Department of Justice | An Roinn Dlí agus Cirt | Männystrie O tha Laa

Access to Justice in relation to the Aarhus Convention

A Call for Evidence

This Call for Evidence begins on Friday 20 December 2024 and closes on Friday 28 February 2025

Contents

1. Purpose of this Call for Evidence

Why are we issuing this Call for Evidence?

1.1 The purpose of this Call for Evidence is to seek views from those with an interest in the provisions of the Aarhus Convention regarding legal challenges in relation to environmental matters. This may include, but is not limited to, the judiciary, the legal profession, developers and environmental groups.

1.2 One of the Convention's core aims is to ensure access to justice in environmental matters. The Convention's monitoring body, the Aarhus Convention Compliance Committee, has found the UK to be non-compliant with the Convention and has made several recommendations, which have been adopted as decisions by the Meeting of the Parties, about matters on which the UK must take action to bring its policies into compliance with the Convention. This call for evidence seeks views on these recommendations and the issues arising to determine the best way to reach compliance.

Responding to the Call for Evidence

1.3 The Call for Evidence will run for a period of ten weeks, from **Friday 20 December 2025 to 5pm on Friday 28 February 2025**. Please note that it is unlikely that responses will be accepted after this date.

1.4 The list of those notified of this Call for Evidence is contained at **Annex A**. The list 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 Call for Evidence.

1.5 If you wish, you can respond to the Call for Evidence using the questionnaire which is provided separately on the Department's website (see https://www.justice-ni.gov.uk/consultations/call-evidence-aarhus). Responses to the Call for Evidence should be submitted by email to: DoJCivilJusticeandJudicialPolicyDivision@justice-ni.gov.uk

1.6 An electronic copy of this document is available to view and download from the Department of Justice's website. However, hard copies of the document and copies in other formats, such as Braille, large print etc., may be made available on request. If it would help you to have to this document in a different format or in a language other than English, please let us know and we will do our best to assist you.

1.7 If you require any further information on this Call for Evidence, please contact us by email: DoJCivilJusticeandJudicialPolicyDivision@justice-ni.gov.uk

Privacy, confidentiality and access to Call for Evidence responses

1.8 All responses to this Call for Evidence may be published on the Department's website except for those where the respondent indicates that they are an individual acting in a private capacity, e.g. a member of the public. All responses from organisations and individuals responding in a professional capacity may be published. Where relevant, email addresses and telephone numbers will be removed from responses. However, apart from this, they will be published in full. For more information about how personal data is handled, please see the Department's consultation privacy notice at **Annex B**.

1.9 Your response, and all other responses to this Call for Evidence, may also be disclosed on request in accordance with the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ("EIR"). However, all disclosures will be in line with the requirements of the Data Protection Act 2018 and the General Data Protection Regulation (EU) 2016/679.

1.10 If you want the information that you provide to be treated as confidential, you should explain in your response which particular section(s) of your response is confidential and why it should potentially be withheld (please refer to the Information Commissioner's Office's guidance on the application of the section 41 exemption (Information provided in confidence).[1] This will form part of the

[1] information-provided-in-confidence-section-41.pdf

consideration should the Department receive a request for the information under FOIA or EIR.

Complaints

1.11 If you have any concerns about the way in which the Call for Evidence process has been handled, please email us at: Governance.Unit@justice-ni.gov.uk.

2. Introduction

2.1 The UK is one of 47 Parties to the Aarhus Convention, officially known as "the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", an international treaty adopted under the auspices of the United Nations Economic Commission for Europe in 1998. The UK ratified the Aarhus Convention in 2005. The Convention sets out obligations on Parties to make provision for the public to access environmental information, to participate in environmental decision-making, and to access justice when challenging environmental matters.

2.2 The Aarhus Convention Compliance Committee ("the ACCC") was set up by the Convention's decision-making body, the Meeting of the Parties ("the MoP"), to monitor compliance with the Convention. The ACCC reviews alleged instances of a Party's non-compliance, which are normally raised by members of the public or environmental NGOs and determines whether there has been non-compliance. In cases of non-compliance, the ACCC makes recommendations to the MoP about how the Party concerned can remedy the issue.

