Costs Protection in Environmental Cases

Proposals to revise the costs capping scheme for eligible environmental challenges

This consultation closes on 20 January 2016

Contents

Executive Summary

The purpose of this consultation is to seek views 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 proposals for improvement are set within the framework of relevant EU law requirements.

The proposals have arisen in light of judgments of the:

- Court of Justice of the European Union (CJEU) in case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914;
- UK Supreme Court in the same case: *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55; and
- CJEU in case C-530/11 *European Commission v. UK [2014] 3 WLR 853.*

In the latter case, the CJEU found that the costs regime for environmental judicial review cases which had been in place in the UK in 2010 had not properly implemented the 'not prohibitively expensive' requirement of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') as required by the Public Participation Directive (2003/35/EC).

In response to these concerns, a regime codified in the Regulations was introduced in April 2013. This sets out the circumstances in which costs protection can be granted and the level at which it can be made.

The Regulations were, however, introduced prior to the delivery of judgments in the above cited cases. After detailed consideration of these judgments, the Department recognises there is scope for making measured adjustments to the current costs regime within the framework of the relevant Directives. The proposals contained in

this consultation are aimed at providing greater flexibility, clarity and certainty within the regime.

In summary, the main areas of focus of the proposals contained in this consultation are the:

- types of applicants that are eligible for costs protection;
- level of costs protection available and whether they should remain fixed or variable; and
- factors which courts must consider when deciding whether cross-undertakings in damages for interim injunctions are required in cases which fall within the scope of the regime.

Chapter 1: Introduction

1.1. The purpose of this consultation paper is to seek views about proposed amendments to the costs protection regime for Aarhus Convention cases. It is aimed at those who may be involved in or affected by environmental legal proceedings in Northern Ireland which fall within the scope of the relevant Directives and Aarhus Convention.

1.2. The paper is divided into five chapters. Chapter 2 provides some background to reform. Chapter 3 sets out the proposals for reform and provides specific questions for respondents. Chapter 4 provides a summary of the key questions on which the Department is inviting views, whilst chapter 5 outlines the procedure for providing responses to the paper.

1.3. The paper includes for comment an amended version of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 intended to give effect to the proposed changes (see **Appendix 1**). In that Appendix the proposed additions are denoted as underlined text which is in blue in the electronic version of this document and the proposed deletions are denoted as struck-through text which is in red in the electronic version of this document. For ease of reference, the existing Regulations are also at **Appendix 2**.

1.4. An equality screening exercise required by section 75 of the Northern Ireland Act 1998 has been conducted and is set out at **Appendix 3**. A partial Regulatory Impact Assessment for the proposals is also included at **Appendix 4**. We would welcome comments on both these assessments, in particular, on our analysis of the potential impact and benefits of the proposals and whether consultees consider that they give rise to any implications which have not been identified.

1.5. The list of consultees **Appendix 5** is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the matters covered by this consultation paper. **Appendix 6** provides a

questionnaire for completion by respondents which is also available on the Department's website.

1.6. This consultation will close on 20 January 2016. Following analysis of the responses received, the Department will consider and amend the Regulations as appropriate.

Chapter 2: Background

2.1. The Aarhus Convention requires parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In particular, it requires parties to ensure the public have access to a procedure to challenge decisions subject to the public participation procedures (*Article 9(2) of the Convention*) and contraventions of national law relating to the environment (*Article 9(3) of the Convention*) and specifies that those court procedures should, amongst other things, not be 'prohibitively expensive'. Both the UK and the EU are parties to the Aarhus Convention.

2.2. The Public Participation Directive implemented in EU law the requirements of Article 9(2) of the Convention relating to public participation procedures and specified that such procedures should not be 'prohibitively expensive'. It did this by amending Directives on Environmental Impact Assessment and Integrated Pollution Prevention and Control. The relevant amendments made by the Public Participation Directive have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the Environmental Impact Assessment Directive (2011/92/EU).

European Commission concerns

2.3. Between 2007 and 2010, the European Commission raised concerns that the UK had not properly transposed the requirements of the Public Participation Directive in respect of the costs of bringing proceedings to challenge environmental decisions. In summary, the Commission was concerned that, in the UK:

- the potential financial consequences of losing environmental judicial review challenges could have prevented non-governmental organisations (NGOs) and individuals from bringing cases against public bodies; and
- requiring applicants for interim injunctions to give cross-undertakings in damages before interim injunctions were granted by the courts could have

been an impediment to the use of interim injunctions, which can be used for temporarily halting operations that may have a potentially damaging effect on the environment.

2.4. The European Commission subsequently announced that it was bringing proceedings against the UK over the cost of challenges to decisions on environmental matters.

Departmental response

2.5. In October 2011, in response to the Commission's concerns, the Department launched the consultation '*Cost Protection for Litigants in Environmental Judicial Review Applications - Outline Proposals to Limit Costs for Judicial Review Applications which fall within the Aarhus Convention'*[1] regarding proposals to provide greater clarity about the level of costs for parties in environmental cases by introducing a codified regime for costs protection in these cases.

2.6. The Regulations, made on 15 April 2013, provide for a simple fixed recoverable costs regime for Aarhus Convention cases at first instance. This involves a fixed asymmetric costs cap structure, whereby the respondent, if the application fails, may recover no more than a prescribed amount from the applicant and, if the application succeeds, the applicant may recover no more than a prescribed amount from the respondent. The amount recoverable from the applicant is capped at £5,000 where the applicant is an individual and £10,000 in other cases (for example where the applicant is a NGO). The 'cross-cap' amount recoverable from the respondent is £35,000. The costs protection applies to costs incurred at any stage of the application. The caps are fixed and not able to be varied. The Regulations also set out a procedure for applications by the defending public authority to challenge that a case is an Aarhus Convention case. They apply to judicial reviews and other statutory reviews which come within the scope of the Convention[2].

[1] *http://www.dojni.gov.uk/index/public-consultations/archive-consultations/cost-protection-consultation-pdf-07.12.11.pdf*
[2] Provision was also made in 2013 for environmental cost protection in the other jurisdictions of the UK. This largely mirrors that provided for by the Regulations albeit that there are some differences with regard to the scope of the schemes.

2.7. There is presently no subjective element to the regime. This means that no account is taken of the particular applicant's financial position (i.e. the only question is whether or not the applicant is claiming as an individual) or the strength of their particular case. Other than the distinction drawn between applicants who claim as individuals and all other applicants, the Regulations do not take into account the nature of the applicant.

2.8. The Regulations also contain provision in respect of cross-undertakings in damages for interim injunctions in Aarhus Convention cases; they provide that in considering whether to require an applicant to give a cross-undertaking in damages, the court must have particular regard to the need for the terms of the relevant order not to be such as would make continuing with the case 'prohibitively expensive' for the applicant. In addition, the Regulations allow the court to make costs payable to a charity promoting pro bono legal representation where the applicant's representation or part of it has been provided free of charge.

