

Evidence to the Justice Committee Call on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Scottish Environment LINK Legal Strategy Subgroup

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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.

A. Introduction

The SE LINK Legal Strategy Subgroup welcomes the opportunity to submit evidence to the Justice Committee on the Civil Litigation (Expenses and Group Proceedings) Bill (Scotland). Our input concerns the cost barriers for environmental litigation in Scotland in respect of Scotland's obligations under the UNECE Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters.

Members of the Legal Strategy Subgroup have been raising issues of non-compliance with the Aarhus Convention within Parliament, directly with the Scottish Government, with the European Commission (EC) and the Aarhus Convention Compliance Committee (ACCC) since 2010. Despite rulings from both the EC and ACCC that find Scotland to be non-compliant with the Aarhus Convention, and despite the opportunities presented by the Making Justice Work programme of civil court reform, the Scottish Government has failed to address barriers to access to justice in environmental matters, including cost barriers. As such, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is another missed opportunity to tackle ongoing non-compliance with the Convention.

B. Recommendations

The Scottish Government should urgently undertake a comprehensive review of the legal system in relation to Aarhus obligations, and we urge the Committee to take the opportunity presented in this Bill to raise this issue. In particular, as part of the Committee's stage 1 scrutiny of the Bill, members may wish to ask the Scottish Government how the Bill, and/or their wider civil courts reform programme, is going to address the deficiencies in Scotland's implementation of the Aarhus Convention.

As one step towards addressing this non-compliance, we recommend amending Section 8 to include all litigation that falls under the scope of the Aarhus Convention in provisions for Qualified One Way Cost Shifting, and thereby move some way towards compliance.

C. Access to Justice under the Aarhus Convention and EU law

The third 'pillar' of Aarhus - Article 9 - provides members of the public and NGOs with rights in relation to access to justice in environmental matters.¹ It is critical in giving teeth to provisions on access to information and public participation under the first two pillars of the Convention.

Article 9 requires that:

¹ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 <http://www.unece.org/env/pp/documents/cep43e.pdf>.

- members of the public have access to a review procedure to challenge the substantive and procedural legality of decisions, acts or omissions subject to provisions on public participation in decision making, as per Article 6 (9.2);
- members of the public have access to procedures to challenge acts and omissions by private persons and public authorities which contravene environmental law (9.3);
- such procedures must be 'fair, equitable, timely and not prohibitively expensive' (9.4);
- Parties 'shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice' (9.5).²

While, unlike pillars 1 and 2, the third pillar of Aarhus has not been wholly transposed into EU law, Article 9 has been incorporated into EU law to a limited extent, by way of two of the many directives that deal with environmental protection. The EU Public Participation Directive 2003/35³ (PPD) amended the EIA and IPPC Directives⁴ respectively to require that the public and eNGOs have standing before the courts (or other independent review body) to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the PPD, and that access to such review is 'fair, equitable, timely and not prohibitively expensive'.⁵ These amendments were transposed into Scots law, to the same limited extent, via amendments to the relevant secondary legislation.

However, on ratification of Aarhus, the European Council (EC) made it very clear that the Public Participation Directive (PPD) and the Public Access to Environmental Information Directive did not fully implement the Convention – in particular its access to justice provisions – and that member states were responsible for complying with these remaining obligations.⁶ Further, decisions of the CJEU have made it clear that Article 9 provisions for access to justice are of indirect effect.⁷

D. Article 9 implementation in Scotland

Scotland is a signatory to the Aarhus Convention by way of ratification by both the UK and the EU in 2005, and therefore obliged to fully implement its provisions. We note that in the particular constitutional context following the referendum vote to leave the EU, Scotland remains obliged to implement the provisions of Aarhus as a signatory by way of UK ratification, while Cabinet Secretary Roseanna Cunningham has pledged to maintain EU environmental standards.

However, the Scottish Government has to date failed to undertake a comprehensive review of the Scottish legal system in relation to Article 9 provisions and instead adopted a reluctant, piecemeal approach to compliance.

Environmental litigation in Scotland is carried out mainly by judicial review, which is very expensive. Expenses often run into six figures.⁸ Expenses follow success, and whilst

² see the Convention's 'Implementation Guide' for further information on its interpretation Jonas Ebbesson et al, 'The Aarhus Convention: An Implementation Guide' (2014, 2nd Edn, UNECE). p190-207.

³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ('Environmental Impact Assessment Directive'), and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control

⁵ Articles 3(7) and 4(4) of the PPD.

⁶ 2005/370/EC: Council Decision of 17 February 2005: "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations." <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML>

⁷ Reference for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* in Case C-240/09.