2.3 **Decision VII/8s**[2], adopted by the MoP in October 2021, includes a number of recommendations on ways in which the UK can bring itself into compliance with the Convention with regard to the access to justice provision under Article 9 (see **Annex C** for the text of Article 9 of the Aarhus Convention in full). Some of these recommendations relate to costs protection in environmental legal challenges and there is also a recommendation relating to the time limit for bringing a judicial review within the scope of the Convention.

2.4 Specifically, Decision VII/8s endorsed and reaffirmed the earlier **Decision VI/8k**, noting progress towards compliance made since that decision but requested further steps to:

[2] ECE/MP.PP/2021/42 (unece.org)

- ensure that the allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair and equitable, and not prohibitively expensive;

- further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

- further review its rules regarding the time-frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable, and amount to a clear and transparent framework; and

- establish a clear, transparent and consistent framework to implement Article 9(4) of the Convention.

2.5 The following parts of this Call for Evidence set out in turn the ACCC recommendations underpinning the MoP decision, alongside the background to each of these.

2.6 Respondents are asked to consider the ACCC's recommendations and having regard to the likely benefits and potential risks, to indicate whether each recommendation should be implemented or whether there are suitable alternatives which could deliver the desired outcome of bringing these areas into compliance.

2.7 This Call for Evidence focuses on the compliance issues for Northern Ireland. The UK Government and the Scottish Government are responsible for how the relevant compliance issues are addressed in England and Wales and Scotland. However, we are working closely with them to ensure the UK meets its international law obligations under the Aarhus Convention.

3. The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013

History of the Costs Protection Regulations

3.1 As a Party to the Aarhus Convention, the UK is required, amongst other things, to make sure that there is a clear, transparent and consistent framework for members of the public to access environmental justice, and that the costs of bringing environmental challenges are not 'prohibitively expensive'. When the UK ratified the Aarhus Convention, it was still a member of the European Union. Elements of the Aarhus Convention have been implemented via EU Directives, which means that some non-compliance issues were subject to the EU's legal and infraction procedures when the UK was a Member State.

3.2 In 2013, the Department of Justice ("the Department") made *The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013* ("the Costs Protection Regulations") for Northern Ireland. The Regulations, as introduced, fixed the maximum costs that a court can order an unsuccessful claimant to pay to other parties for judicial reviews and statutory reviews, which fall within the scope of the Aarhus Convention.[3] The costs caps were set, at the outset, at £5,000 (for individual claimants), £10,000 (where the applicant is a legal person or applying in the name of a legal entity or unincorporated association) and £35,000 (for respondents).

3.3 The European Court of Justice ("the CJEU") gave a judgment in 2014 in which it found that the costs regime for environmental judicial review cases which had been in place in the UK in 2010 (before the Costs Protection Regulations were in operation) had not properly implemented the 'not prohibitively expensive' requirement of the Aarhus Convention, as required by the Public Participation Directive (2003/35/EC).[4]

[3] "An Aarhus Convention case" is defined at regulation 2 of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013

[4] C-530/11 European Commission V. UK [2014] 3 WLR 853

3.4 In light of this judgment and other judgments of the CJEU[5] and the UK Supreme Court[6], the Department consulted on proposed amendments to the Costs Protection Regulations in 2015 and subsequently made *The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017*[7], which introduced several new provisions, including the following:

- giving the courts the power to vary the default costs cap downwards for an applicant to avoid prohibitive expense and to increase the cap for a respondent to, again, avoid prohibitive expense to the applicant;
- in deciding whether the cap is prohibitively expensive, the court must take into account the applicant's financial means;
- a separate costs cap to apply to an appeal within the scope of the Convention in the Court of Appeal;
- clarification that only applicants who are members of the public (and not public bodies) are entitled to costs protection; and
- a direction to the court to apply certain principles when considering whether or not to require an undertaking in an application for an interim injunction in a case within the scope of the Convention.

3.5 As it has been some time since the costs caps came into operation and the Costs Protection Regulations were subsequently amended, the Department believes now is the right time to review these in detail, including how they operate in practice.

[5] C-260/11 Edwards V. Environment Agency [2013] 1 W.L.R. 2914

[6] R (Edwards) V. Environment Agency (No.2) [2014] 1 W.L.R. 55

[7] The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 (legislation.gov.uk)

Question 1: How effective are the Costs Protection Regulations in ensuring that Aarhus Convention cases are not prohibitively expensive to bring?