European developments

2.9. Shortly after the introduction of the current costs regime, the CJEU gave its judgment in the *Edwards* case*,* in which it clarified what is meant by the EU law requirement that the costs of certain environmental cases should not be 'prohibitively expensive'[3]. This was in response to the Supreme Court in *Edwards* referring questions to the CJEU for a preliminary ruling, including on how a national court should decide whether the cost of litigation is 'prohibitively expensive'; and how flexible a national court could be in considering whether this is the case[4]. The CJEU set out principles, which were subsequently reiterated by the Supreme Court,[5] regarding the approach to determining what level of costs in any particular case would be 'prohibitively expensive'[6].

[3] Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914
[4] *R (Edwards) v. Environment Agency* [2011] 1 WLR 79; the questions are set out in the CJEU judgment at paragraph 23
[5] *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55
[6] See the CJEU's judgment at paragraphs 40 to 46 and the Supreme Court's judgment at paragraphs 21 to 28

2.10. The judgment suggested that, in meeting the not 'prohibitively expensive' requirement, the Regulations could be more flexible than they currently stand. For instance, it held that the test of what is 'prohibitively expensive' is not purely subjective: the cost of proceedings must not exceed the financial resources of the person concerned and, in addition, the cost must not appear to be objectively unreasonable.

2.11. In February 2014, the CJEU gave its judgment in *European Commission v. United Kingdom*[7]. It found that the costs regime for environmental judicial review cases which had been in place in the UK in 2010 had not properly implemented the 'not prohibitively expensive' requirement as required by the Public Participation Directive. The Court was assessing the position before the UK Jurisdictions' costs regimes were revised in 2013.

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

Chapter 3: Proposals for consultation

3.1. The proposals outlined within this chapter aim to ensure that the costs regime in Aarhus Convention cases offers enhanced flexibility and clarity within the framework of the relevant European Directives.

Eligibility – types of applicant which are eligible for costs protection

3.2. It is clear that the intention of introducing the Regulations was to protect members of the public. This was substantiated by the comments of Lord Carnwath in the *Edwards* case[8] when he referred to the corresponding changes to the Civil Procedure Rules for England and Wales by stating;

'*Amendments are made to comply with the Aarhus Convention so that any system for challenging decisions in environmental matters is open to members of the public and is not prohibitively expensive*.' (*emphasis added*)

3.3. The current Regulations do not, however, expressly specify the types of applicant which are eligible for costs protection under the Aarhus Convention costs regime. On this basis, it has been argued that applicants are entitled to costs protection under the Aarhus Convention regime whether or not they are members of the public for the purposes of the Aarhus Convention. The Department does not accept that this is a correct interpretation of the current Regulations. The Regulations are expressed to apply to 'an application for judicial review…or a review… under any statutory provision… which is subject to the provisions of the Aarhus Convention'. Therefore, whether any case is subject to the Aarhus Convention costs regime in the Regulations can only be answered by considering the terms, and purpose, of the Aarhus Convention itself.

3.4. Under the Aarhus Convention, costs protection clearly only applies to persons who are members of the public; Article 2 of the Aarhus Convention contains the following definitions relevant to the term 'member of the public':

[8] *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55 at paragraph19

"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;

"The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'

The same definitions are used in Article 1 of the Environmental Impact Assessment Directive and in Article 3 of the Industrial Emissions Directive. The relevant obligations arising under Article 9 of the Aarhus Convention and the Directives, therefore, only apply in relation to a member of the public.

3.5. In order to ensure a clearer alignment between the wording of the Regulations and the obligations arising under Article 9 of the Aarhus Convention and the relevant Directives **the Department proposes to amend the Regulations to reflect that only an applicant who is a 'member of the public' is entitled to costs protection** (see the definition of 'Aarhus Convention case' in amended regulations 2(1) and 3(2) at Appendix 1).

3.6. It will be a matter for the courts to decide whether a particular applicant is or is not a member of the public in a case where entitlement to costs protection under the Aarhus Convention costs regime is contested, having regard to any further guidance from future case law in this area. The proposed amendment is intended to make it clearer that, as was always intended, 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 costs protection.

Q1. Do you agree with the proposed changes to the wording of the Regulations regarding eligibility for costs protection? If not, please give your reasons.

Levels of available costs protection

3.7. In its judgment in *Edwards*, the CJEU set out principles regarding the approach to determining what level of costs in any particular case would be 'prohibitively expensive'[9]. These principles were reiterated by the Supreme Court in the same case[10]. The principles are that the costs of the proceedings must not exceed the financial resources of the applicant and must not appear to be objectively unreasonable, having regard to certain factors including the merits of the case.

3.8. The approach taken in the Regulations is very simple and contains no subjective element, capping the amount for individual applicants at £5,000 and for all other applicants at £10,000. The court does not take into consideration an individual applicant's financial resources or whether the costs of the proceedings might appear to be objectively unreasonable. There is no provision to vary the terms of the fixed costs protection, although it is expressly left open to an applicant to opt out of the regime, so that (for example) an applicant can opt out in order that it would not be faced with a cap on the respondent's liability for the applicant's costs (see existing Regulation 3(1) at Appendix 2).

3.9. This approach, and in particular the absence of any requirement for the court to take into account the financial resources of an applicant, was influenced by the domestic case law at the time that the Regulations were introduced and was developed prior to the CJEU and the Supreme Court setting out the principles in *Edwards*.

3.10. **It is proposed that the current Regulations be revised in favour of a 'hybrid' model because, in every case where the regime applied, the cost cap would - at least initially - be set at the same default levels, but any party could make an application for the court to vary their own - or another party's - costs cap** (see proposed new regulation 3A at Appendix 1). The court would also be able to vary the caps of its own motion. In varying the caps, the court would be able to increase or decrease them and, in

[9] Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914 at paragraphs 40-46
[10] *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55 at paragraphs 21-28

appropriate cases, remove a cap altogether. It is proposed to make provision regarding the amount of costs payable to the Northern Ireland Pro Bono Unit in case where representation to the applicant is provided free of charge to reflect the fact that the cost cap in these cases could be subject to variation (see regulation 3(5) at Appendix 1).

3.11. Under the proposed model, in all cases where the court considered whether to vary a costs cap, it would be required to have regard to the principles set out in *Edwards* in ensuring any variation would not make costs 'prohibitively expensive' for the applicant (proposed new regulation 3A(3)(a) at Appendix 1).

3.12. The Department takes the view that it would be exceptional for applicants to require more costs protection than is provided by the default costs caps. Before lowering an applicant's costs cap or increasing a respondent's cap, the court would have to be satisfied that the case was exceptional because, without the variation, the costs of the proceedings would be 'prohibitively expensive' for the applicant, again having regard to the principles in *Edwards* (proposed new regulation 3A(3)(b) and (4) at Appendix 1). This approach is intended to deter applicants from making unmeritorious applications to vary caps but it would not limit the court's ability to provide more costs protection in the exceptional cases where that would be necessary.

