal are 'prohibitively expensive' for the applicant.**

To clarify, irrespective of whether it is an applicant or respondent at first instance that appeals, it is intended that the amount of costs that can recovered from an applicant at first instance on appeal should not exceed £5,000 in the case of an individual. The Department considers that this approach will set out a clear but flexible framework for caps on appeal which will allow regard to be taken of the applicant's resources including any costs incurred by it in the lower court.

WAY FORWARD

5.13. The Department will make amendments to the Regulations to implement its proposed changes in the near future. It intends to keep the impact and application of its amendments under review.

6. Equality Impact

DOJ Section 75

EQUALITY SCREENING FORM

Costs Protection in Environmental Cases

Proposals to revise the costs capping scheme for cases which fall within the scope of the Aarhus Convention

The Legal Background

Under section 75 of the Northern Ireland Act 1998, the Department is required **to have due regard to the need to promote equality of opportunity:**

- between person of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and,
- between persons with dependants and persons without[1].

Without prejudice to the obligations set out above, the Department is also required to:

- **have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group; and**
- **meet legislative obligations under the Disability Discrimination Order.**

Introduction

1. This form should be read in conjunction with the Equality Commission's revised Section 75 guidance, "A Guide for Public Authorities" April 2010, which is available on the Equality Commission's website (www.equalityni.org). **Staff should complete a form for each new or revised policy for which they are responsible (see page 6 for a definition of policy in respect of section 75).**

2. The purpose of screening is to identify those policies that are likely to have an impact on equality of opportunity and/or good relations and so determine whether an Equality Impact Assessment (EQIA) is necessary. Screening should be introduced at an early stage when developing or reviewing a policy.

[1]A list of the main groups identified as being relevant to each of the section 75 categories is at Annex B of the document.

3. The lead role in the screening of a policy should be taken by the policy decision-maker who has the authority to make changes to that policy and should involve, in the screening process:

- other relevant team members;
- those who implement the policy;
- staff members from other relevant work areas; and
- key stakeholders.

A flowchart which outlines the screening process is provided at Annex A.

4. The first step in the screening exercise, is to gather evidence to inform the screening decisions. Relevant data may be either quantitative or qualitative or both (this helps to indicate whether or not there are likely equality of opportunity and/or good relations impacts associated with a policy). Relevant information will help to clearly demonstrate the reasons for a policy being either 'screened in' for an equality impact assessment or 'screened out' from an equality impact assessment.

5. The absence of evidence does not indicate that there is no likely impact but if none is available, it may be appropriate to consider subjecting the policy to an EQIA.

6. Screening provides an assessment of the likely impact, whether 'minor' or 'major', of its policy on equality of opportunity and/or good relations for the relevant categories. In some instances, screening may identify the likely impact is none.

7. The Commission has developed a series of four questions, included in Part 2 of this screening form with supporting sub-questions, which should be applied to all policies as part of the screening process. They identify those policies that are likely to have an impact on equality of opportunity and/or good relations.

Screening decisions

8. Completion of screening should lead to one of the following three outcomes. The policy has been:

   i. ‘screened in’ for equality impact assessment;
   ii. ‘screened out’ with mitigation or an alternative policy proposed to be adopted; or
   iii. ‘screened out’ without mitigation or an alternative policy proposed to be adopted.

Screening and good relations duty

9. The Commission recommends that a policy is ‘screened in’ for equality impact assessment if the likely impact on **good relations** is ‘major’. While there is no legislative requirement to engage in an equality impact assessment in respect of good relations, this does not necessarily mean that equality impact assessments are inappropriate in this context.

Part 1

Definition of Policy

There have been some difficulties in defining what constitutes a policy in the context of section 75. To be on the safe side it is recommended that you consider any new initiatives, proposals, schemes or programmes as policies or changes to those already in existence. It is important to remember that even if a full EQIA has been carried out in an "overarching" policy or strategy, it will still be necessary for the policy maker to consider if further screening or an EQIA needs to be carried out in respect of those policies cascading from the overarching strategy.

Overview of Policy Proposals

The aims and objectives of the policy must be clear and terms of reference well defined. You must take into account any available data that will enable you to come to a decision on whether or not a policy may or may not have a differential impact on any of the s75 categories.