Question 2: Please provide data on the number of Aarhus claims in which you have been involved since February 2017 and their outcomes.

Question 3: Please provide data on the impact, if any, of the Covid-19 pandemic on the number of Aarhus claims in which you have been involved.

Costs Protection Regulations Compliance Issues

Overview

3.6 This section sets out the compliance issues for Northern Ireland identified by the ACCC. In each instance we have summarised the ACCC's concerns and set out some issues for further consideration. The Department would be grateful for respondents' views on the issues raised and any supporting evidence.

3.7 Decision VII/8s, adopted at the MoP to the Aarhus Convention in October 2021, concerns several different UK Aarhus compliance issues.[8] This part of the Call for Evidence considers the compliance issues raised in that decision insofar as they relate to the Costs Protection Regulations or other costs provisions, and associated procedural issues.

3.8 Decision VII/8s followed on from Decision VI/8k, which was made on 14 September 2017, and following which the UK reported on progress towards compliance in annual reports submitted to the ACCC in 2018, 2019 and 2020.[9] The ACCC issued a final report in 2021 providing detailed consideration of the issues regarding costs protection and indicating where some concerns remain.

[8] See Decision VII/8s: Decisions adopted by the Meeting of the Parties, advance edited copy (ECE/MP.PP/2021/2/Add.1) | UNECE.

[9] The UK's first progress report (in October 2018) on the implementation of Decision VI/8k is available here: frPartyVI8.k_01.10.2018_first_progress_report.pdf (unece.org). The UK's second progress report (in September 2019) on the implementation of Decision VI/8k is available here: frPartyVI.8k_30.09.2019_2nd_progress_report.pdf (unece.org). The UK's third and final progress report (in September 2020) on the implementation of Decision VI/8k is available here: frPartyVI8.k_30.09.2020_final_progress_report.pdf (unece.org).

This report was submitted to the MoP in October 2021 and underpins the new Decision VII/8s.[10] Accordingly, for the purpose of this Call for Evidence and consideration of the Costs Protection Regulations, we refer to the specific issues addressed by the ACCC in Part I of the report on Decision VI/8k, as listed below (while some recommendations discussed were directed towards other UK jurisdictions, they have read across to Northern Ireland):

(a) costs protection on appeal;

(b) types of claims covered;

(c) cross-undertakings for damages;

(d) costs for procedures with multiple claimants; and

(e) costs orders against or in favour of interveners.

(a) Costs protection on appeal

3.9 **The issue:** The ACCC considers that the Costs Protection Regulations fail to ensure sufficient costs protection for claimants in environmental legal challenges where there is an appeal.

3.10 **ACCC comments:** Although the ACCC final compliance report on Decision VI/8k noted comments made by some environmental groups that the 2017 amendments to the Costs Protection Regulations in Northern Ireland have, to date, operated reasonably well in practice, they recommended that the costs to be ordered on appeal, including any possible costs caps, "must recognise that the requirement not to be prohibitively expensive applies to the procedure as a whole, encompassing all stages of the procedure" (see paragraph 115 in Part I of the report on Decision VI/8k).

3.11 **Commentary:** The Costs Protection Regulations, as amended, already provide for separate costs caps in appeals in Aarhus cases and for the appeal court to

[10] See the ACCC's final report to the Meeting of the Parties on Decision VI/8k (Part I): ECE/MP.PP/2021/59 (unece.org); and Part 2: ECE_MP.PP_2021_60_E.pdf (unece.org). Part I reviews the progress made by the UK in implementing paragraphs 2, 4 and 6 of Decision VI/8k; Part II review the UK's progress in implementing paragraph 8 of Decision VI/8k.

have the same power as the original court to decrease this amount. They also provide that the appeal court retains its power to make an order as to the costs of the proceedings in the original court, subject to the prescribed costs caps and any order of that court varying these. Taken together, this may give the appeal court sufficient powers to ensure the proceedings, as a whole, are not prohibitively expensive. However, the Department notes the concern raised by the ACCC and welcomes any evidence in relation to this issue.