⁸ 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

environmental litigants can apply for a 'Protective Expenses Order' (PEO), very few of these have been granted under the statutory regime which was created in 2014 and extended in 2016.⁹ We note that the PEO regime was introduced reluctantly in response to EC infringement proceedings regarding compliance with the prohibitive expense provisions of the Public Participation Directive.¹⁰

While the introduction of formal PEO rules was an improvement in the cost regime, it is apparent that the terms of PEOs – in particular the £5,000 cap – have been set without an assessment of the overall costs of litigation to an applicant.¹¹ There are a number of structural problems with the PEO system which limit their ability to meet Scotland's obligations under the Aarhus Convention: they require an application and hearing which is costly to prepare for and contest, and any appeals require a repeat PEO application because PEOs cover only one stage in the proceedings. Although the scope of PEOs has been recently extended to cover all judicial reviews and statutory appeals falling under the scope of the Convention, they do not apply to private cases under the Convention. The Scottish Civil Justice Council recently consulted on proposals to amend PEO rules, some of which, if implemented would to a degree improve the system, however both the PEO regime itself and the overall cost regime would remain non-compliant.

PEOs are designed to reduce the uncertainty of open-ended costs liability to the other side by capping costs liability in the event that the litigation is unsuccessful - they offer no assistance to a litigant for their own legal expenses in the event that his/her case is unsuccessful.

While legal aid provision exists, Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 presents a barrier to applications for legal aid for certain Aarhus cases. This requires that the Scottish Legal Aid Board (SLAB) look at whether 'other persons' might have a joint interest with the applicant.¹² If so, it is prohibited from granting legal aid if it would be reasonable for those other persons to help fund the case. Further, the test states that the applicant must be 'seriously prejudiced in his or her own right' without legal aid in order to qualify. These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. Moreover, community groups are not able to apply for legal aid under the Scottish regime. These long-term difficulties were exacerbated in 2013 by the introduction of a cap on the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000. In our view this is an entirely unrealistic figure to run a complex environmental judicial review or statutory appeal.

Furthermore, certain court fees have doubled in recent years a move which exacerbates the issue of prohibitive expense in Aarhus cases. For example, hearing fees in the Court of Session are now £200 per half hour in the Outer Court and £500 per half an hour in the Inner Court, per party. For a complex judicial review with several days in court this has the potential to run up thousands of pounds in costs.

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>.

⁹ Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), as amended by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408).

¹⁰ See Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC: A Consultation, January 2012 <http://www.gov.scot/Publications/2012/01/09123750/2>

¹¹ See letter from Paul Wheelhouse, Minister for Community Safety and Legal Affairs to the Convener of the Equal Opportunities Committee at the Scottish Parliament, June 2015. The Minister acknowledges that Aarhus cases are different, and that it hasn't been possible to assess the overall costs in Aarhus litigation [http://www.parliament.scot/S4_EqualOpportunitiesCommittee/General%20Documents/Letter from Mr Wheelhouse Petition 1372 \(2\).pdf](http://www.parliament.scot/S4_EqualOpportunitiesCommittee/General%20Documents/Letter%20from%20Mr%20Wheelhouse%20Petition%201372%20(2).pdf)

¹² See <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made>

We note that the Justice Committee took evidence from SE LINK members during the passage of the Courts Reform (Scotland) Act 2014 which stated these systemic issues with obtaining access to justice in environmental matters in Scotland, as well as the lack of substantive review offered by judicial review proceedings. The Committee highlighted in its Stage 1 Report *“the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law”* and its *“[sympathy] to calls for the introduction of an environmental tribunal for Scotland”*¹³, as an important step towards a fair, just and Aarhus-compliant legal regime.

In March 2016, the Scottish Government invited views on developments in environmental justice in Scotland. A number of respondents, including SE LINK, submitted that the establishment of a specialist environmental court or tribunal should be considered to help improve access to justice and compliance with Article 9 of the Aarhus Convention, while the majority of responses were broadly critical of the very limited approach to Aarhus matters as outlined in the paper.¹⁴ The Government has yet to publish a formal response to this consultation over a year later.

E. Rulings of the Aarhus Compliance Committee in relation to Scotland

In 2011, on recommendation of the Aarhus Convention Compliance Committee, the 4th Meeting of the Parties (MOP4) to the Aarhus Convention found the UK to be in non-compliance with Article 9 (Decision IV/9i). In 2014 the UK was found by MOP5 to be in continued non-compliance (Decision V/9n). Unlike the former Decision, the 2014 ruling identifies distinctive aspects of the Scottish regime that result in non-compliance for the party as a whole.

Decision V/9n requires that Scotland 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;
*(d) Put in place the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention.”*¹⁵

The ACCC has recently published its recommendation on UK compliance ahead of MOP6 next month, and in reviewing progress towards compliance finds that Scotland has still not fulfilled the requirements of decision V/9n.¹⁶

Specifically, the recommendation:

- points to aspects of the Protective Expense Order (PEO) regime in Scotland that must be improved in order to comply with the Convention, including the subjective approach taken by the Courts in awarding PEOs, and how appeals are handled;
- highlights the lack of cost protection for litigants in private law claims under Aarhus;
- notes with concern increases in court fees and encourages Scotland to ‘expressly include’ court fees in any assessment of what is prohibitively expensive;

¹³ Justice Committee Stage 1 Report on the Courts Reform (Scotland) Bill para 322

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/76275.aspx#v>

¹⁴ See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmentaljustice>

¹⁵ https://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf

¹⁶ Report of the Compliance Committee to the 6th Meeting of the Parties to the Aarhus Convention on Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, August 2017

http://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ECE.MP.PP.2017.46_as_submitted_advance.pdf

- takes note of the submissions of observers regarding the limited availability of legal aid in Aarhus cases, and that it has not had further information from the party in respect of this matter.

