ERCS information sheet #3

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Access to justice on the environment, and whether Scotland is providing it

Introduction

The Environmental Rights Centre for Scotland (ERCS) aims to increase people's awareness of their rights relating to the environment. We also aim to ensure that people can effectively exercise their environmental rights in Scotland.

Earlier ERCS information sheets have covered one of the main environmental rights – the right of access to environmental information – setting out how it is based on the Aarhus Convention and firmly established in Scots law, and how relatively simple it is to exercise it.

This information sheet looks in detail at another of the 'Aarhus rights' – the right of access to justice on the environment – and describes how the failure to incorporate it properly in Scots law makes this right so much harder to exercise for people in Scotland.

The key points are that, in Scotland:

- Following Brexit, the only way of challenging breaches of environmental laws by public bodies is by raising judicial review proceedings in the Court of Session, which is very expensive.
- The introduction of a system of Protective Expenses Orders has gone some way to make judicial review procedures more affordable.
- Nevertheless, access to environmental justice remains 'prohibitively expensive', according to the body set up to monitor compliance with the Aarhus Convention.

The Aarhus Convention

The overall objective of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is set out in its first Article:

> ***"In order to contribute to the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."***

The right of access to justice in environmental matters – sometimes referred to as 'access to environmental justice' – is provided for by Article 9 of the Convention, which spells out what is meant by the term 'access to justice'.

Article 9 of the Convention

Articles 9(1) and (2) provide for "*access to a review procedure before a court of law or another independent and impartial body established by law*", for breaches of the rights of access to information and participation in decision-making, respectively.

Article 9(3) provides for "*access to administrative or judicial procedures*" to challenge breaches by private and public bodies of national environmental laws.

Article 9(4) requires that all these procedures, including those for challenging breaches of environmental laws, must be "*fair, equitable, timely and not prohibitively expensive*".

It is the last of these requirements that has caused most difficulty in Scotland, due to the costs of going to court over breaches of environmental laws.

The Scottish Parliament's Equalities and Human Rights Committee is currently considering a public petition (PE1372) on Scotland's ongoing failure to comply with this requirement. This petition was first raised by Friends of the Earth Scotland in 2010.

The cost of going to court over the environment in Scotland

The only way to challenge breaches of most environmental laws in Scotland is through judicial review proceedings at Scotland's most senior civil court, the Court of Session in Edinburgh. Judicial review is a very expensive process. (The European Commission investigates complaints from EU citizens about systemic breaches of EU laws, but that option will soon no longer be available, following Brexit.)

A person seeking a judicial review (the 'petitioner') not only has to pay their own legal expenses, which can be particularly high as judicial review requires the involvement of both solicitors and advocates. The petitioner also faces having to pay their opponent's expenses too, if they lose – this is known as the 'loser pays' rule.

In a judicial review, the petitioner's expenses alone can range from £20,000 to £100,000, depending on the complexity of the case and the willingness of lawyers to limit their fees.

Protective Expenses Orders

A system of 'Protective Expenses Orders' (PEOs) has been developed in Scotland. PEOs soften the 'loser pays' rule by limiting or 'capping' a petitioner's liability to cover their opponent's expenses if they are unsuccessful in their claim for judicial review. The main driver for the development of PEOs has been the Aarhus Convention.

The system of PEOs was introduced by the addition of a new chapter to the rules of the Court of Session in 2013, following a 2011 decision that the UK was failing to comply with Article 9(4) of the Convention. There have been two changes to the PEO rules since then, the latest in 2018.

Under the current rules, the petitioner can apply for a PEO at the outset of their case. The application is to be made in writing and must include certain specified information. The person defending the judicial review proceedings (the 'respondent') can oppose the application for a PEO.

If the judge decides that the proceedings would be prohibitively expensive for the petitioner, they must make a PEO.

A PEO must cap the petitioner's liability for the respondent's expenses at £5,000, unless either party can persuade the judge that a higher or lower amount is necessary. But it must also limit the respondent's liability in expenses to the petitioner, if the claim succeeds, to the sum of £30,000. This 'cross-cap' may also be raised or lowered "*on cause shown*".

The Aarhus Convention Compliance Committee and the Meeting of the Parties

The Aarhus Convention Compliance Committee (ACCC) is the body formally entrusted with ensuring that parties to the Convention are held to account for meeting their legal commitments under the Convention. It was established at the first Meeting of the Parties to the Convention in 2002.