Question 4: Can you provide examples of occasions when appeal costs have proved to be prohibitively expensive to continuing with an appeal in an Aarhus case?

Question 5: Do the Costs Protection Regulations require to be clarified to ensure Aarhus cases that go to appeal are not prohibitively expensive? What are the likely benefits and risks of doing so?

(b) Types of claims covered

3.12 **The issue**: In its final report on Decision VI/8k, the ACCC suggested that the scope of the Costs Protection Regulations should be extended to cover private nuisance claims.

3.13 **ACCC comments**: In particular, the ACCC in its final report on Decision VI/8k found that, by excluding private law claims such as private nuisance from the scope of costs protection, the requirements of paragraph 2 (a), (b) and (d) of Decision VI/8k have not been met yet. The MoP endorsed this recommendation (in Decision VII/8s) and requested that, as a matter of urgency, the necessary legislative, regulatory, administrative and practical measures should be taken to ensure that the allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair and equitable, and not prohibitively expensive.

3.14 **Commentary**: The Department notes the ACCC position that a lack of costs protection for private nuisance claims is presenting a barrier to justice in environmental matters in practice and would welcome any evidence on this issue.

3.15 There have been two cases in the Court of Appeal in England and Wales in which costs protection orders for private nuisance claims were sought and refused since the UK acceded to the Aarhus Convention: *Austin v Miller Argent*[11] and *Morgan v Hinton Organics (Wessex) Ltd*[12]. In the Austin case the Court stated that such a claim for private nuisance could come within the scope of Article 9(3) provided the nature of the complaint has a close link with the environmental matters regulated by the Convention and the claim if successful would confer significant public environmental benefits. Both parties in each case then raised a communication with the ACCC. [in the form of ACCC/C/2013/85[13] and ACCC/C/2013/86[14]].

3.16 The Department is not aware of any judgments considering the application of the Aarhus Convention in private nuisance claims in this jurisdiction but would welcome any examples of a Northern Ireland court considering this issue.

3.17 As it currently stands, the Costs Protection Regulations only apply to applications brought by a member of the public for judicial review or for review under the provision of any statutory provision as defined by regulation 2 of the Costs Protection Regulations. There may be a concern that extending the Regulations to include private nuisance claims runs the risk of increasing legal challenges

[11] Original private nuisance case *Austin v Miller Argent* [2011] EWCA Civ 928, the costs of those proceedings were later appealed in *Austin v Miller Argent* [2014] EWCA Civ 1012. In the Austin case, the applicant brought a claim in private nuisance alleging that she was affected by noise and dust pollution from the respondent's mining operations. The Court noted that that the obligation to impose a Protected Costs Order (PCO) under court rules was limited to Aarhus Convention claims that were judicial review cases, but that there was also a discretionary power to order a PCO under general case management powers. Whilst a PCO was refused on the facts of the case, the Court of Appeal considered whether the Aarhus Convention has any application to private nuisance claims.

[12] Original private nuisance case from Queen's Bench Division in E&W A2/2008/0038, and then later appealed in Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107

[13] ACCC/C/2013/85 United Kingdom | UNECE

[14] ACCC/C/2013/86 United Kingdom | UNECE

between private persons which have only a tenuous link to the environment or to wider public environmental benefit.

3.18 The Department also notes that parties can choose to resolve private nuisance claims outside of the courts in Northern Ireland. This can be achieved through other dispute resolution mechanisms, such as mediation, which helps parties avoid the time, cost and stress of adversarial court proceedings.

3.19 If the Costs Protection Regulations were to be extended to private nuisance claims, one option could be to make such protection available only at the court's discretion, where the court considers a particular dispute to be sufficiently closely connected to an environmental matter. Additionally, provision could be made for the court to consider any wider public interest raised by the case. This would be similar to the approach of the English Court of Appeal in the *Austin v Millar Argent* case.

Question 6: Please provide any data or information you hold on the costs involved in pursuing a private nuisance claim with an environmental component.

Question 7: Please provide any experience you have in a case in which costs protection measures were sought for private nuisance claims.

Question 8: Please provide your views on the courts using judicial discretion to determine whether a private nuisance claim should benefit from the Costs Protection Regulations. What are the likely benefits and potential risks of doing so?

