Ministry of JUSTICE

Cost Protection for Litigants in Environmental Judicial Review Claims

Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention

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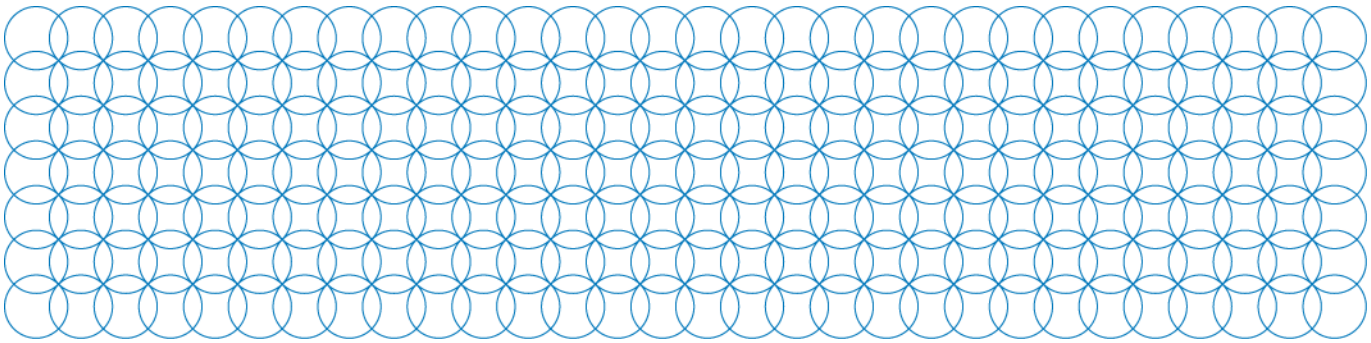

Ministry of JUSTICE

Cost Protection for Litigants in Environmental Judicial Review Claims

Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

To:	Seek views from those who may be involved in judicial review proceedings within the scope of the Aarhus Convention in England & Wales on proposals to cap costs for those cases.
Duration:	From 19 October 2011 to 18 January 2012
Enquiries (including requests for the paper in an alternative format) to:	Steven Uttley Ministry of Justice Post Point 4.23 102 Petty France London SW1H 9AJ Tel: 020 3334 3191 Email:steve.uttley@justice.gsi.gov.uk
How to respond:	Please send your response by 18 January 2012 to: Steven Uttley Ministry of Justice Post Point 4.23 102 Petty France London SW1H 9AJ Tel: 020 3334 3191 Email: steve.uttley@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published in March 2012 at: http://www.justice.gov.uk

Contents

Executive summary

1. This consultation is on proposals to implement the UK's obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention') and Directive 2003/35/EC ("the Public Participation Directive" or "PPD"). It relates to England and Wales: separate consultations are being undertaken in relation to Scotland and Northern Ireland.

2. The Aarhus Convention requires parties 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 and contraventions of national law relating to the environment and specifies that those court procedures should, amongst other things, not be 'prohibitively expensive'. Both the UK and the EU are parties to the Convention.

3. The PPD implements, in part this requirement and aims to improve public participation in the making of certain decisions affecting environmental matters. In particular, the Directive amends Directives on Environmental Impact Assessments and Industrial Emissions to require Member States to permit members of the public to have access to a court procedure to challenge decisions subject to the public participation procedures and specifies that those court procedures, amongst other things, should not be 'prohibitively expensive'.

4. Over a number of years the courts have been developing mechanisms known as Protective Costs Orders (PCOs), which are designed to limit the exposure of claimants to defendant's costs. Case law has now moved to develop a strong presumption that a PCO will be granted where an environmental case is brought in the public interest. The case of *Garner* defined cases that fell within the PPD as automatically within the public interest, therefore there is effectively no public interest test to be met in such cases. However, the courts still retain a large amount of discretion around the granting of a PCO, in particular around the amount of the order and the question of what test should apply in determining the level at which a particular PCO should be set.