3.13. The Department does not consider the level of a respondent's costs cap to be relevant to whether proceedings are 'prohibitively expensive' for the purposes of the Aarhus Convention or the relevant European Directives; and this is not why it proposes to revise the Regulations in this regard. Instead, the intention behind the proposal to treat respondents' costs caps in this way is to prevent their presence from incentivising respondents (particularly when respondents have greater financial resources than applicants) to expand the cost of a dispute unnecessarily, with the purpose of increasing an applicant's costs so they substantially exceed the level of the respondent's costs cap.

3.14. The proposal that the costs caps could be varied on the basis of the *Edwards* principles would require the courts to have regard to whether the costs of proceedings would exceed the financial resources of the applicant, as this is

the subjective element set out in the *Edwards* cases. The Department considers that, for these purposes, the financial resources of the applicant include financial support which third parties have already provided to the applicant or which they are likely to provide in the future. Consequently, **it is proposed that, when the court looks at the financial resources of an applicant in considering whether to vary a costs cap, it should have regard to any financial support which a third party has provided or is likely to provide to the applicant** (proposed regulation 3A(5) at Appendix 1).

3.15. The proposal that the courts should have regard to the applicant's financial resources when considering whether to vary a costs cap raises questions about the evidence which a court would have to consider, and whether this type of evidence would be available to other parties so that they could decide whether to make an application to vary a costs cap. **The Department considers that information about how applicants are financing Aarhus Convention cases should be provided to the court.** Courts require this information to ensure that they are able to make appropriate decisions about costs. This would be particularly relevant in the context of Aarhus Convention cases under the proposed 'hybrid' model, as without this information the court might not know that it would be appropriate to consider varying a party's costs cap.

3.16. Ordinarily, respondents would not have access to information about an applicant's financial resources. This has the potential to undermine the proposal that any party should be able to apply to vary any other party's costs cap based on the *Edwards* principles. It is, therefore, necessary to make provision in the Aarhus Convention costs regime to ensure that respondents are able to access this information. **The Department proposes that an applicant who indicates on its application that they consider the proceedings to be an Aarhus Convention case would be required to file at court and serve on the respondent a schedule of their financial resources, verified by affidavit**. This would be done at the same time as issuing and serving the application and would ensure that, in all cases,

respondents had access to the relevant information (see proposed regulation 3(1)(a)(ii) at Appendix 1).

3.17. The schedule of the applicant's financial resources would have to take account of any financial support which third parties had provided to the applicant or where likely to provide in the future (see proposed regulation 3A(5) at Appendix 1).

3.18. In order for courts to apply the *Edwards* principles, it may be necessary to make reference to information concerning applicants' financial resources during oral hearings. There is already provision in the Rules of the Court of Judicature (Northern Ireland) 1980 which allows proceedings or parts of them to be held in private if the court so directs (see Order 32, rule 17 of those Rules). This might be relied upon in Aarhus Convention cases which involve the disclosure of confidential information where publicity would damage that confidentiality.

3.19. In cases involving a number of applicants or respondents, the Department takes the view that a separate costs cap should be applied to each individual party. This is consistent with the broad policy aim of ensuring that each party to the case has its costs capped at an appropriate level. **It is, therefore, proposed that the Regulations are amended to make it clear that costs caps will be applied to each applicant and respondent individually** (see proposed regulation 3(10) at Appendix 1).

3.20. A question which the introduction of the 'hybrid' model raises is whether the default costs caps should be set at the same level as the fixed costs caps under the Regulations or whether consideration should be given to setting the default costs caps at an alternative level. Under the 'hybrid' model, the court will be able to adjust costs caps and this is something that will be considered at court hearings, resulting in additional costs and delay and taking up court resources. The impact could be minimised by setting the default costs caps at a level that is neither too high nor too low, minimising the need for this type of hearing. The Department's view is that the default costs caps should not be set at levels which mean they deter applicants from bringing challenges or

from making use of the scheme provided by the Regulations. It does, however, recognise that the respondents in these cases are public bodies and are funded by the taxpayer, so there could be an unnecessary cost to the taxpayer if the default costs caps provide too much costs protection. The Department is, therefore, seeking views on whether the default costs caps should be set at the same level as the fixed costs caps under the Regulations (£5,000 for individual applicants, £10,000 for other applicants and £35,000 for respondents) or whether they should be altered and, if so, how that could best be done. For example, would increasing the caps for individual applicants to £10,000 and £20,000 for other applicants and reducing the cap for respondents to £25,000 be appropriate?

3.21. In the future, an alternative approach to setting default costs caps may be to introduce a range of default costs caps. The appropriate default costs cap would be determined with reference to the applicant's financial means. This would mean that the level at which costs protection was initially set would be different for different applicants, depending on their financial resources. It would still be possible to vary costs caps in appropriate cases. The Department recognises that there is currently limited data to use in setting the range for default costs caps and the corresponding levels of applicants' financial means, but expects that this data – in the form of case law – would become available once the 'hybrid' model had been implemented. It welcomes views on whether such an approach should be considered for the future.

Q2. 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.

Q3. Do you agree that the criteria set out at proposed regulation 3A(4) properly reflect the principles from the *Edwards* cases? If not, please give your reasons.

Q4. 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.

Q5. 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.

Q6. 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.

Q7. At what level should the default costs cap be set? Please give your reasons.

Q8. What are your views on the introduction of a range of default costs caps in the future?

Costs of Challenges and applications to vary cost caps

3.22. The Department also proposes to amend the provision in the Regulation regarding the costs of respondents' challenges to applicants' assertions that they are entitled to costs protection under the Aarhus Convention costs regime. Currently, an applicant is protected if it wrongly asserts that its case is an Aarhus Convention case, because regulation 4(3)(a) provides that no order for costs will normally be made where this is the case. However, where the respondent wrongly asserts a case is not an Aarhus case, costs will normally be awarded against it on the indemnity basis, whether or not this would increase its costs exposure above the level of its costs cap.

3.23. These provisions were introduced because of concerns that respondents might be encouraged to bring weak challenges if there was no penalty for contesting that a case attracted Aarhus Convention costs protection, and that without some sanction this would lead to unnecessary satellite litigation. The Department is of the view that this has created an uneven playing field and now considers it necessary to equalise the position. **It is, therefore, proposed that the provision for costs normally being made on the indemnity basis is replaced with one for costs normally being made on**

the standard basis (see proposed regulation 4(3)(b) at Appendix 1). This would not, however, prevent a court from making an indemnity costs order if it considered it appropriate.

Q9. 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.

Q10. 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?

Cross-undertakings in damages

3.24. The Regulations contain provision relating to cross-undertakings in damages for interim injunctions in Aarhus Convention cases. In summary, when a court considers whether to require an applicant to give a cross-undertaking in damages in an Aarhus Convention case, it will have particular regard to the need for the terms of the relevant order not to be such as would make continuing with the case 'prohibitively expensive' for the applicant.

3.25. **The Department proposes an amendment to provide additional clarity in relation to how courts assess whether a cross-undertaking in damages would make continuing with a case 'prohibitively expensive' for an applicant**. The amendment would direct the courts to apply the *Edwards* principles when considering whether continuing with proceedings would be 'prohibitively expensive' (see proposed new regulation 5(2)(b) at Appendix 1).