Question 9: What particular private nuisance claims should benefit from costs protection under the Aarhus Convention?

Question 10: Please provide your views on mediation or other forms of dispute resolution as a means to resolve private nuisance disputes.

(c) Cross-undertakings for damages

3.20 **The issue**: In its final report on Decision VI/8k, the ACCC stated that, based on a lack of data before the Committee, it was not clear whether the courts in Northern Ireland still in practice require cross-undertakings for damages when an injunction is sought in an Aarhus claim. They considered that this uncertainty fails to meet the requirement in Article 3(1) for a clear, transparent and consistent framework to implement the Convention's provisions.

3.21 **ACCC comments**: Further to the above, the ACCC sought up-to-date data regarding '(a) the number of Aarhus claims in which an interim injunction was sought; (b) whether a cross-undertaking was required; and (c) if so, the amount required'.

3.22 **Commentary:** Cross-undertakings may typically be required to compensate the respondent to an application for an injunction for any loss or damage they might suffer if an interim injunction is granted but the application is later refused. There is no rule in Northern Ireland which stipulates that such an undertaking will be required, rather it is at the court's discretion. Under the Costs Protection Regulations (see regulation 5), the court is required, when making a cross undertaking, to consider the terms of the order overall, so as not to make the case prohibitively expensive for the applicant. As of 9 June 2023, Northern Ireland Courts and Tribunal Service record the number of Aarhus cases. Following a manual examination of a random sample of such cases, no record of an order for a cross-undertaking for damages was found.

3.23 The Department would welcome further evidence as part of this review.

Question 11: Please provide any data on the number of Aarhus claims in which you have been involved where an interim injunction was sought and whether the issue of a cross-undertaking in damages arose, in particular:
(a) the number of Aarhus claims in which an interim injunction was sought
(b) whether a cross-undertaking was required; and
(c) if so, the amount required.

(d) Costs for procedures with multiple claimants

3.24 **The issue:** The ACCC sees no basis for a rule requiring separate costs caps for each claimant, in particular, where the claimants make the same legal arguments on the same factual basis. Although the ACCC recommendation refers specifically to England and Wales, the recommendation applies equally to Northen Ireland where a similar rule is in place.

3.25 **ACCC comments:** In its final compliance report on Decision VI/8k, the ACCC commented: 'the ACCC does not agree that it is undesirable for claimants to be able to share the costs burden for challenges within the scope of the Convention'.

3.26 **Commentary:** The Civil Procedure Rules in England and Wales stipulate that the costs caps in the Environmental Costs Protection Regime apply only to individual claimants and/or defendants, and 'may not be exceeded, irrespective of the number of receiving parties.' (CPR 46.26(4)). The Costs Protection Regulations in Northern Ireland (in regulation 3) set costs caps for applicants and respondents respectively but do not make any specific provision in regard to costs in cases of multiple claimants raising the same issues on a similar factual basis and legal argument. It is acknowledged that additional claimants may lead to increased costs of proceedings. The viability of a separate 'shared claimant' default costs cap could be considered (including, for example, if a second claimant is only raising the same legal argument). As an example, caps could be set at one and a half times the default individual claimant cap (e.g., £7,500, if there are two claimants who are individuals and £15,000 for two claimants otherwise), but crucially still retain the potential for variability. This would allow claimants to share the costs burden, if they wished to do so, but also reflect the fact that multiple claimants can increase the administration and complexity of legal arguments. This could be considered a positive development without undermining the principles of the current Costs Protection Regulations. The Department would welcome views on this issue including any risks associated with a shared claimants costs cap.

Question 12: Would you support a default shared claimant costs cap, and, if so, what form should that take and should any conditions apply (for example, only where a second claimant is raising the same legal arguments)?

Question 13: What are the likely potential benefits and risks of a default shared claimant costs cap?

(e) Costs orders against or in favour of interveners

3.27 **The issue**: The ACCC considers that members of the public who join proceedings as interveners *in support of* the claimant should also be entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive. Although this ACCC recommendation refers specifically to England and Wales, it applies equally to Northen Ireland where similar rules are in place.