5. The Government has accepted for some time that it would be in the interests of applicants in environmental judicial review cases to provide greater clarity about the level of costs through a codification of the rules on PCOs which sets out the circumstances in which a PCO will be granted and the level at which it will be made.

6. The proposals in this consultation are designed to establish the basic principles for rules setting out the nature and content of a PCO in a

'standard case' and how far, and in what circumstances it will be possible to depart from the 'standard case'.

7. The following summarises the main proposals which form the basis of the consultation:

   - The rules are to apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the PPD The rules are to apply in relation to all claimants in the same way, regardless of whether the claimant in a particular case is a natural or legal person;
   - A PCO will obtained by making an application. However, the application need not be supported by grounds and evidence unless an order other than the "default order" (see below) is sought;
   - A PCO will only be granted if permission to apply for judicial review is granted;
   - Applications should normally be made at the same time as the application for permission/in the claim form. It will be decided on by the court when it considers whether to grant permission, and will normally be considered on the papers;
   - The PCO will limit the liability of the claimant to pay the defendant's costs to £5,000 and also limit the liability of the defendant to pay the claimant's costs to £30,000;
   - By way of exception the defendant may apply for the cap to be removed – i.e. that there should be no costs capping because the claimant is not in need of costs protection - where information on the claimant's resources is publicly available. Consultees are also asked for their views on the possibility of allowing the cap to be raised as well as removed. An application to remove the cap may only be on the basis that the claimant has such resources available for litigation that access to justice is not in issue and no costs protection is required. This should be supported by such evidence as is publicly available, as the applicant will not be able to require the claimant to disclose his or her means.
   - Costs of the PCO application will not be payable by either party if the PCO is applied for with default terms and is made in those terms (that is to say, there should be no additional costs element for a "default" application and order);

8. This consultation asks questions about the proposed limit and the appropriate level of the cross-cap. It also seeks views about the circumstances in which it might be appropriate to depart from the cap and whether it should be capable of being raised as well as lowered. It also asks similar questions about the cross cap and about whether the granting of a cap should be linked to the granting of a cross cap.

Introduction

9. This paper sets out for consultation the Government's proposals to codify for England and Wales the current case law on protective costs orders (PCOs) in relation to judicial review claims which fall under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention'), including those covered by the Public Participation Directive (Directive 2003/35/EC) (the 'PPD').

10. This consultation is therefore aimed at those who may be involved in or affected by judicial review proceedings in England and Wales falling within the scope of the Aarhus Convention.

11. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 18 have been followed.

12. An Impact Assessment is not required for this consultation because rules of court are not generally within the definition of regulation by reference to which the requirement for such an assessment is determined.

13. Copies of the consultation paper are being sent to:

    Environment Agency for England and Wales

    Law Society

    The Bar Council

    Civil Aviation Authority

    The Planning Inspectorate

    Infrastructure Planning Commission

    Planning and Environmental Bar Association

    Renewable UK

    UK Business Council for Sustainable Energy

    Confederation of British Industry

    Local Government Association

    Welsh Local Government Association

    UK Environmental Law Association

    The Association of British Insurers

    Federation of Small Businesses

    British Chambers of Commerce

    National Farmers Union

    RSPB

Friends of the Earth

WWF-UK

Greenpeace

Environmental Law Foundation

Client Earth

Coalition for Access to Justice for the Environment

Network Rail

Highways Agency

UK Major Ports Group

British Ports Association

Airport Operators association

British Air Transport Association

Royal Town Planning Institute

Planning Aid

The Master of the Rolls

The Head of the Administrative Court

14. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

Background

15. The Aarhus Convention is implemented in part through the Public Participation Directive (Directive 2003/35/EC) (the PPD) which amended the Directives on Environmental Impact Assessment (Directive 85/337/EEC) and Integrated Pollution Prevention and Control (Directive 96/61/EC, now replaced by the Industrial Emissions Directive (Directive 2010/75/EC)) to include provisions for public participation and access to justice to challenge decisions.