Policy Scoping

10. The first stage of the screening process involves scoping the policy under consideration. The purpose of policy scoping is to help prepare the background and context and set out the aims and objectives for the policy, being screened. At this stage, scoping the policy will help identify potential constraints as well as opportunities and will help the policy maker work through the screening process on a step by step basis.

11. Public authorities should remember that the Section 75 statutory duties apply to internal policies (relating to people who work for the authority), as well as external policies (relating to those who are, or could be, served by the authority).

Information about the policy

Name of the Policy

Costs Protection in Environmental Cases. Proposals to revise the cost capping scheme for cases which fall within the scope of the Aarhus Convention.

Is this an existing, revised or a new policy?

Revised policy.

What is it trying to achieve? (intended aims/outcomes)

The policy aims to provide greater flexibility and clarity in terms of cost protection in cases which come within the scope of the Aarhus Convention within the framework of the European Directives which contribute to implementation of the Convention. These Directives require that review by the courts of environmental decisions is not 'prohibitively expensive'.

Views were sought on proposals to improve the current scheme relating to costs protection in those environmental cases governed by the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 ('the Regulations'). **The focus of the revised proposals is to;**

- **provide clarity on the types of applicants that are eligible for costs protection;**
- **allow the level of costs protection available to be varied in certain circumstances;**
- **provide more certainty about cost exposure in onward appeal cases; and**
- **clarify factors which courts must consider when deciding whether cross-undertakings in damages for interim injunctions are required in Aarhus Convention costs regime cases.**

Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

No.

Who initiated or wrote the policy?

Department of Justice

Who owns and who implements the policy?

Department of Justice

Implementation factors

12. Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision?

If yes, are they

☒ financial
☒ legislative
☐ other, please specify _____

Main stakeholders affected

13. Who are the internal and external stakeholders (actual or potential) that the policy will impact upon?

☐ staff
☒ service users
☒ other public sector organisations
☒ voluntary/community/trade unions
☒ other, please specify- judiciary, businesses (including legal practitioners)

Other policies with a bearing on this policy

N/A

• what are they?

• who owns them?

Available evidence

14. Evidence to help inform the screening process may take many forms. Public authorities should ensure that their screening decision is informed by relevant data.

15. What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

It has not been possible to identify data on separate section 75 categories. The number of environmental cases in Northern Ireland which come under the scope of the existing regulations is extremely small; between 1 April 2013 and 31 December 2015, there were 11 such cases brought in Northern Ireland, only 5 proceeded to judicial review and, to date, none have been subject to appeal. There were no applications for interim injunctions in these cases during that time period.

Section 75 Category	Details of evidence/information
Religious belief	See answer at 15.
Political opinion	See answer at 15.
Racial group	See answer at 15.
Age	See answer at 15.
Marital status	See answer at 15.
Sexual orientation	See answer at 15.
Men and Women generally	See answer at 15.
Disability	See answer at 15.

Dependants	See answer at 15.

Needs, experiences and priorities

16. Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories.

It has not been possible to identify data on separate section 75 categories. There does not appear to be any needs, experiences or priorities which are relevant to section 75 categories.

Section 75 Category	**Details of evidence/information**
Religious belief	See answer at 16.
Political opinion	See answer at 16.
Racial group	See answer at 16.
Age	See answer at 16.
Marital status	See answer at 16.
Sexual orientation	See answer at 16.
Men and Women generally	See answer at 16.
Disability	See answer at 16.
Dependants	See answer at 16.

Part 2

SCREENING QUESTIONS

Introduction

17. In making a decision as to whether or not there is a need to carry out an equality impact assessment, consider questions 1-4 listed below.

18. If the conclusion is **none** in respect of all of the Section 75 equality of opportunity and/or good relations categories, then the decision may to screen the policy out. If a policy is 'screened out' as having no relevance to equality of opportunity or good relations, give details of the reasons for the decision taken.

19. If the conclusion is **major** in respect of one or more of the Section 75 equality of opportunity and/or good relations categories, then consideration should be given to subjecting the policy to the equality impact assessment procedure.

20. If the conclusion is **minor** in respect of one or more of the Section 75 equality categories and/or good relations categories, then consideration should still be given to proceeding with an equality impact assessment, or to:

- measures to mitigate the adverse impact; or
- the introduction of an alternative policy to better promote equality of opportunity and/or good relations.