3.26. **The Department also proposes** an amendment to provide additional clarity for cases involving multiple applicants. This amendment **provides that in a multi-applicant case the court will have regard to the combined financial resources of those applicants when applying the Edwards principles to make a decision about a cross-undertaking in damages** (see proposed new regulation 5(3) at Appendix 1). The intention is to avoid a situation where a court took into account the financial resources of some but not all of the

applicants, even though all of the applicants could potentially be liable under the cross-undertaking. When the court looks at the financial resources of any applicant, the Department proposes that it should have regard to any financial support which a third party has provided or is likely to provide to the applicant (proposed new regulation 5(4) at Appendix 1).

3.27. **The Department proposes a further amendment, to make it clearer on the face of the Regulations that the provisions relating to cross-undertakings in damages in Aarhus Convention cases apply only to an applicant for an interim injunction who is a member of the public** (see proposed regulation 5(1) at Appendix 1). As above, this is because the relevant obligations arising under Article 9 of the Aarhus Convention and the relevant Directives only apply in relation to a member of the public.

Q11. Do you have any comments on the proposed revisions to the provision in the Regulations dealing with cross-undertakings in damages?

Chapter 4: Summary of Key Questions

Q1. **Do you agree with the proposed changes to the wording of the Regulations regarding eligibility for costs protection? If not, please give your reasons.**

Q2. **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.**

Q3. **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.**

Q4. **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.**

Q5. **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.**

Q6. **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.**

Q7. **At what level should the default caps be set? Please give your reasons.**

Q8. **What are your views on the introduction of a range of default cost caps in the future?**

Q9. **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.**

Q10. **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?**

Q11. **Do you have any comments on the proposed revisions to the provision in the Regulations dealing with cross-undertakings in damages?**

Chapter 5: How to respond and when

5.1. The Department welcomes views on the proposals and issues raised in this consultation paper. The consultation will run from 25 November 2015 and all responses should be submitted by 5pm on 20 January 2015. Responses can be sent by e-mail, fax or post as below.

5.2. For queries and responses to the consultation please contact:

Civil Justice Policy Division
Department of Justice
Access to Justice Directorate
Massey House
Stormont Estate
Belfast
BT4 3SX

Tel: *028 90163206*
Fax: *028 90169502*
Textphone: *028 90527668*

Email: *atojconsultation@dojni.x.gsi.gov.uk*

5.3. When responding, please state whether you are making a submission as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

5.4. A list of those notified of this exercise is presented at Appendix 5.

Additional Copies and Alternative Formats

5.5. An electronic copy of this document along with an easy read version is available to view and download from the consultation section of the Department of Justice website (http://www.dojni.gov.uk).

5.6. You may make copies of this document without seeking permission and if you require further printed copies, we would invite you to access the document through our website. If you do not have access to the internet and require us to provide you with further copies, please contact us with your specific request.

5.7. Copies in other formats, including Braille, large print or audio cassette may be made available on request. If it would assist you to access the document in an alternative format, or a language other than English, please let us know and we will do our best to assist you.

Confidentiality

5.8. At the end of the consultation period, copies of responses received by the Department may be made available publicly. A summary of responses will also be published on the Department of Justice website. If you prefer all or part of your response or name to be anonymised, please state this clearly in your response. Any confidentiality disclaimer that may be generated by you or your organisation's IT system or included as a general statement in your fax cover sheet, will be taken to apply only to information in your response for which confidentiality has been specifically requested.

5.9. Any personal data which you provide will be handled in accordance with the Data Protection Act 1998. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that responses not subject to specific exemptions in the Act be communicated to third parties on request.

5.10. Please contact the Consultation Co-ordinator at the address below to request copies of responses. An administrative charge may be made to cover photocopying of the responses and postage costs.

Equality

5.11. Section 75 of the Northern Ireland Act 1998 requires that all public authorities in Northern Ireland comply with a statutory duty to:

- have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation, gender, and those with or without a disability and those with or without dependents; and
- have regard to the desirability of promoting good relations between persons of different religious belief, political opinion and racial group.

5.12. In addition, public authorities are also required to meet legislative obligations under the Disability Discrimination (Northern Ireland) Order 2006,[11] particularly in the formation of public policy making.

5.13. The Department is committed to fulfilling those obligations and proposals arising this paper have been subjected to screening to determine impact on equality of opportunity, good relations and other statutory duties (see screening form at Appendix 3).

[11] S.I. 2006 No.312 (N.I.1)

Complaints

5.14. Any comments, queries or concerns about the way this exercise has been conducted should be sent to the Departmental Consultation Co-ordinator at the following address:

Standards Unit
Department of Justice
Stormont Estate
Belfast
BT4 3SL
Or email to standardsunit@dojni.x.gsi.gov.uk

Appendix 1 – Proposed amendments to the Aarhus Cost Regulations

The Department of Justice, being a Northern Ireland department designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to the environment, makes the following Regulations in exercise of the powers under section 2(2) of the European Communities Act 1972.

Citation and commencement

1.—(1) These Regulations may be cited as the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 and shall come into operation on 15th April 2013.

(2) These Regulations only apply to proceedings commenced on or after 15th April 2013.

Interpretation

2.—(1) In these Regulations—

"the Aarhus Convention" means the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters done at Aarhus on 25 June 1998;

"an Aarhus Convention case" means an application *brought by a member of the public*

(a)
for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978(**3**) of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; or

(b)
for review under the provisions of any statutory provision to the High Court of a decision, act or omission ~~all or~~ part of which is subject to the provisions of the Aarhus Convention;

"court" means the High Court;

"free of charge" means otherwise than for or in expectation of fee, gain or reward;

"~~indemnity~~ *standard* basis" has the meaning assigned to it by rules of court;

"legal representative" means a person exercising a right of audience or conducting litigation in an Aarhus Convention case.

(2) The Interpretation Act (Northern Ireland) 1954 shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Costs in Aarhus Convention cases

3. (1) These Regulations shall not apply where the applicant—

(a)has not —

(i) stated in the application that it is an Aarhus Convention case; *and*

(ii) filed and served with the application a schedule of his estimated means supported by affidavit; or

(b)has stated in the application that the applicant does not wish these Regulations to apply.

(2) Subject to paragraph (4) *and regulation 3A*, in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant *who is a member of the public* shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.

(3) In an Aarhus Convention case, the court shall order that the costs recoverable from a respondent shall not exceed £35,000 subject to regulation *3A and* 4(3).

(4) Where the applicant is or was represented by a legal representative and this representation is or was provided free of charge, in whole or in part, even if the applicant is or was also represented by a legal representative not acting free of charge, the court shall order the respondent to make a payment to the Northern Ireland Lawyers Pro Bono Unit (registered charity number XR35688) in respect of such part of the recoverable costs as the court considers just.

(5) The amount payable under paragraph (4) shall not exceed the amount which an applicant would have recovered under paragraph (2) *or an order made under regulation 3A* had the representation of the applicant not been provided free of charge.