16. The Convention and the PPD require that members of the public have access to review procedures that are 'fair, equitable, timely and not prohibitively expensive'.

17. In England and Wales, the main mechanism for challenge is judicial review. At least partly in response to the Aarhus Convention and the PPD, the courts have been developing case law on protective costs orders (PCOs), designed to limit claimants' exposure to defendants' costs. PCOs in effect set a limit on applicants' costs at an early stage (usually when permission is granted). If the challenge is unsuccessful, the claimant will not be liable to pay the costs of the defendant above the limit set in the PCO.

18. A number of domestic cases dating from *R(Corner House Research) v the Secretary of State for Trade and Industry [2005] 1 WLR 2006* including *R (Garner) v. Elmbridge Borough Council [2011] 1 Costs L.R. 48 (8 September 2010)*, have set out the basic principles underpinning the use of PCOs in judicial review proceedings.

19. The cases did not provide detailed guidance on the level at which a PCO should be set, but *Garner* made it clear that a level of twice the national average income would be too high. In *Garner* itself the court awarded a PCO at £5,000. Other cases where the courts have awarded PCOs include *Badger Trust v. Welsh Ministers [2010] EWCA Civ 807* (where the cap on the claimants costs was £10,000) and *R (Medical Justice) v. Secretary of State for the Home Department [2010] EWHC 1425 (Admin*) (where the cap was £5,000).

20. The issue of costs in environmental litigation has been raised by the European Commission and the Aarhus Compliance Committee. The Commission adopted a reasoned opinion on 18 March 2010 which set out its view that the current rules on costs for environmental challenges do not ensure compliance with the PPD. The Commission has now referred the matter to the CJEU. The Aarhus Compliance committee has also criticised the UK in this area and has asked it to review and report.

21. The purpose of this consultation is to seek views on proposed changes to the Civil Procedure Rules which are designed to provide a certain and affordable level of cost protection for applicants in judicial review cases within the scope of the Aarhus Convention. As part of this, views are sought from consultees on the extent to which the current costs provisions have deterred them from bringing such judicial review claims.

Q1. Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.

Why PCOs?

22. As part of the process of developing a workable costs protection for claimants the Ministry has considered possible alternatives to PCOs. The Ministry consulted on the possibility of moving to qualified one-way cost shifting in England and Wales as part of a wider consultation on the response to the consultation on 'Proposals for reform of civil litigation funding and costs in England and Wales'.

23. The response to the consultation published on 29 March 2011, announced that the Government will introduce qualified one way costs shifting for personal injury cases (including clinical negligence) only at this stage as part of a package of measures aimed at reducing the costs of civil litigation. The Government was not persuaded that the case for introducing qualified one way costs shifting in other types of claim had been made out at that stage.

24. The consultation paper set out the Government's view that Protective Costs Orders ought to provide a better costs protection in environmental judicial review cases than qualified one way costs shifting. This is because, unlike in most forms of qualified one way costs shifting, it will be clear from the outset of a challenge that if permission is obtained the applicant will know the extent of its liability if the claim is unsuccessful. Only PCOs provide such a level of clarity at an early stage (qualified one way costs shifting resolves itself only after the fact, since its application depends on the behaviour of the claimant) and the Government remains convinced that they are the right approach for judicial review cases covered by the Aarhus Convention.

25. The view that unqualified one way costs shifting (where claimants receive their costs in full from the other side if successful but are not responsible for the defendant's costs if they lose) is the best way to comply with the Directive has also been expressed by a number of parties. However, the Government continues to take the view that it is reasonable to require a claimant to pay something towards the costs of an unsuccessful case, even if that is a relatively small amount. The Convention and the PPD do not require that claimants be protected entirely from adverse exposure to costs, but merely that costs should not be 'prohibitively expensive'. In this context, views are sought as to the impact that the proposed codification of

PCOs would be likely to have. In particular, if parties would be more likely to bring proceedings. If so, the types of issues on which they would be likely to issue proceedings and the numbers of additional claims that they would expect to bring.