In favour of a 'major' impact

21. (a) The policy is significant in terms of its strategic importance;

(b) Potential equality impacts are unknown, because, for example, there is insufficient data upon which to make an assessment or because they are

complex, and it would be appropriate to conduct an equality impact assessment in order to better assess them;

(c) Potential equality and/or good relations impacts are likely to be adverse or are likely to be experienced disproportionately by groups of people including those who are marginalised or disadvantaged;

(d) Further assessment offers a valuable way to examine the evidence and develop recommendations in respect of a policy about which there are concerns amongst affected individuals and representative groups, for example in respect of multiple identities;

(e) The policy is likely to be challenged by way of judicial review;

(f) The policy is significant in terms of expenditure.

In favour of 'minor' impact

22. (a) The policy is not unlawfully discriminatory and any residual potential impacts on people are judged to be negligible;

(b) The policy, or certain proposals within it, are potentially unlawfully discriminatory, but this possibility can readily and easily be eliminated by making appropriate changes to the policy or by adopting appropriate mitigating measures;

(c) Any asymmetrical equality impacts caused by the policy are intentional because they are specifically designed to promote equality of opportunity for particular groups of disadvantaged people;

(d) By amending the policy there are better opportunities to better promote equality of opportunity and/or good relations.

In favour of none

23. (a) The policy has no relevance to equality of opportunity or good relations.

(b) The policy is purely technical in nature and will have no bearing in terms of its likely impact on equality of opportunity or good relations for people within the equality and good relations categories.

24. Taking into account the evidence presented above, consider and comment on the likely impact on equality of opportunity and good relations for those affected by this policy, in any way, for each of the equality and good relations categories, by applying the screening questions given overleaf and indicate the level of impact on the group i.e. minor, major or none.

Screening questions

1. What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 equality categories? **None. No bearing on equality of opportunity for section 75 categories is expected.**		
Section 75 category	**Details of policy impact**	**Level of impact? Minor/Major/None**
Religious belief		**None.**
Political opinion		**None.**
Racial group		**None.**
Age		**None.**
Marital status		**None.**
Sexual orientation		**None.**
Men and Women generally		**None.**
Disability		**None.**
Dependants		**None.**

2. Are there opportunities to better promote equality of opportunity for people within the Section 75 equalities categories?

No opportunities to promote equality of opportunity for section 75 categories are expected.

	If Yes, provide details	**If No, provide reasons**
Religious belief		**No opportunities expected.**
Political opinion		**No opportunities expected.**
Racial group		**No opportunities expected.**
Age		**No opportunities expected.**
Marital status		**No opportunities expected.**
Sexual orientation		**No opportunities expected.**
Men and Women generally		**No opportunities expected.**
Disability		**No opportunities expected.**
Dependants		**No opportunities expected.**

3. To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group? **None. There does not appear to be any bearing in terms of its likely impact on good relations for people within the equality and good relations categories.**		
Good relations category	**Details of policy impact**	**Level of impact Minor/Major/None**
Religious belief		**None.**
Political opinion		**None.**
Racial group		**None.**

4. Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group? **There does not appear to be any opportunities to promote good relations.**		
Good relations category	**If Yes, provide details**	**If No, provide reasons**
Religious belief		**No opportunities expected.**
Political opinion		**No opportunities expected.**
Racial group		**No opportunities expected.**

Additional considerations

Multiple identity

25. Generally speaking, people can fall into more than one Section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities?

None apparent.

(*For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).*

26. Provide details of data on the impact of the policy on people with multiple identities. Specify relevant Section 75 categories concerned.

Part 3

Screening decision

27. If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

It is not anticipated that an equality impact assessment is required as it is not envisaged that the revised policy will have any bearing in terms of its likely impact on equality of opportunity or good relations for people within the equality and good relations categories.

28. If the decision is not to conduct an equality impact assessment, consider if the policy should be mitigated or an alternative policy be introduced.

This is not considered necessary.

29. If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

30. Further advice on equality impact assessment may be found in a separate Commission publication: Practical Guidance on Equality Impact Assessment.

Mitigation

31. When the public authority concludes that the likely impact is ‘minor’ and an equality impact assessment is not to be conducted, the public authority may consider mitigation to lessen the severity of any equality impact, or the introduction of an alternative policy to better promote equality of opportunity or good relations.

