

Consultation on Scottish Court Fees 2018-2021

Scottish Environment LINK, Legal Strategy Subgroup Response

12 January 2018

Scottish Environment LINK is the forum for Scotland's voluntary environment organisations. It has over 35 member bodies which represent a wide range of environmental interests with the common goal of contributing to a more environmentally sustainable society. LINK assists communication between member bodies, government and its agencies and other sectors within civic society. Acting at local, national and international levels, LINK aims to ensure that the environment is fully recognised in the development of policy and legislation affecting Scotland.

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A. Introduction

This response is made on behalf of the SE LINK Legal Strategy Subgroup. It focuses on Scotland's obligations under the Aarhus Convention in relation to the costs of environmental litigation.

Scotland is currently non-compliant with Articles 9(4) and 9(5) of the Aarhus Convention. The increases in court fees proposed by this consultation will add costs to a system which is already prohibitively expensive. If implemented, these consultation proposals will result in moving Scotland further from compliance with the Aarhus Convention.

Scotland's Compliance record with the Aarhus Convention

The Aarhus Convention protects the human right to live in an environment adequate to health and well-being. Access to environmental justice allows citizens to realise their rights to information, participate in decision making and ensure that environmental laws are enforced.

This is set out in the preamble to the Convention, which states that,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights...¹

¹ Aarhus Convention, preamble, paragraphs 7-8.

Article 9(4) requires that environmental litigation is ‘not prohibitively expensive’, and Article 9(5) obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Environmental litigation in Scotland is carried out mainly by judicial review, which is very expensive. Expenses often run into six figures.²

Decision V/9n by the Aarhus Convention’s Meeting of the Parties (MOP) in 2014 found that Scotland was not compliant with Article 9(4) and 9(5).³ Decision V/9n recommended that the Party “take urgent action” to:

(a) Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive;

*(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;*⁴

The Aarhus Convention Compliance Committee (ACCC) – the body established under the Convention for reviewing Parties’ compliance - carried out its first progress review in 2015. The Compliance Committee reached the same conclusion, finding that Scotland remained non-compliant with Article 9(4) and 9(5).⁵

In February 2017 the Compliance Committee – in its second progress review – again found that Scotland was non-compliant with Article 9(4) and 9(5).⁶

In September 2017 the Convention’s Meeting of the Parties largely repeated its 2014 conclusion, finding that Scotland was non-compliant with Article 9(4) and 9(5).⁷

The September 2017 finding by the Meeting of the Parties is therefore the fourth in a series of reviews of Scotland’s compliance with the Aarhus Convention, all of which have found Scotland to be non-compliant with Article 9(4) and 9(5).

² E.g. in *McGinty and Another* [2010] CSOH 5, the petitioner’s potential liability was stated as £80,000 for his own legal expenses, and a potential £90,000 liability for the expenses of the respondent were he to be unsuccessful (para 4 of the judgement). McGinty was unemployed and in receipt of jobseekers allowance. More recently, the John Muir Trust had to pay expenses of £120,000 to the Scottish Government and SSE following judicial review in the Outer House (where the John Muir Trust was successful), and an appeal to the Inner House (in addition to two unsuccessful PEO applications) – *The John Muir Trust v The Scottish Ministers and SSE Generation Limited and SSE Renewables Developments (UK) Limited* [2016] CSIH 61. See <http://thirdforcenews.org.uk/tfn-news/huge-legal-costs-could-cripple-campaigning-charities>.

³ [Decision V/9n of the Meeting of the Parties on compliance by the United Kingdom with its obligations under the Convention](#) (ECE/MP.PP/2014/2/Add.1), para 2(a-b).

⁴ *Ibid*, para 8.

⁵ Aarhus Convention Compliance Committee, ‘[First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)’ (2015), para 33.

⁶ Aarhus Convention Compliance Committee, ‘[Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)’ (2017), para 107.

⁷ Aarhus Convention Compliance Committee, ‘[Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#)’ (2017), para 107.

Scotland is non-compliant with its access to justice obligations under the Aarhus Convention – and has not complied since the UK ratified the Convention in 2005.

B. Consultation Questions

We have responded to questions 1 and 4 only.

1. Do you agree that court fees should have a general uplift of 2.3% on 1 April 2018 followed by 2% rises in the subsequent 2 years?

No.

First, we do not support the policy of the Scottish Government that court fees should be set at a level to seek full cost recovery.

This policy is based on a misconception that only the immediate parties to litigation gain any benefits from it, and therefore public expenditure on the civil justice system represents an unnecessary ‘subsidy’. The civil justice system is not an optional commodity the benefits of which are exclusively private; it is a public service which provides a number of public benefits. Its funding arrangements should reflect this.

Second, Scotland is already non-compliant with Article 9(4) of the Aarhus Convention. Increasing court fees will worsen Scotland’s non-compliance.

The ACCC has made clear that,

*When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system **as a whole and in a systemic manner**.*⁸

Court fees are part of the costs to be considered in relation to the standard set by Article 9(4).⁹

Friends of the Earth Scotland’s 2016 response to the Scottish Government’s ‘Developments in Environmental Justice in Scotland’ consultation illustrated that court fees in environmental litigation can be prohibitive of themselves. It demonstrated that court fees constitute a significant cost to environmental litigants:

... in McGinty vs Scottish Ministers, we estimate that the Outer House hearing took 18 hours incurring fees of approximately £1,620 for the half hourly rate of time spent in court alone; under the current regime this would double to £3,360 in 2016. In Walton vs Scottish Ministers

⁸ ACCC, ECE/MP.PP/C.1/2010/6/Add.3, para 128 (emphasis added).

⁹ Court fees are explicitly mentioned amongst the costs of litigation in UNECE, ‘The Aarhus Convention: An Implementation Guide’ (UNECE, 2014), p204.

*the hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580; this would more than double to £12,493 in 2016.*¹⁰

Third, the issue of Aarhus compliance has not been addressed by this consultation or the accompanying EQIA. The consultation document does not mention the Aarhus Convention. The EQIA states that,

*There is nothing to suggest that there would be a particular environmental impact from these proposals albeit many environmental groups are concerned about the cost of bringing actions to the courts and Scotland's compliance with its obligations under the Aarhus Convention to promote environmental justice.*¹¹

There is no mention in either the EQIA or the consultation document that the ACCC and the MOP have both found Scotland to be non-compliant. These decisions are of importance to this consultation and should have been addressed. Environmental groups are concerned about Scotland's compliance record, but it is the Convention's official decision-making bodies whose findings on this issue should be acknowledged.

There are no remedies suggested in the consultation document to address the problem of Aarhus compliance in relation to court fees.

4. Do you have any other comments on the paper or on the future direction of court fees?

The consultation paper has not addressed the issue of Aarhus compliance.

The future direction of court fees should be a reduction in fees paid by court users and a return to a publically funded civil justice system, to reflect its nature as a public service and improve access to justice.

We recommend that Aarhus-type cases are made automatically exempt from court fees, as a way of partly addressing Scotland's non-compliance with the Convention.

¹⁰ Friends of the Earth Scotland, 'Developments in Environmental Justice - Friends of the Earth Scotland response to the Scottish Government's consultation' (2016), p5.

¹¹ Scottish Government, 'Equality Impact Assessment Record: Consultation on Scottish Court Fees 2018-2021' (Scottish Government, 2017), p3.