Q2. Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons.

A Presumptive Limit?

26. A key issue is that clarity should be available at an early stage. This could be achieved by setting either an automatic presumptive limit or an absolute cap on the claimant's exposure to the defendant's costs, available at the permission stage. An absolute cap would not be capable of being exceeded but a presumptive limit would allow the presumption to be displaced and its replacement by a higher limit, or no limit, provided that the conditions for displacement were made out.

27. An absolute cap would have the advantage for users of providing the most certainty, but it would also provide the same protection for wealthy organisations and individuals as for those of more limited means. A presumptive limit would be more capable of being targeted at those most in need, but if too flexible could give rise to unnecessary and time consuming arguments about costs.

28. The proposals on which we are seeking views propose a presumptive limit. Although a PCO in the presumptive limit must be applied for it will not be necessary for the application to be supported by grounds and evidence. By definition it is possible to displace such a limit. However, in order to provide clarity about the level of PCO which will normally apply, it is proposed that the circumstances in which this may be done be limited to exceptional cases.

29. In order to limit the overall cost of judicial review cases falling under the Aarhus Convention the Government has taken the view that it would also be desirable to codify the courts' ability to limit the costs exposure of the defendant by enabling them to secure a 'cross-cap' on their liability to pay the costs of the claimant. Consideration has been given to whether the cross-cap should also be a presumptive limit and whether it should be capable of being challenged by a defendant who wished to spend more than the amount prescribed and whether the granting of a cap and cross cap should be linked in some way.

30. The approach proposed in this consultation document provides for challenges on very limited grounds and should not permit the defendant to require the claimant to disclose his or her means. The approach we have proposed therefore only permits a challenge on the basis of information on the claimant's resources which is publicly available.

31. In addition it is suggested that to maintain as straightforward a process as possible challenges should only be permitted where the claimant has such resources available for litigation that access to justice is not an issue and no costs protection is required.

32. A further issue on which this consultation paper seeks views is whether the exceptions should apply only to organisations of various types, or whether it might also be applied to individuals. A number of organisations might be set up to pursue a particular agenda or for the purposes of limiting individuals' liability and it will most often be a matter of public record (in filed accounts or other form) that they have funds available to them for campaigning or for legal costs (e.g. groups of local residents may sometimes form a limited liability as a vehicle for litigation).

33. In such circumstances the Government believes that it will clearly be both possible and reasonable for a defendant to demonstrate to the court that costs protection is not required, or that a lesser degree of cost protection is appropriate. It may also be the case that the means of a wealthy private individual are, for whatever reason, a matter of public record. This consultation therefore invites views on whether it would be reasonable to enable challenges to be made for both individuals and organisations. It also invites views as to whether it should be possible for defendants to apply for the cap to be raised, or just for it to be removed, based on the resources of the claimant.

The Level of cap

34. As noted earlier it is clear that the level at which the cap is set will be of critical importance. A zero cap could of course be proposed, but as set out earlier the Government believes that it would not be desirable for claimants to have no costs exposure. There is only limited data on the cases where PCOs have been awarded. For example, the court awarded a cap of £10,000 on the claimants costs along with a cross-cap of £10,000 on the defendants costs in *Badger Trust v. Welsh Ministers [2010] EWCA Civ. 807*. In *R (Medical Justice) v. Secretary of State for the Home Department [2010] EWHC 1425 (Admin)*, the court awarded a cap of £5,000 on the claimants costs with cross-cap on the defendants costs set at a "reasonably modest amount" taking account of the fact that success fee would be payable.

35. Taking account of the levels which are currently being used by the courts as well as the importance of setting a level which could not be further reduced, it is proposed that the cap should be set at a level of £5,000. This is on the basis that any claimant who is so impecunious that the possibility of being liable for £5,000 would present an insuperable barrier to proceeding would in most cases be eligible for legal aid, with its attendant cost protection in any event. At the same time, we would welcome any evidence from consultees, particularly those who have had experience of considering whether to apply for a PCO, whether the need to disclose means has itself acted or would act as a disincentive to litigate.