(6) Where the court makes an order under paragraph (4) the applicant shall send a copy of the order to the Northern Ireland Pro Bono Unit within 7 days of receipt of the order.

(7) Upon any appeal of a decision in an Aarhus Convention case, the court hearing the appeal may make an order that the recoverable costs of the appeal will be limited to the extent which the court specifies having regard to—

(a)the means of both parties;

(b)all the circumstances of the case; and

(c)the need to facilitate access to justice.

(8) The court hearing the appeal shall have the same powers as those of the High Court under paragraph (4).

(9) The amounts specified in paragraphs (2) and (3) do not include value added tax.

(10) Where a case involves a number of respondents or a number of applicants who are members of the public, the amounts specified at paragraphs (2) and (3) apply in relation to each respondent or applicant individually.

Varying the limit on costs recoverable in an Aarhus Convention case

3A. *— (1) The court may vary the amount exceeding which a party to an Aarhus Convention case may not be ordered to pay from that specified in regulation 3(2) and (3).*

(2) In varying such an amount under paragraph (1), the court may remove altogether the restriction provided for by regulation 3 on the amount of costs which a party to an Aarhus Convention case may be ordered to pay.

(3) The court may vary such an amount under paragraph (1) only if it is satisfied–

(a) that to do so would not make the costs of the proceedings prohibitively expensive for the applicant; and

(b) in a case where the variation is to decrease the amount exceeding which an applicant may not be ordered to pay or to increase the amount exceeding which a respondent may not be ordered to pay, that

the case is exceptional because without the variation the costs of the proceedings would be prohibitively expensive for the applicant.

(4) Proceedings are to be considered 'prohibitively expensive' for the purpose of this regulation if their likely costs either–

(a) exceed the financial means of the applicant; or

(b) are objectively unreasonable having regard to–

(i) the situation of the parties;

(ii) whether the applicant has a reasonable prospect of success;

(iii) the importance of what is at stake for the applicant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the case is frivolous.

(5) When the court considers the financial means of the applicant under this regulation it shall have regard to any financial support which any person has provided or is likely to provide the applicant.

(6) The court may exercise its powers under this regulation on application or on its own initiative at any time.

(7) An application for the court to vary an amount under paragraph (1) must be supported by evidence.

(8) This regulation does not apply to an appeal of a decision in an Aarhus Convention case.

Challenging whether the case is an Aarhus Convention case

4.—(1) If the applicant has stated in the application that it is an Aarhus Convention case, regulation 3 applies unless—

(a)the respondent has:

(i)stated that the case is not an Aarhus Convention case; and

(ii)set out the respondent's grounds for arguing that the case is not an Aarhus Convention case; and

(b)the court is satisfied that the case is not an Aarhus Convention case.

(2) Where the respondent argues that the case is not an Aarhus Convention case, the court shall determine that issue at the earliest opportunity.

(3) In any proceedings, including any appeal, in relation to the question whether the case is an Aarhus Convention case—

(a)if the court is satisfied that the case is not an Aarhus Convention case, it shall normally make no order for costs in relation to those proceedings;

(b)if the court is satisfied that the case is an Aarhus Convention case, it shall normally order the respondent to pay the applicant's costs of those proceedings on the ~~indemnity~~ *standard* basis, and those costs shall be payable notwithstanding that this would increase the costs payable by the respondent beyond those specified in regulation 3 *or as varied under regulation 3A*.

(4) An appeal of a decision on whether the case is an Aarhus Convention case shall lie to the Court of Appeal and the notice of appeal shall be served within 21 days from the date the decision was filed.

Injunctions

5. (1) If in an Aarhus Convention case the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court shall, in considering both whether to require an undertaking by ~~the~~ *an* applicant *who is a member of the public* to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking—

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the case prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard at the earliest opportunity.

(2) Proceedings are to be considered 'prohibitively expensive' for the purpose of this regulation if their likely costs, having regard to the amount of any cross-undertaking in damages as well as any order made under regulations 3 or 3A, either –

(a) exceed the financial means of the applicant; or

(b) are objectively unreasonable having regard to –

(i) the financial situation of the party or parties whose interests would be protected by the cross-undertaking in damages;

(ii) the situation of the parties;

(iii) whether the applicant has a reasonable prospect of success;

(iv) the importance of what is at stake for the applicant;

(v) the importance of what is at stake for the environment;

(vi) the complexity of the relevant law and procedure; and

(vii) whether the case is frivolous.

(3) When a court considers whether proceedings are 'prohibitively expensive' for the purpose of this regulation in an application with a number of applicants, it will have regard to the combined financial means of the applicants.

(4) When the court considers the financial means of the applicant under this regulation it shall have regard to any financial support which any person has provided or is likely to provide the applicant.

Appendix 2 –Existing Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013

The Department of Justice, being a Northern Ireland department designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to the environment, makes the following Regulations in exercise of the powers under section 2(2) of the European Communities Act 1972.

Citation and commencement

1.—(1) These Regulations may be cited as the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 and shall come into operation on 15th April 2013.

(2) These Regulations only apply to proceedings commenced on or after 15th April 2013.

Interpretation

2.—(1) In these Regulations—

"the Aarhus Convention" means the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters done at Aarhus on 25 June 1998;

"an Aarhus Convention case" means an application

(a)
for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978(**3**) of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; or

(b)
for review under the provisions of any statutory provision to the High Court of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention;

"court" means the High Court;

"free of charge" means otherwise than for or in expectation of fee, gain or reward;

"indemnity basis" has the meaning assigned to it by rules of court;

"legal representative" means a person exercising a right of audience or conducting litigation in an Aarhus Convention case.

(2) The Interpretation Act (Northern Ireland) 1954(**4**) shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Costs in Aarhus Convention cases

3. (1) These Regulations shall not apply where the applicant—

(a)has not stated in the application that it is an Aarhus Convention case; or

(b)has stated in the application that the applicant does not wish these Regulations to apply.

(2) Subject to paragraph (4), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.

(3) In an Aarhus Convention case, the court shall order that the costs recoverable from a respondent shall not exceed £35,000 subject to regulation 4(3).

(4) Where the applicant is or was represented by a legal representative and this representation is or was provided free of charge, in whole or in part, even if the applicant is or was also represented by a legal representative not acting free of charge, the court shall order the respondent to make a payment to the Northern Ireland Lawyers Pro Bono Unit (registered charity number XR35688) in respect of such part of the recoverable costs as the court considers just.

(5) The amount payable under paragraph (4) shall not exceed the amount which an applicant would have recovered under paragraph (2) had the representation of the applicant not been provided free of charge.

(6) Where the court makes an order under paragraph (4) the applicant shall send a copy of the order to the Northern Ireland Pro Bono Unit within 7 days of receipt of the order.

(7) Upon any appeal of a decision in an Aarhus Convention case, the court hearing the appeal may make an order that the recoverable costs of the appeal will be limited to the extent which the court specifies having regard to—

(a)the means of both parties;

(b)all the circumstances of the case; and

(c)the need to facilitate access to justice.