3.28 **ACCC comments**: The ACCC's position is that costs protection should be afforded to interveners during proceedings. The ACCC considers that 'members of the public who join proceedings as interveners in support of the claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive'. They find that the UK has not yet achieved compliance on this point.

3.29 **Commentary:** The Department is not aware of any Aarhus case in which costs were sought or imposed against an intervener. Further views on this issue are welcomed.

Question 14: Please provide any data on the number of Aarhus claims in which you have been involved where it has been appropriate for interveners to intervene to support claimants and whether there has been uncertainty as to costs liability. Did this uncertainty dissuade an intervener from taking part in the claim?

Question 15: The ACCC's position is that costs protection should be afforded to interveners during proceedings. Should interveners in support of an Aarhus claim have any additional protection from costs beyond the current position? What are the likely benefits and risks of doing so?

4. Judicial Review Time Limit

Current position in Northern Ireland

4.1 Court rules in Northern Ireland currently provide that an application for leave to bring a judicial review must be brought within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending that period.[15] Previously a leave application had to be brought "promptly" and in any event within three months but the promptitude requirement was removed in 2017 following a public consultation.

4.2 Regarding when "the grounds for the application first arose", case law has established that this is generally the date on which the decision under challenge was taken.

Compliance issue

4.3 Paragraph 2(c) of Decision VII/8s "requests the UK to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:

(c) *Further review its rules regarding the time frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework".*

4.4 Whilst welcoming the removal of a promptitude requirement, in its final report on Decision VI/8k the ACCC found that, by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e. the date on which a claimant knew, or ought to have known, of the act, or omission, at stake, Northern Ireland has still not complied with the requirement in Article 9, paragraph 4, that procedures subject to Article 9 are fair and equitable.

[15] The Rules of the Court of Judicature (NI) 1980 Order 53 rule 4 RsCJ formerly RSC

Commentary

4.5 Judicial review is a constitutionally important mechanism which allows an individual or organisation affected by a decision taken by a public body to challenge that decision in court. The time limits for bringing a claim are intended to strike a balance between the need for legal certainty and the right of access to justice. This was recently summarised by Mr Justice Scoffield *In The Matter Of An Application By William Bannon For Leave To Apply For Judicial Review*[16] in which he stated:

"The courts have frequently emphasised the importance of legal certainty in the context of judicial review time limits since [O'Reilly v Mackman [1983] 2 AC 237], including for example in this jurisdiction in Re Turkington's Application [2014] NIQB 58 (at para [33], Treacy J referring to good administration requiring "decisiveness and finality" in the absence of compelling reasons); and Re Musgrave Retail's Application [2012] 109 (at para [13], Maguire J referring to the "need for speed" in the initiation of judicial review decisions and it being "important that a point in time is arrived at which it can confidently be said that a public law decision is beyond question"). Where time is to be extended, it is well established that there should be a good reason for doing so; and an onus lies upon an applicant seeking such an extension to account for all relevant periods of delay."

4.6 As noted above, provision already exists in the rules to allow the court to use its discretion to extend the three-month time limit where there is good reason to do so. The question of when the claimant knew (or ought to have known) enough information to make an application for judicial review will be a relevant factor, which is material to the question of whether an extension of time should be granted.

4.7 Changing the position so that the time limit is calculated from the date the decision became known to the public and not from the date that the contested

[16] Paragraph 17 [2024] NIKB 25

decision was taken, was not considered in the 2017 consultation which resulted in the removal of the promptitude requirement. Therefore, the Department would welcome views on the likely benefits and potential risks associated with the implementation of this recommendation as a means of ensuring that the judicial review regime in Northern Ireland meets the UK's obligations under the Aarhus Convention.

4.8 The Department understands that the aim of the ACCC's recommendation is to ensure that an individual or organisation seeking to make an Aarhus Convention claim can take full advantage of the time limit. Respondents are asked to indicate whether they consider that this change should be made in Northern Ireland in order to ensure compliance or whether there is an alternative that might be more effective in enabling us to meet our obligations under the Convention.