Q3. Do you agree with the proposal to set the presumptive (i.e. default) PCO limit at £5,000? If not what should the figure be? Please give reasons.

Q4. Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?

Q5. If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendants to make applications to raise the cap? Please give reasons.

Q6. In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?

Q7. Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons.

Q8: If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?

The Cross Cap level

36. The Cross cap level is proposed at a higher level than the claimant's limit to reflect its different purpose. It is not designed to promote access to justice in the sense of the Aarhus Convention, but rather to reflect a reasonable limit for the bringing of a judicial review, taking into account that public resources are not unlimited and the general need to keep costs at a reasonable level. This will also have the effect of preventing the claimant from incurring excessive costs on their own side which will not be recovered if the claim is unsuccessful. Views are invited from consultees on the appropriate level, but taking the *Garner* case as starting point a level of £30,000 is proposed**.**

Q9. Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?

Challenges to the Cross-cap

37. The only appropriate basis on which a claimant might potentially wish to challenge a cross cap would be in situations where the claimant considered that its claim would require more legal resources than an average judicial review. The Government therefore considered whether it would be appropriate to include an ability to challenge a cross-cap in these proposals. It has been decided not to do so as the main purposes of a cross cap is to hold down overall costs.

38. However, the Government would be interested to learn whether this view is shared by stakeholders, or whether it is felt that the ability to apply for a

higher cross cap would outweigh these advantages. It would also be interested in views on whether if a facility to challenge a cross cap were introduced that should have implications for the cap on claimant's exposure to the defendant's costs? In other words is it not reasonable to expect that a claimant who wishes to incur over £30,000 expenditure on their own costs could bear exposure to defendant's costs over £5,000?

Q10. Should it be possible to challenge the cross cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.

Q11. Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?

Appeals

39. This consultation includes no specific proposals in respect of appeals. The Government is however interested in the views of consultees on how appeals should be dealt with. It would be possible to deal with appeals by applying the initial cap or presumptive limit (currently proposed at £5,000, with a cross-cap of £30,000) to all proceedings including appeals. In most cases, this would effectively mean a zero cap, or one way cost shifting at the appeal stage, since in all or most cases the limit of recoverable costs will have been reached at first instance.

40. Alternatively, it would be possible to require a further application on appeal in order to set an additional limit for the appeal. If it is accepted that, save for very exceptional circumstances, claimants should have the benefit of costs protection above a proposed minimum (e.g. £5,000) in current proposals, would it be reasonable to say that the claimant can afford (for example) the same amount again if there is an appeal? It should be noted in this context that it will not necessarily be the claimant who has appealed, so there will not always even be a choice surrounding whether additional costs should be incurred. The views of consultees are requested on these issues.

Q12. Should the default cap as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?

Q13. If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.

Q14. Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

1. **Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.**

2. **Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons.**

3. **Do you agree with the proposal to set the presumptive (i.e. default) PCO limit at £5,000? If not what should the figure be? Please give reasons.**

4. **Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?**

5. **If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendants to make applications to raise the cap? Please give reasons.**

6. **In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?**

7. **Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons.**

8. **If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?**

9. **Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?**

10. **Should it be possible to challenge the cross cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.**

11. **Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?**

12. Should the default cap as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?

13. If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.

14. Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 18 January 2012 to:

Steven Uttley
Ministry of Justice
Post Point 4.23
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3191
Email: steve.uttley@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from steve.uttley@justice.gsi.gov.uk, telephone 020 3334 3191.

Publication of response

A paper summarising the responses to this consultation will be published in March 2012. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic

confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Consultation Co-ordinator
Ministry of Justice
Better Regulation Unit
Analytical Services
7th floor, Pillar 7:02
102, Petty France
London SW1H 9AJ

Produced by the Ministry of Justice

Alternative format versions of this report are available on request from steve.uttley@justice.gsi.gov.uk