(8) The court hearing the appeal shall have the same powers as those of the High Court under paragraph (4).

(9) The amounts specified in paragraphs (2) and (3) do not include value added tax.

Challenging whether the case is an Aarhus Convention case

4.—(1) If the applicant has stated in the application that it is an Aarhus Convention case, regulation 3 applies unless—

(a)the respondent has:

(i)stated that the case is not an Aarhus Convention case; and

(ii)set out the respondent's grounds for arguing that the case is not an Aarhus Convention case; and

(b)the court is satisfied that the case is not an Aarhus Convention case.

(2) Where the respondent argues that the case is not an Aarhus Convention case, the court shall determine that issue at the earliest opportunity.

(3) In any proceedings, including any appeal, in relation to the question whether the case is an Aarhus Convention case—

(a)if the court is satisfied that the case is not an Aarhus Convention case, it shall normally make no order for costs in relation to those proceedings;

(b)if the court is satisfied that the case is an Aarhus Convention case, it shall normally order the respondent to pay the applicant's costs of those proceedings on the indemnity basis, and those costs shall be payable

notwithstanding that this would increase the costs payable by the respondent beyond those specified in regulation 3.

(4) An appeal of a decision on whether the case is an Aarhus Convention case shall lie to the Court of Appeal and the notice of appeal shall be served within 21 days from the date the decision was filed.

Injunctions

5. If in an Aarhus Convention case the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court shall, in considering both whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking—

(a)have particular regard to the need for the terms of the order overall not to be such as would make continuing with the case prohibitively expensive for the applicant; and

(b)make such directions as are necessary to ensure that the case is heard at the earliest opportunity.

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 are 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 proposals contained is to amend the;

- types of applicants that are eligible for costs protection;
- level of costs protection available and allow it to be varied;

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

• what are they?

Policies in other UK jurisdictions to ensure compliance with the relevant European Directives.

• who owns them?

The responsible public authorities within those jurisdictions.

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 not known but it is considered to be relatively small. The number of interim injunctions which are applied for in these cases is unknown but it is considered that these applications are rare. This answer is subject to the views of consultees.

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. This answer is subject to consultation responses.

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. This is subject to consultation responses.**		
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. This is subject to replies to the consultation.

	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. This is subject to responses to the consultation.**		
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. This is subject to responses to the consultation.**		
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. This is subject to the consultation responses.
(*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.

At this stage, it is not anticipated that an equality impact assessment is required as this consultation is technical in nature and it is not envisaged that it 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. This is subject to consultation responses.

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.

Subject to consultees' views, 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**	**04/11/15**
Approved by:		
Laurene McAlpine	**Deputy Director, Civil Justice Policy Division**	**04/11/15**

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.

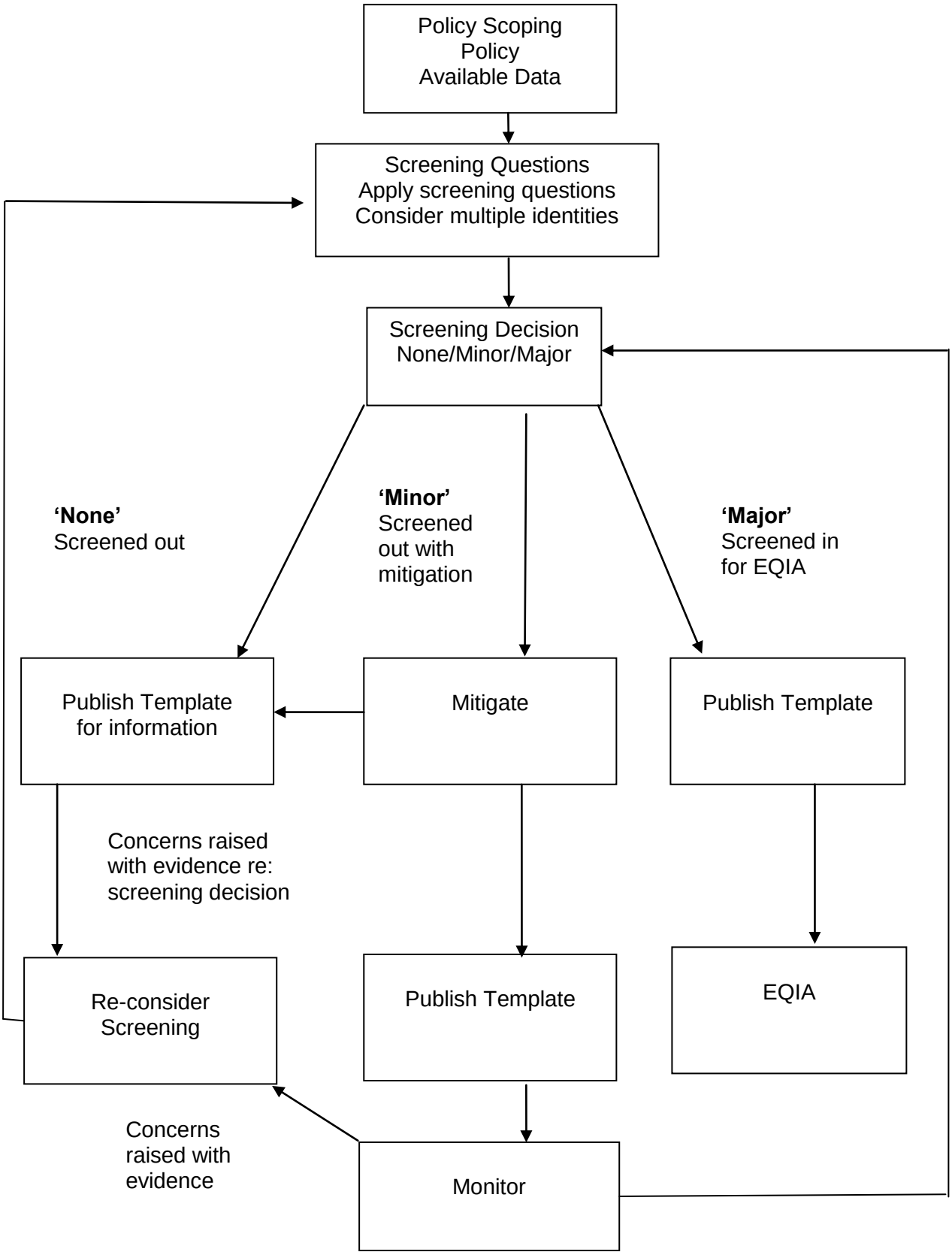
When you have completed the form please retain a record in your branch and send a copy for information to:-

Corporate Secretariat
Room 3.13B
Castle Buildings
Stormont Estate
BELFAST
BT4 3SG
Tel: 02890 522611

or e-mail to Equality Unit dojequality@dojni.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.