32. Can the policy/decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and/or good relations?

33. If so, give the **reasons** to support your decision, together with the proposed changes/amendments or alternative policy.

Timetabling and prioritising

34. Factors to be considered in timetabling and prioritising policies for equality impact assessment.

35. If the policy has been **'screened in'** for equality impact assessment, then please answer the following questions to determine its priority for timetabling the equality impact assessment.

36. On a scale of 1-3, with 1 being the lowest priority and 3 being the highest, assess the policy in terms of its priority for equality impact assessment.

Priority criterion	**Rating (1-3)**
Effect on equality of opportunity and good relations	
Social need	
Effect on people's daily lives	
Relevance to a public authority's functions	

37. Note: The Total Rating Score should be used to prioritise the policy in rank order with other policies screened in for equality impact assessment. This list of priorities will assist the public authority in timetabling. Details of the Public Authority's Equality Impact Assessment Timetable should be included in the quarterly Screening Report.

38. Is the policy affected by timetables established by other relevant public authorities?

39. If yes, please provide details.

Part 4

Monitoring

40. Public authorities should consider the guidance contained in the Commission's Monitoring Guidance for Use by Public Authorities (July 2007).

41. The Commission recommends that where the policy has been amended or an alternative policy introduced, the public authority should monitor more broadly than for adverse impact (See Benefits, P.9-10, paras 2.13 – 2.20 of the Monitoring Guidance).

42. Effective monitoring will help the public authority identify any future adverse impact arising from the policy which may lead the public authority to conduct an equality impact assessment, as well as help with future planning and policy development.

Part 5

Approval and authorisation

Screened by:	**Position/Job Title**	**Date**
Naomi Callaghan	**Grade 7, EU Branch, Civil Justice Policy Division**	**15/06/16**
Approved by:		
Laurene McAlpine	**Deputy Director, Civil Justice Policy Division**	**15/06/16**

Note: A copy of the Screening Template, for each policy screened should be 'signed off' and approved by a senior manager responsible for the policy, made easily accessible on the public authority's website as soon as possible following completion and made available on request.

The Screening exercise is now complete.

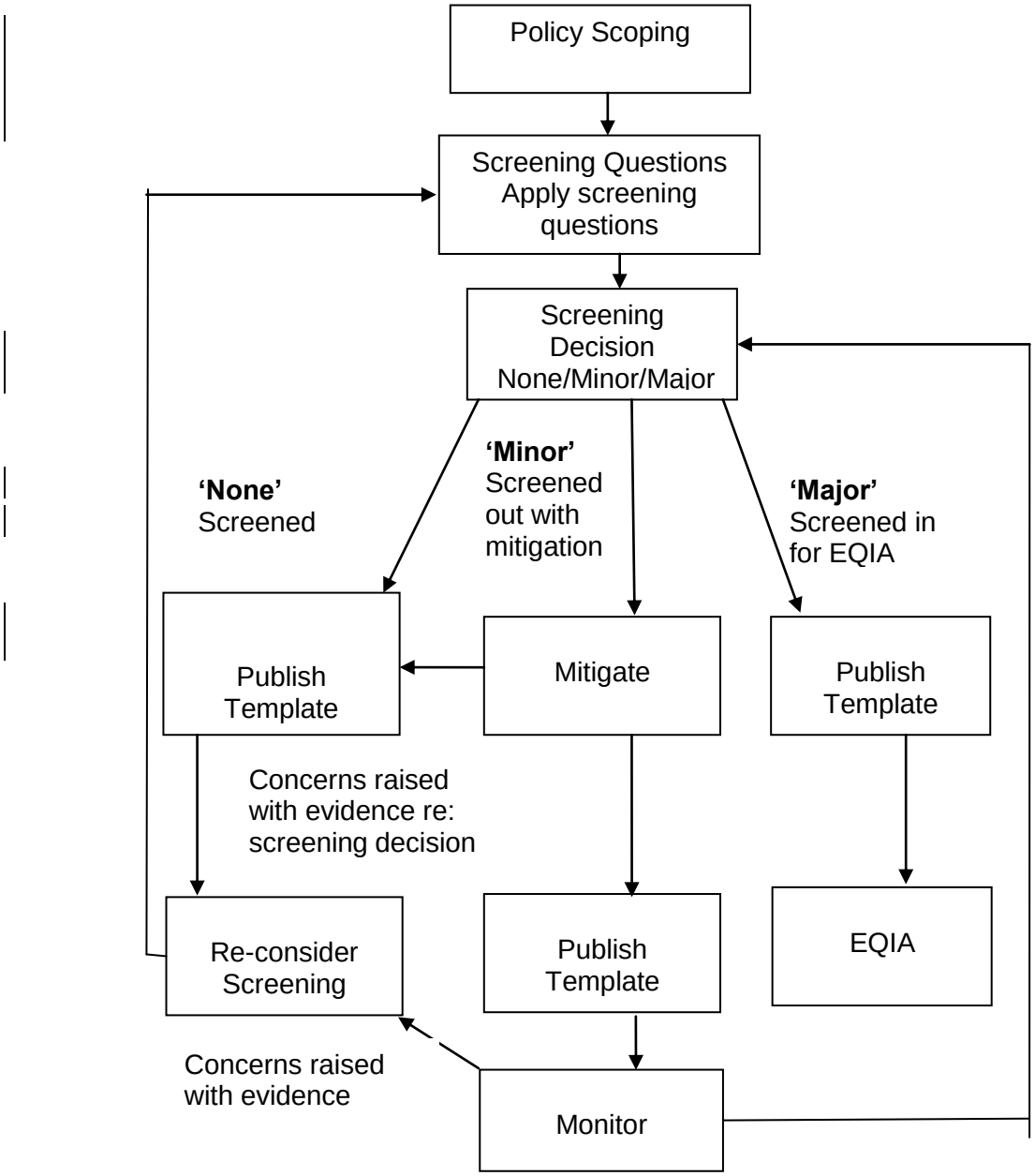
When you have completed the form please retain a record in your branch and send a copy for information to:-