4.9 The Department has identified two possible options to implement the ACCC's recommendation. Both would involve changing the rules so that the time limit starts from when a decision is made public rather than when it was taken. The first option would be to define in legislation 'when a decision is made public' as the date when that decision was published. The second would be to leave it to the court to establish the test as to when a decision is considered to have been made public, or when a claimant knew or ought to have known about that decision. While the first would provide for greater certainty as to when an eligible judicial review claim may be made, the latter could provide judges greater flexibility to consider the specific circumstances of each case when determining whether a claim was made in time.

4.10 The Department would welcome views from the judiciary, legal practitioners and other stakeholders on how the ACCC's recommendation ought to be implemented, with particular regard to how it might impact the operation of the courts.

Question 16: What are the likely benefits of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

Question 17: What are the potential risks of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

Question 18: If legislative provision was to be made so that the time limit starts when a decision is made public, should 'when a decision is made public' be defined as the date when that decision is published or should this be left open for the courts to determine?

Question 19: Are there other approaches which could better address the non-compliance finding regarding judicial review time limits in Northern Ireland?

5. Next Steps

5.1 The Department intends to publish a response as soon as practicable following the closing date of this Call for Evidence. Any screening and impact assessments will be completed as part of the Department's response to this Call for Evidence and ongoing policy development in this area.

6. Summary of Questions

We welcome responses to the following questions, which refer to the specific issues raised in the sections above. You do not need to answer every question. Please give reasons for your responses, including examples and data from cases.

Costs Protection Regulations

Question 1: How effective are the Costs Protection Regulations in ensuring that Aarhus Convention cases are not prohibitively expensive to bring?

Question 2: Please provide data on the number of Aarhus claims in which you have been involved since February 2017 and their outcomes.

Question 3: Please provide data on the impact, if any, of the Covid-19 pandemic on the number of Aarhus claims in which you have been involved.

(a) Costs protection on appeal

Question 4: Can you provide examples of occasions when appeal costs have proved to be prohibitively expensive to continuing with an appeal in an Aarhus case?

Question 5: Do the Costs Protection Regulations require to be clarified to ensure Aarhus cases that go to appeal are not prohibitively expensive? What are the likely benefits and risks of doing so?

(b) Types of claims covered

Question 6: Please provide any data or information you hold on the costs involved in pursuing a private nuisance claim with an environmental component.

Question 7: Please provide any experience you have in a case in which costs protection measures were sought for private nuisance claims.

Question 8: Please provide your views on the courts using judicial discretion to determine whether a private nuisance claim should benefit from the Costs Protection Regulations. What are the likely benefits and potential risks of doing so?

Question 9: What particular private nuisance claims should benefit from costs protection under the Aarhus Convention?

Question 10: Please provide your views on mediation or other forms of dispute resolution as a means to resolve private nuisance.

(c) Cross-undertakings for damages

Question 11: Please provide any data on the number of Aarhus claims in which you have been involved where an interim injunction was sought and whether the issue of a cross-undertaking in damages arose, in particular:
(a) the number of Aarhus claims in which an interim injunction was sought;
(b) whether a cross-undertaking was required; and
(c) if so, the amount required.

(d) Costs for procedures with multiple claimants

Question 12: Would you support a default shared claimant costs cap, and, if so, what form should that take and should any conditions apply (for example, only where a second claimant is raising the same legal arguments)?

Question 13: What are the likely potential benefits and risks of a default shared claimant costs cap?

(e) Costs orders against or in favour of interveners

Question 14: Please provide any data on the number of Aarhus claims in which you have been involved where it has been appropriate for interveners to intervene to support claimants and whether there has been uncertainty as to costs liability. Did this uncertainty dissuade an intervener from taking part in the claim?

Question 15: The ACCC's position is that costs protection should be afforded to interveners during proceedings. Should interveners in support of an Aarhus claim have any additional protection from costs beyond the current position? What are the likely benefits and risks of doing so?

Judicial Review Time Limit

Question 16: What are the likely benefits of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

Question 17: What are the potential risks of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

Question 18: If legislative provision was to be made so that the time limit starts when a decision is made public, should 'when a decision is made public' be defined as the date when that decision is published or should this be left open for the courts to determine?

Question 19: Are there other approaches which could better address the non-compliance finding regarding judicial review time limits in Northern Ireland?