Appendix 4 – Partial Regulatory Impact Assessment

1. INTRODUCTION

1.1 This paper provides a partial Regulatory Impact Assessment (RIA) of the implications that may arise from the proposals to revise the current costs protection scheme for environmental cases that fall within the scope of the Aarhus Convention.

1.2. It is not practicable, at this stage, to develop a detailed impact assessment given that the final proposals will be informed by the public consultation exercise. This paper, therefore, provides a 'screening' of likely impacts and highlights any potential impacts. It seeks the views of consultees on the impact of the proposals and on how any potential impacts can be mitigated.

1.3 An initial Equality Impact Assessment (EQIA) Screening exercise has also been prepared which is available to download from the Department's website.

Purpose and structure

1.4. The purpose of an RIA is to provide a basis by which impacts can be identified in terms of who they impact on and the nature and scale of that impact. While an EQIA is unique to Northern Ireland, flowing from the Northern Ireland Act 1998 and the guidance of the Equality Commission, a RIA is common best practice on assessing the impact of new policies or legislation.

Background

1.5. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) requires parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In particular, it requires that members of the public have access to review procedures to challenges decisions subject to the public participation procedures and contraventions of national law relating to the environment that are 'fair, equitable, timely and not prohibitively expensive'. The

Public Participation Directive incorporated these requirements into EU law by amending Directives on Environmental Impact Assessment and Integrated Pollution Prevention and Control.

1.6. The current scheme relating to costs protection in those environmental cases arising in Northern Ireland that fall within the scope of the Aarhus Convention is governed by the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (the Regulations). The Regulations set out the circumstances in which costs protection can be granted and the level at which it can be made.

1.7. The Department is proposing to amend the Regulations to provide greater flexibility and clarity to the current scheme within the framework of the relevant European Directives. Its proposals have arisen in light of the judgments of the:

- Court of Justice of the European Union (CJEU) in case of C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914;
- UK Supreme Court in the same case: *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55; and
- CJEU in case C-530/11 *European Commission v. UK [2014] 3 WLR 853.*

In the latter case, the CJEU found that the costs regime for environmental judicial review cases which had been in place in the UK in 2010 had not properly implemented the 'not prohibitively expensive' requirement of the Aarhus Convention as required by the Public Participation Directive.

1.8. Although the current Regulations were introduced prior to the delivery of judgments in these cases, the Department recognises that there is scope for some measured refinement to the Regulations in light of this case law.

1.9. In summary, its proposals are to amend the;

- types of applicants that are eligible for costs protection;

- levels of costs protection available and allow them to be varied; and
- factors which courts consider when deciding whether cross-undertakings in damages for interim injunctions are required in cases that fall within the scope of the regime.

2. IDENTIFYING POTENTIAL SECTORS FOR IMPACTS

2.1. This section describes the sectors which may be affected by the policy proposals and the likely nature of the impact. The potential impact of the proposals on these sectors is then considered in the next section.

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 comes 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 Court 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 system to challenge the decisions which fall within the scope of the Aarhus Convention.

3. FINDINGS

3.1 This section describes the proposals put forward in the consultation document and summarises the impacts arising for the various sectors.

Eligibility

1. ***The Regulations should be amended to clarify that only applicants who are 'members of the public' are entitled to costs protection or to avail of the provisions relating to cross-undertakings in damages.***

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.

Level of available cost protection

2.	***There should be a 'hybrid' model' for caps on cost liability where the default position would be that the current caps would apply but any party could make an application for the court to vary their own or another party's costs cap.***

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 the case is exceptional because, 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 exceptional cases.

3.4. Although statistics are not kept on the number of cases that come within the scope of the Regulations, they are relatively uncommon 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. 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 proposal, it will be open to the court to increase the applicant's cost cap of its own motion or on the application of the respondent. The proposal, therefore, has the potential, in some cases, to increase the costs exposure of some applicants (such as wealthy individuals or members of the third or business sectors with substantial financial resources). It could also increase the revenue recoverable by public sector respondents. Under the proposal, however, the court will only be

able to increase the applicants cap if it is satisfied that it will not make the costs prohibitively expensive for the applicant. This safeguard should significantly reduce any adverse impact for applicants.

Variations to respondents cap

3.6. Under the proposal, the courts will also have the power to increase or decrease a respondent's costs cap. It is possible that the flexibility proposed to increase a respondent's cap 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 £30,000. 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 favourable 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 the case is exceptional because not increasing it would be prohibitively expensive for the applicant.

3.7. Providing the court with the power to decrease a respondent's costs cap may impact on those applicants from the third and business sectors as well as their legal representatives. It is, however, expected that the number of cases affected by this proposal would be extremely small. The court would only be able to exercise this power if it is satisfied that it would not make the cost of proceedings prohibitively expensive for the applicant. This should reduce any resulting impact on potential applicants and their representatives.

3. Information about how applicants are financing Aarhus Convention cases should be provided to the court

3.8. Under the proposed changes, an applicant in an Aarhus Convention case would be required to file at court and serve on the respondent a schedule of their financial resources at the time it makes its application for cost protection to the court. It is possible that some individuals, voluntary organisations and businesses may find this process intrusive and that it may dissuade some from bringing an action. It is, however, submitted that any 'chill factor' arising from this proposal would be muted for three reasons. Firstly, much of the information required will already be available publicly (for example, the published accounts of charities and public limited liability companies and land registry information including whether, for example, an individual has a mortgage). Secondly, it is envisaged that, in most cases, an examination of an applicant's means would be conducted on the papers without an oral hearing. Thirdly, even where an oral hearing is considered appropriate existing provision in the relevant court procedural rules should mean that, in appropriate cases, any examination of the means of an applicant which involves discussion of sensitive information takes place in private.

3.9. The proposal may mean that more judicial and court time is spent assessing financial means in an Aarhus case than currently. Given the small number of Aarhus cases in Northern Ireland and that only some cases are likely to raise issues in respect of variation of caps, it is not expected that this proposal would have any significant impact on public sector resource. It is also envisaged that a general reliance on a paper based assessment of means should reduce any impact considerably.

4. The Regulations should be amended to make it clear that cost caps will be applied to each applicant and respondent individually.

3.10. Aarhus Convention cases are sometimes brought by a number of different applicants or against a number of different respondents. It is proposed that a separate costs cap should be applied in these cases to each individual party. This would remove any uncertainly encountered by applicants in the relevant cases as to

their potential costs liability and, thereby, remove any deterrent that may currently exist to the bringing of actions by more than one applicant.

Costs of challenging and applications to vary

5. Costs normally awarded against respondents who unsuccessfully claim that a case is not an Aarhus case should be awarded on the standard basis.

3.11. At present where a respondent wrongly asserts a case is not an Aarhus case, costs are normally awarded against it on the indemnity basis. This means that in assessing the amount of costs, the court generally resolves any doubt which it may have as to whether the costs were reasonably incurred or reasonable in amount in favour of the applicant; the onus is on the respondent to show that the costs claimed are unreasonable.