Corporate Secretariat
Room 3.13B
Castle Buildings
Stormont Estate
BELFAST
BT4 3SG
Tel: 028 9052 2611

or e-mail dojequality@justice-ni.x.gsi.gov.uk

ANNEX A

SCREENING FLOWCHART



ANNEX B

MAIN GROUPS IDENTIFIED AS RELEVANT TO THE SECTION 75 CATEGORIES

Category	Main Groups
Religious Belief	Protestants; Catholics; people of other religious belief; people of no religious belief
Political Opinion	Unionists generally; Nationalists generally; members/supporters of any political party
Racial Group	White people; Chinese; Irish Travellers; Indians; Pakistanis; Bangladeshis; Black Africans; Afro Caribbean people; people of mixed ethnic group, other groups
Age	For most purposes, the main categories are: children under 18; people aged between 18 and 65. However the definition of age groups will need to be sensitive to the policy under consideration. For example, for some employment policies, children under 16 could be distinguished from people of working age
Marital/Civil Partnership Status	Married people; unmarried people; divorced or separated people; widowed people; civil partnerships
Sexual Orientation	Heterosexuals; bisexual people; gay men; lesbians
Men and Women generally	Men (including boys); women (including girls); trans-gender and trans-sexual people
Persons with a disability and persons without	Persons with a physical, sensory or learning disability as defined in Schedules 1 and 2 of the Disability Discrimination Act 1995.
Persons with dependants and persons without	Persons with primary responsibility for the care of a child; persons with personal responsibility for the care of a person with a disability; persons with primary responsibility for a dependent elderly person.

7. Regulatory Impact Assessment

1. INTRODUCTION

1.1 This section provides an assessment of the regulatory impact of the Department's revised way forward on changes to the current costs protection scheme for environmental cases that fall within the scope of the Aarhus Convention.

2. IDENTIFYING POTENTIAL SECTORS FOR IMPACTS

2.1. This part describes the sectors which may be affected by the revised policy proposals and the likely nature of the impact.

Sectors

2.2. The proposed changes will affect the voluntary, business and public sectors.

Third sectors

2.3. The proposals will have implications for those organisations within the third sector (such as environmental NGOs) that challenge decisions in Northern Ireland in cases which come within the remit of the Aarhus Convention. They will also affect those organisations within this sector that provide legal assistance and representation to members of the public involved in such proceedings.