Draft Decision VI/8k for consideration by MOP6, endorses this report and reaffirms the need to undertake action 'as a matter of urgency' in relation to the points (a), (b) and (d) above.¹⁷ The draft Decision also endorses the Compliance Committee's findings regarding a complaint about prohibitive expense in private nuisance cases and recommends the Party take action to review the costs regime in respect of this.

F. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and Aarhus Compliance

The Civil Litigation Bill stems from the proposals of the Taylor Review into Costs and Funding of Civil Litigation. We note that as with other aspects of the Civil Court reform programme, Aarhus compliance was absent from Sheriff Principal Taylor's remit, despite the Scottish Government's assurances at the time on this front.¹⁸ It is perhaps unsurprising therefore that the present Bill does not set out to address key gaps in Aarhus compliance regarding prohibitive expense.

However, the Bill does propose certain measures that would incidentally improve some limited aspects of the cost regime for certain private cases falling under the Aarhus Convention. Further, the establishment of a group procedure that would enable third-parties such as environmental NGOs to take action on behalf of a group of litigants brings scope for improving Aarhus compliance, although the detail of such procedures is outwith the scope of this Bill.

Bearing in mind the context set out above, we respond in brief to the questions posed by the Committee below.

1. Will the Bill achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system?

In respect of the rights and responsibilities on citizens to take legal action in environmental matters under the Aarhus Convention, the Bill does little to improve access to justice, as per the barriers set out in part D above.

2. The specific provisions in the Bill which:

(i) regulate success fee agreements (sometimes called 'no win, no fee' agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements;

(ii) allow solicitors to enforce damages based agreements (a form of 'no win, no fee' agreement, where the fee is calculated as a percentage of the damages recovered);

(iii) introduce 'qualified one way costs shifting', which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender's legal expenses even if the action is unsuccessful;

¹⁷ Draft decision VI/8k concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

http://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_30_E.pdf

¹⁸ We met with the Secretary to the Taylor Review in February 2012, who confirmed that the Taylor Review remit did not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the Aarhus Convention, this was confirmed in correspondence, and is apparent in the absence of discussion of the requirements of the Convention in the Report of the Taylor Review.

We cautiously welcome the move to regulate SFAs and allow solicitors to enforce DBAs in personal injury and other civil actions, and welcome the introduction of QOCS in personal injury, however, note the limited impact in terms of Aarhus compliance.

As outlined in part D above, there is currently little in the way of cost protection for non-legally aided litigants pursuing private claims under the scope of the Aarhus Convention. These measures combined theoretically provide provisions to ensure that access to justice in personal injury with an environmental flavour – toxic torts – is not prohibitively expensive.

Anecdotally however, we understand that there is a real difficulty in finding lawyers willing to act under SFAs or DBAs in environmental cases in Scotland. That being so, any moves to regulate the area will have a negligible impact on access to justice in this respect.

Further we are concerned that the regulation, and anticipated increase in use, of SFAs and DBAs could be used as justification for further cuts to legal aid provision.

Private nuisance cases – a further key area of private litigation falling under the scope of the Convention – as well as the broad scope of public interest cases falling under the Convention are excluded from QOCS under these proposals therefore, combined, the measures do little to improve access to justice in environmental matters.

We are of the view that QOCS is a far more appropriate system of costs protection than the PEO regime, to tackle the issue of prohibitive expense in Aarhus cases, as we have raised in response to various consultations under the Making Justice Work programme.

We note that the argumentation for the introduction of QOCS as outlined in the Policy Memorandum to the Bill could equally apply to public interest cases under the Aarhus Convention, in particular Sheriff Principal Taylor's concerns about 'asymmetrical relationships' in court, and levelling the playing field. The point that 'if a pursuer's costs would exceed the likely benefit from the litigation, then a rational pursuer would not choose to bring a case at all' applies all the more so in relation to public interest environmental cases, where there may be no 'benefit' at all for a litigant. It is difficult to see how the case for QOCS in relation to personal injury can be accepted by the Scottish Government and its rejection in relation to Aarhus cases justified.

Therefore we urge the Committee to recommend amending Section 8 of the Bill as drafted to include all litigation that falls under the scope of the Aarhus Convention.

(viii) allow for the introduction of a group procedure in Scotland, which would enable people with similar claims to bring a joint action.

We welcome the introduction of a group procedure in Scotland that would enable people, and NGOs on behalf of a group of people, to take joint action in court. We welcome the particular recognition of environmental cases in this respect, however note the limited detail set out in the Bill of how this would work in practice, which cases it would apply to and how such actions would be funded. These questions are of course critical to how such a procedure would move towards greater compliance with the Aarhus Convention.

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