

Guide to responding to the Environmental Costs consultation

Friends of the Earth's views

The Government is currently consulting on increasing the cost to individuals and community groups of bringing environmental legal cases.

You can submit a response online [on the Ministry of Justice website](#).

Friends of the Earth believes that such cases are in the public interest and, if passed, the changes would push environmental justice out of reach of the majority of people in the UK. This means that communities could be faced with a Government decision which would be highly damaging to their local environment, yet have no way to challenge the decision because they couldn't afford to take the financial risk.

This guide has been put together to help individuals and groups respond to what is a very technical consultation. For each question we have explained the views of Friends of the Earth, taking in a range of legal expertise from throughout the environmental sector.

If you would like to respond to the consultation [you can find it here](#), where you can submit a response online.

Using our guidance this should only take around 15 minutes.

Definition of Aarhus Convention claim

N.B. [The Aarhus Convention](#) came in to force in 2001 and secures fair access for the public to environmental information and justice.

In question 1 of the consultation the Government asks if consultees agree with the definition it proposes for an Aarhus Convention claim

Friends of the Earth does not agree with the definition. We think that all cases covering environmental issues, including all statutory reviews, not just the kinds mentioned by the Government, should fall within the definition.

Eligibility

In question 2 of the consultation the Government asks if consultees agree with proposed changes to eligibility for costs protection.

Friends of the Earth disagrees with the changes. We believe that:

- They may exclude certain people and groups from getting costs protection and as a result, from being able to access the courts.
- The amendment refers to "[a member of the public](#)". This implies that only a single individual should benefit from costs protection, and that groups such as associations, community organisations, and even environmental NGOs, should not. This breaches the Aarhus Convention which gives the public and such groups "wide access to justice"

- The proposals may also exclude cases covering legislation impacting on the environment (such as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships) that does not specifically mention the environment in its title or heading.

Question 3 of the consultation asks whether costs protection should only be given once permission to proceed with a case has been granted.

No.

Friends of the Earth believes that:

- In order to comply with EU law and the [Aarhus Convention](#), costs protection must apply from the point at which the claimant lodges a claim form for judicial review, as is currently the case.
- If costs protection is delayed until permission to proceed with a claim has been granted, the claimant may be prevented from making a claim in the first instance, because they won't have certainty about the maximum level of their exposure to costs.

Levels of costs protection available

Question 4 asks whether there should be a “hybrid” approach to costs capping where it is possible to increase the level of caps.

No.

Friends of the Earth believes that:

- The cost of legal proceedings must be within the financial means of the claimant and they must be objectively reasonable.
 - o The default costs caps are currently £5,000 for individuals and £10,000 for organisations. This is already a large sum for many groups to fundraise against.
 - o In addition to the above costs, the claimant must pay the administrative court fee of £1,000 and their own legal costs which regularly amount to £25,000. Therefore, an objective figure is £31,000 - £36,000 not £5000 - £10,000.
 - o The costs of bringing environmental cases outlined above are already prohibitively expensive and therefore should not be increased further.
 - o The proposals will allow a party to apply to the court to increase or even remove the claimant's costs cap.
 - o The court will also be able to change the cap of its own accord.
 - o This creates real uncertainty for claimants as to what the maximum costs of bringing a claim will be and has a chilling effect.

Question 5 asks whether the rules meet the requirement of the EU case of “Edwards” which found the UK to be in breach of EU obligations because of the costs of bringing environmental cases.

Friends of the Earth believes that it does not for the reasons set out in 4 above and because:

- The Edwards case confirms that costs must be assessed as a whole.
- Costs in complex environmental cases can make such cases too expensive to win.
- The core requirement for the level of costs protection in environmental cases is that it should be clear, unequivocal and objectively reasonable.

Question 6 asks if the principles proposed by the Government should be used to change the level of costs caps.

Friends of the Earth believes they should not for the reasons set out in responses to questions 4 and 5, above.

Disclosure of Financial Information

Question 7 asks whether all claimants be required to file at court and serve on the defendant a schedule of their financial resources when they begin a claim.

No.