Members of the public can send a 'communication' to the ACCC when they think that a party is not meeting its obligations. Where a communication is considered admissible by the ACCC, it takes evidence from both sides, deliberates and then produces written findings on whether there has been non-compliance, as well as recommendations on how to remedy non-compliance. It then reports its findings to the next session of the Meeting of the Parties – usually held every three years.

The ACCC has reviewed the PEO rules every year since they were introduced, and found on all six occasions that the Scottish civil justice system does not meet the Convention's 'not prohibitively expensive' requirement.

After the ACCC's first review in 2014, the Meeting of the Parties issued a formal decision that Scotland was failing to comply with Article 9(4) of the Convention. In response to that decision, the rules were amended in 2016, but following a further report by the ACCC, the Meeting of the Parties decided in 2017 that Scotland was still failing to comply, leading to further amendments to the rules in 2018.

The Scottish Government's view on Scotland's compliance with Article 9

The Scottish Government's position on Scotland's compliance is set out in a letter to the Scottish Parliament's Equalities and Human Rights Committee from Humza Yousaf MSP, Cabinet Secretary for Justice, dated 26 June 2019, as follows:

> ***"The Scottish Government is confident that it is compliant with the requirement of the Aarhus Convention in respect of maintaining access to justice in environmental cases. … In saying that I acknowledge that although the UN's Aarhus Convention Compliance Committee has recognised 'significant progress to date' it is still of the opinion that there are further issues to be addressed. We will continue to engage with the committee to reassure them of Scotland's continued compliance."***

The ACCC's view of Scotland's compliance with Article 9 of the Convention

The most recent ACCC annual progress review, from March 2020, praises some features of the 2018 PEO rules, such as the introduction of a written application procedure and a cap on liability for the other side's expenses in an unsuccessful PEO application to £500.

However, the ACCC also makes a number of criticisms of the latest rules, as follows:

- PEOs are not available for private law claims.
- The £5,000 cap on the petitioner's liability can now not only be lowered (as permitted by the previous version of the rules), but also raised, increasing the petitioner's exposure to risk.

According to the ACCC, this "*introduces legal uncertainty and could have a chilling effect*", and "*moves the Party concerned significantly further away*" from compliance.

- Where a petitioner with a PEO for proceedings in the Outer House of the Court of Session appeals against its decision to the Inner House, they must reapply for a PEO to obtain further protection from costs. The ACCC had commented, in its 2017 report to the Meeting of the Parties, that this situation "*leads to uncertainty and additional satellite litigation, which itself adds further cost, at the appeal stage*".
- PEO applications must explain the terms on which the applicant is represented. The ACCC did "*not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid to long-term*."

The ACCC found that most of the problems identified in earlier findings had not yet been adequately addressed, and therefore that the requirements of the Convention are still not being met in Scotland.

What next?

The Scottish Government must report again on its progress towards compliance by 1 October 2020. This will be its last opportunity to demonstrate compliance before the ACCC reports in June 2021 to the next session of the Meeting of the Parties.

In its consultation last year on environmental governance in Scotland following the UK's exit from the European Union (EU), the Scottish Government invited views on what should be done to address the loss of EU enforcement powers. LINK's was one of several responses that called for the establishment of a "*fully Aarhus-compliant*" environmental court. The outcome of that consultation was published last month, in the form of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

The Government's accompanying policy memorandum acknowledges that there were "*suggestions for the establishment of a new tribunal and/or court system*" and states that the criteria for the new governance arrangements include "*supporting delivery of Scotland's obligations under the Aarhus Convention*", but the Bill contains no provisions to address the failure to comply with those obligations.

ERCS is not aware of any plans to amend the PEO rules further, or to address the ACCC's findings in any other way this year, so it is very likely that when it convenes in September 2021, the Meeting of the Parties will decide for a third consecutive time that Scotland is failing to comply with the Convention's requirement that access to environmental justice must not be prohibitively expensive.

For further information contact info@ercs.scot.

Web addresses of useful resources:

Friends of the Earth Scotland briefing on an environmental court or tribunal for Scotland (2015): https://foe.scot/wp-content/uploads/2017/08/An-Environmental-Court-or-Tribunal-for-Scotland-FoES-Policy-Briefing-April-2015-1.pdf.
UNECE information about the Aarhus Convention: https://www.unece.org/env/pp/introduction.html.