Annex A

List of Recipients

Antrim and Newtownabbey Borough Council

Ards and North Down Borough Council

Armagh, Banbridge & Craigavon Borough Council

Bar Library of NI

Belfast City Council

Belfast Solicitors' Association

Causeway Coast and Glens Borough Council

Committee on the Administration of Justice

Departmental Solicitors Office

Derry City and Strabane District Council

Environment and Planning Law Association of Northern Ireland

Fermanagh and Omagh District Council

Infrastructure NI

Lady Chief Justice Northern Ireland

Law Centre (NI)

Law Society of Northern Ireland

Lisburn and Castlereagh City Council

Mid and East Antrim Borough Council

Mid Ulster District Council

Newry, Mourne & Down District Council

NI political party leaders

Northern Ireland Environment Link

Northern Ireland Executive Ministers and NI Executive Secretariat

Northern Ireland Human Rights Commission

Northern Ireland Local Government Association

Office of First Minister and deputy First Minister

Office of the Attorney General for Northern Ireland

PILS Project

Planning Appeals Commission

Royal Institution of Chartered Surveyors Northern Ireland

Royal Society of Ulster Architects

Royal Town Planning Institute Northern Ireland

Rural Community Network

School of Law - The Queen's University of Belfast

Shadow Civil Justice Council

The Law School at the University of Ulster (Jordanstown)

The River Faughan Anglers Ltd

Tidy Northern Ireland

Tourism NI

Translink

Ulster Farmers' Union

Woodland Trust

World Wildlife Fund, Northern Ireland

Annex B

Privacy Notice – Consultations (DoJ)

Data Controller Name: Department of Justice
Address: Knockview Buildings, Stormont, BELFAST, BT4 3SG
Email: AtoJ.Consultation@justice-ni.gov.uk

Data Protection Officer Name: DoJ Data Protection Officer
Telephone: (028) 9037 8617
Email: DataProtectionOfficer@justice-ni.gov.uk

Being transparent and providing accessible information to individuals about how we may use personal data is a key element of the Data Protection Act and the EU General Data Protection Regulation ("GDPR"). The Department of Justice ("the Department") is committed to building trust and confidence in our ability to process your personal information and protect your privacy.

Purpose for processing

We will process personal data provided in response to consultations for informing the development of our policy, guidance or other regulatory work in the subject area of the request for views. We may publish a summary of the consultation responses and, in some cases, the responses themselves but these will not contain any personal data. We will not publish the names or contact details of respondents but will include the names of organisations responding.

Lawful basis for processing

The lawful basis we are relying on to process your personal data is Article 6(1)(e) of GDPR, which allows us to process personal data when this is necessary for the performance of our public tasks in our capacity as a Government Department.
We will only process any special category personal data you provide, which reveals racial or ethnic origin, political opinions, religious belief, health, disability or sexual life/orientation when it is necessary for reasons of substantial public interest under Article 9(2)(g) of GDPR, in the exercise of the function of the Department and to monitor equality.

How will your information be used and shared?

We process the information internally for the above stated purpose. For the time that we are processing this data, it will be held on a secure IT system and access to it will be controlled. We do not intend to share your personal data with any third party. Any specific requests from a third party for us to share your personal data with them will be dealt with in accordance with the provisions of the data protection laws.

How long will we keep your information?

We will retain consultation response information until our work on the subject matter of the consultation is complete and in line with the Department's approved Retention and Disposal Schedule.

What are your rights?

You have:

- the right to obtain confirmation that your data is being processed and access to your personal data;
- an entitlement to have personal data rectified if it is inaccurate or incomplete;
- a right to have personal data erased and to prevent processing in specific circumstances;
- the right to 'block' or suppress processing of personal data in specific circumstances;
- the right to data portability in specific circumstances; and
- rights in relation to automated decision making and profiling.

How to complain if you are not happy with how we process your personal information

If you wish to request access, object or raise a complaint about how we have handled your data, you can contact our Data Protection Officer using the details above.

If you are not satisfied with our response or believe we are not processing your personal data in accordance with the law, you have the right to lodge a complaint with the Information Commissioner's Office:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
Tel: 0303 123 1113
Email: casework@ico.org.uk
https://ico.org.uk/global/contact-us/

Annex C

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Article 9

Access to Justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

   In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

   Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

   (a) Having a sufficient interest

   or, alternatively,

   (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.