Business

2.4. Likewise, the proposals may impact on those in the business sector who take proceedings to challenge decisions subject to the Aarhus Convention. Others in this sector that may be affected include those entities that are engaged by Northern Ireland Departments and public authorities to execute decisions which come within the scope of the Convention (such as third party commercial developers). Legal practitioners who provide representation to members of the

public and voluntary sector involved in proceedings under the Convention may also be affected by the proposed changes.

Public Sector

2.5. The proposals will have implications for those Northern Ireland Departments and other public authorities which make decisions subject to the Aarhus Convention as they will be the respondents to court challenges to these decisions. They may also have an impact on the Northern Ireland Courts and Tribunals Service (an Executive agency of the Department of Justice) which is responsible for supporting the administration of the courts.

Individuals

2.6. The proposed changes are likely also to be felt by those members of the public who use the legal system to challenge the decisions which fall within the scope of the Aarhus Convention.

3. FINDINGS

3.1 This part describes the revised proposals put forward in section 5 and summarises the impacts arising for the various sectors.

Eligibility

1. The Regulations should be amended to

- ***reflect that only an applicant who is a member of the public is entitled to costs protection; and***
- ***define the term 'the public' with reference to the definition provided by the Aarhus Convention.***

3.2. The purpose of this proposal is to put beyond all doubt that cost capping scheme enshrined in the Regulations is intended to protect members of the public. Anecdotal evidence suggests that in Northern Ireland there have not been any occasions when an applicant who is not a member of the public has been deemed entitled to the costs protections available under the Regulations. It is not envisaged, therefore, that the proposal will have any financial impact on the public sector here. Likewise, no impact on the third or business sectors is

anticipated. Defining the term 'the public' will make it clear, as was always intended, that eligibility for costs protection is not restricted to individuals only.

Level of available cost protection

2. ***An applicant's costs cap should be set a default limit of £5,000 where an applicant is an individual and £10,000 in all other cases and a respondent's cross-cap should be set at a default limit of £35,000;***

3. ***An applicant should be able to apply to the court for it's cap to be lowered and the respondent's cap to be raised where the default limits would make the proceedings prohibitively expensive for the applicant;***

4. ***The court should have regard to the principles set out in Edwards when considering whether the default limits are 'prohibitively expensive' for the applicant.***

Variations to applicant's cap

3.3. The proposed changes would allow scope for the applicant's current cost caps to be reduced where the court is satisfied that, without variation, the costs of the proceedings would be 'prohibitively expensive' for the applicant. The cap is already set at a low level and, as such, it is expected that the number of cases in which a reduction would be ordered is likely to be small. Nonetheless, the proposal should, in some cases, reduce the financial burden on applicants (such as individuals, voluntary organisations or businesses of limited means). As such, the proposal should improve access to justice in these cases.

3.4. Between 1 April 2013 and 31 December 2015, there were only 11 Aarhus Convention cases brought in Northern Ireland. It is not expected that the prospect of potentially lower cost caps for applicants will result in any significant increase in the number of Aarhus cases being brought in this jurisdiction. Most cases here are brought by way of judicial review and, even if there was an increase in the number of applications for leave to apply for judicial review as a result of the prospect of lower cost caps, the court will continue to apply the same criteria in its decisions on granting leave and, thereby, filter out unmeritorious applications at an early stage (just under half of those Aarhus cases brought between 1 April 2013 and 31

December 2015 were granted leave to proceed). The impact of this proposal on the public sector (in terms of defending proceedings and court resources) and business sector (in respect of resultant delay in the progress of any relevant projects) is expected to be minimal.

3.5. Under the revised proposal, the court will not be able to increase the applicant's cost cap. The proposal will not, therefore, increase the costs exposure of applicants or the revenue recoverable by public sector respondents.