Friends of the Earth believes that:

- The requirement is vague and cannot work in reality.
- Funding for charities and charitable companies comes from grants, donations, legacies, membership subscriptions etc, none of which may be linked in any way to litigation.
- It is very concerning that defendants will be able to access such information which may contain the names and addresses of children and vulnerable people. Not only is there a significant risk of accidental disclosure, people making donations to charities, groups and organisations are likely to feel very concerned that their names and addresses will be supplied to a public body as supporters of a charity or organisation that it might dislike.
- There is no need for this provision.

Costs caps in cases where there is more than one defendant or claimant

Question 8 asks whether there should be a costs cap for each claimant in a case.

No.

Friends of the Earth believes that:

- If there were different claimants in a case and separate cost caps were applied to each one then the total figure of costs would very high and would be non-compliant with the Aarhus Convention

Question 9 asks at what level the costs caps should be set

Friends of the Earth believes that:

- The caps should be fixed at the current levels (£5,000 for individuals and £10,000 other cases), with the option for the cap to be decreased if too expensive for the claimant in question.
- It should be possible to increase the costs the defendant pays if they lose if there is reason for this.
- The above arrangements currently apply in Scotland.
- Caps should not be increased to £10,000 for individual claimants and £20,000 for other claimants as the Government proposes in the consultation.
- If the costs caps are increased in the way the Government proposes, the costs of bringing a case would likely rise to £36,000 - £46,000 which is far out of the reach of most individuals and organisations wanting to bring public interest environmental cases.
- Caps should not be reduced for defendants to £25,000.

Question 10 asks for views on the possibility of introducing a range of costs caps in the future

Friends of the Earth believes that:

- No range of default cost caps should be introduced because claimants are required to have certainty in advance of bringing a case through clear costs rules.
- Having a range of caps will lead to substantial confusion along with costly and time-consuming litigation.

Costs of challenges and of applications to vary costs caps

Question 11 asks whether the rules on challenges to whether cases fit within the Aarhus Convention should change.

No.

- Currently, if a defendant unsuccessfully challenges the status of an Aarhus claim, the court will ask the defendant to pay extra heavy costs.
- The Government proposes that a defendant should pay ordinary costs if they lose their challenge. As this will be less expensive for the defendant, Friends of the Earth believe it will encourage defendants to challenge claims which will lead to unnecessary litigation.

Q12 asks whether rules should be set of changing costs caps

As set out above, Friends of the Earth thinks that varying costs caps is inconsistent with the UK's EU law obligations under the Public Participation Directive and the Aarhus Convention.

Cross-undertakings in damages

Q13 proposes changes to the court rules about getting injunctions to prevent environmental harm taking place

Friends of the Earth does not support the proposed change

- the requirement in the proposed changes for the application to be made by a member of the public will prevent NGOs and other bodies from using the provisions
- There is currently no certainty about when costs protection will be available in injunction situations and the proposed wording doesn't help
- The proposals to split costs between group members and for the court to consider financial support provided to the case are unreasonable and unworkable.
- The right approach is to remove the need to pay the costs of injunctions in Aarhus cases and grant injunctions where there is evidence that a failure to grant relief would result in significant and irreparable harm to the environment.

Other forms of review

Question 14 asks whether there are other types of challenge to which the costs protection regime should be extended

Friends of the Earth believes that:

- The Aarhus costs regime should cover all environmental cases (judicial reviews, statutory reviews and private claims) as set out in the Aarhus Convention.
- Costs caps should apply up when a case is heard in the Court of Appeal or the Supreme Court, not only in the High Court.

Impact of proposals on particularly vulnerable groups

Question 15 asks whether there any groups of individuals protected by legislation who might be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

Yes.

- Research conducted by the Environmental Law Foundation shows that the majority of people requesting legal advice were from the lowest income group in society.

- A follow-up report in 2009 also concluded that the majority of people contacting Environmental Law Foundation for legal advice about environmental issues primarily consisted of “not very wealthy people concerned primarily about the impact of development in the area in which they live”
- It is therefore clear that the poorest members of society will potentially be most affected by these proposals.
- Also, charity membership is an affordable way for people with limited resources to contribute to the protection and enhancement of the environment and civil society. Vulnerable categories of society, such as children, older people and people with disabilities are also often members of charities – but the knowledge that membership may expose them to court costs is likely to deter such individuals from joining environmental charities and participating in activities associated with improving the environment.