3.12. It is possible that providing that the costs be assessed on the standard basis could mean that the costs awarded against the respondent are lower than if they were assessed on an indemnity basis. As such, this might adversely impact on applicants in these cases who may be individuals or from the third and business sectors. It is not, however, envisaged that this impact would be significant. The risk of an award of costs (irrespective of its basis should) would still act as a sufficient deterrent to any spurious claims by respondents that a case does not come within the scope of the Regulations. It is also noted that the proposed change would not prevent a court from making an indemnity costs order against a respondent if it considered it appropriate.

3.13. This proposal may impact favourably on those Departments and public authorities who defend Aarhus Convention cases in Northern Ireland in that it might result in savings to the public purse arising from a reduction in the court costs they are required to pay. Again, given the small number of Aarhus cases taken in Northern Ireland and that not all of them involve a challenge taken by public authorities to the status of a case, it is not envisaged that any such savings would be significant.

Cross-undertakings in damages

6. The Regulations should be amended to further clarify how courts assess whether a cross-undertaking in damages would make continuing with a case 'prohibitively expensive' for an applicant.

3.14. This proposal should ensure greater clarity and transparency to 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.

7. In a multi-applicant case, the court should have regard to the combined financial resources of those applicants when applying the Edwards principles to make a decision about a cross-undertaking in damages.

3.15. The losses incurred by a third party business, for example a developer, as a result of an interim injunction in an environmental judicial review can be quite substantial. Cross-undertakings in damages when ordered and enforced can offer some protection to third parties against these losses depending on the terms on which they are made. The Regulations currently provide that in deciding whether or not to make a cross-undertaking and its terms, the court must have regard to the need for its terms not be such as would make continuing with the case prohibitively expensive for the applicant.

3.16. The proposal should ensure that, in a multi-applicant case, in deciding whether or not to make a cross-undertaking in damages and its terms, the court does not limit itself to a consideration of the resources of an applicant with the most limited means only but considers the resources of all applicants. The proposal should, therefore, ensure that the system operates equitably and, as such, impact positively on third party businesses (although as applications for interim injunctions in environmental cases are very infrequently made in this jurisdiction, this impact is likely to be small).

3.17. The proposal could also, in an appropriate case, offer some protection to applicants with limited means i.e. by ensuring that the court must consider the resources of all applicants, it may avoid situations arising where cross-undertaking in damages are made on the basis of the substantial resources of one applicant with disregard to other applicants with more modest means even though all applicants will be liable under the undertaking. Again, it is anticipated that, given the small number of environmental interim injunction applications made in Northern Ireland, any impact on applicants is likely to be small.

4. CONCLUSION

4.1. The preceding analysis shows that the proposals have potential to impact across the different sectors. There may be some financial implications for the third and business sectors flowing from proposals. It is, however, generally envisaged that the proposals will improve access to justice for applicants from these 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).

5. CONSULTATION QUESTIONS ON IMPACTS

5.1. The Department welcomes the views of consultees on the impacts of its proposals for change. In particular, the Department asks consultees whether;

- it has correctly identified and assessed the possible impacts of the proposals and any mitigations of those impacts;
- they are aware of any relevant data that quantifies these impacts which they wish to draw to the Department's attention; and
- they have anything to add in relation to the impact assessments.

Appendix 5 – List of consultees

This consultation document has been sent to the following individuals and organisations:

Alliance Party
Alternative A5 Alliance
An Munia Tober
Bar Council
Belfast City Airport Watch
Belfast Hills Partnership
Belfast International Airport
Belfast Metropolitan Residents' Group
Bryson Charitable Group
C&J Black Solicitors
Buglife
Butterfly Conversation Northern Ireland
Causeway Coast & Glens Heritage Trust
Confederation of British Industry Northern Ireland
Northern Ireland Chamber of Commerce and Industry
Citizens Advice Bureaus Northern Ireland
City of Derry Airport
Clerk to Departmental Committees
Conservation Volunteers Northern Ireland
Construction Employers Federation Northern Ireland
Consumer Council for Northern Ireland
Coalition for Access to Justice for the Environment
Community Places
Council for Nature Conservation and the Countryside
Democratic Unionist Party
Dundonald Green Belt Association
Environmental Law Foundation
Friends of the Earth Northern Ireland

George Best City Airport
Green Party
Groundwork Northern Ireland
Labour Party
Landscape Institution
Law Society of Northern Ireland
Local Councils
Malcolm Lake
Members of the NI Assembly
MEPs
MPs
Mourne Heritage Trust
National Trust Northern Ireland Regional Office
NICVA
NILGA
Northern Ireland Chamber of Commerce
Northern Ireland Conservation Association
Northern Ireland Environment Link
Northern Ireland Human Rights Commission
Northern Ireland Tourist Board
Participation and the Practice of Rights
PILS Project
Progressive Unionist Party
Office of the Lord Chief Justice
Royal Institution of Chartered Surveyors Northern Ireland
Royal Society for the Protection of Birds Northern Ireland
Royal Society of Ulster Architects
Royal Town Planning Institute Northern Ireland
Scottish Power Renewables
Social Democratic Labour Party
Sinn Fein
Sustrans
The River Faughan Anglers Ltd
The Workers Party

Tidy Northern Ireland

Traditional Unionist Voice

Translink

Ulster Angling Federation

Ulster Architectural Heritage Society

Ulster Farmers Union

United Kingdom Independence Party Northern Ireland

Ulster Society for the Protection of Countryside

Ulster Unionist Party

Ulster Wildlife Trust

Wildfowl and Wetland Trust

Woodland Trust

World Wildlife Fund, Northern Ireland

Appendix 6 – Questionnaire for Respondents

Please Note this form should be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ ***Please tick as appropriate***

Surname

Forename

2. Postal Address

Postcode	**Phone**
Email	

3. Permissions* - I am responding as…*(choose one)

An Individual ☐	**An Organisation ☐**
(a) Do you agree to your response being made available to the public? **Please tick as appropriate ☐ Yes ☐ No** (b) Where confidentiality is not requested, we will	(c) The name of your organisation ***will be*** made available to the public Are you content for your response to be made available?

make your responses available to the public on the following basis **(please tick ONE of the following boxes):** Yes, make my response and name available ☐ or Yes, make my response available but not my name ☐	**Please tick as appropriate ☐ Yes ☐ No**

CONSULTATION QUESTIONS [continue on separate sheet of paper as required)

Question 1: Do you agree with the proposed changes to the wording of the Regulations regarding eligibility for costs protection? If not, please give your reasons.
Yes / No **Comments:**

Question 2: 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.
Yes / No **Comments:**

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.
Yes / No **Comments:**

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.
Comments:

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.
Yes / No **Comments:**

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.
Yes / No **Comments:**

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

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

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.
Yes / No **Comments:**

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?
Yes / No **Comments:**

Question 11: Do you have any comments on the proposed revisions to the provision in the Regulations dealing with cross-undertakings in damages?
Yes / No **Comments:**

Department of Justice,
Civil Justice Policy Division,
Access to Justice Directorate,
Massey House,
Stormont Estate,
Belfast,
BT4 3SX.

http://www.dojni.gov.uk