Variations to respondent's cap

3.6. Under the revised proposal, the courts will also have the power to increase a respondent's costs cap. It is possible that this may alleviate, at least to some extent, the alleged difficulties encountered by applicants in obtaining legal representation. In some complex cases, the costs incurred by applicants may be considerably higher than the cross-cap of £35,000. It is possible that applicant lawyers may be dissuaded from embarking on cases in which they will not be able to recover their full costs even if successful. This proposal could, therefore, have a positive financial impact on those individuals or environmental NGOs taking proceedings under the Aarhus Convention and the legal practitioners who act on their behalf. Providing the court with the power to increase a respondent's costs cap should also act as a deterrent to respondents to expand the scope of a dispute unnecessarily and, thereby, avoid unwieldy litigation. This could impact favourably on court resources. It should be noted, however, that under the proposal the court will only be able to increase the cap which the respondent may not be ordered to pay where it is satisfied that not increasing it would be prohibitively expensive for the applicant.

Cross-undertakings in damages

5. ***The court should apply the Edwards principles when considering whether continuing with proceedings would be prohibitively expensive;***

6. ***Provisions in the Regulations relating to cross-undertakings in damages should only apply to an applicant for an interim injunction who is a member of the public.***

3.7. The proposal to direct the court to apply the Edwards principles should ensure greater clarity and transparency for both applicants and respondents regarding the factors which a court is to take into consideration when deciding whether or not to make a cross-undertaking in damages in cases and its terms. However, as the proposal essentially codifies existing practice, it is not anticipated that it would give rise to any financial impact for any sector. Likewise, it is not expected that providing clarification on the application of the cross-undertaking provisions in the Regulations will have any significant impact.

Appeal costs

In an onward appeal in an Aarhus case;

7. ***an applicant's costs cap should be set a default limit of £5,000 where an applicant is an individual and £10,000 in all other cases and a respondent's cross-cap should be set at a default limit of £35,000;***

8. ***an applicant should be able to apply for its cap to be reduced and the respondent's cap to be increased in cases where the default limits would make the proceedings prohibitively expensive for the applicant;***

9. ***the court should be required to have regard to the principles set out in Edwards when considering whether the default limits on appeal are 'prohibitively expensive' for an applicant.***

Introduction of default caps

3.8. As noted, between 1 April 2013 and 31 December 2015, there were 11 Aarhus Convention cases brought in Northern Ireland, only 5 of these proceeded to judicial review and, to date, none of these cases have been subject to onward appeal. Although it is possible that introducing default caps for appeal cases could increase the number of applications for leave for appeal, it is not expected that the proposal will give rise to any substantial increase in the number of appeals; the court will continue to apply the same criteria in its decisions on granting leave to appeal to weed out appeals without merit. The impact of this proposal on the public sector (in terms of defending appeals and court resources) and business sector (in

respect of consequential delay to any relevant projects) is, therefore, expected to be insignificant.

Variations to applicant's cap

3.9. The proposed changes would allow scope for the applicant's cost cap on appeal to be lowered where the court is satisfied that, without doing so, the costs of the proceedings would be 'prohibitively expensive' for the applicant. As the cap will be set at a low level, it is envisaged that the number of cases in which a reduction would be ordered is likely to be small. Nevertheless, this flexibility should, in some cases, alleviate the financial burden on applicants and, thereby, enhance access to justice in these cases.

Variations to respondents cap

3.10. Under the revised proposal, the courts will also have the power to raise a respondent's costs cap on appeal. It is envisaged that this could have a favourable financial impact on those individuals or environmental NGOs taking proceedings under the Aarhus Convention and the legal practitioners who act on their behalf. It should be noted that under the proposal the court will only be able to increase the cap which the respondent may not be ordered to pay where it is satisfied that not increasing it would be prohibitively expensive for the applicant. This should reduce the number of cases in which an increase is sought or ordered and minimise any impact on the respondent and court resource.

4. Conclusion

4.1. It is, however, generally envisaged that the proposals will improve access to justice for applicants from the third and business sectors by increasing certainty around potential costs exposure and by providing the flexibility needed to take account of the particular circumstances of individual applicants. The impacts on applicants are, therefore, overall expected to be favourable (albeit limited given the small number of Aarhus Convention cases in Northern Ireland). The Department will, however, keep this matter under review once the amended regulations are in place and as practice develops.

8. List of respondents (alphabetical)

Alternative A5 Alliance

Belfast City Airport Watch

Ben Christman

C& J Black Solicitors

Cormac McAleer

Friends of the Earth Northern Ireland

Kieran Fitzpatrick

Northern Ireland Environmental Link

Sir Liam McCollum

Ulster Angling Federation