

Tipping the Scales

Complying with the Aarhus Convention
on Access to Environmental Justice



Scotland's champion
for our environment.

Written by **Mary Church**

Edited by **Frances McCartney** and **Emilia Hanna**

Designed by **Emma Quinn**

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Friends of the Earth Scotland

5 Rose Street

Edinburgh

EH2 2PR

Tel: **0131 243 2700**

Email: **info@foe-scotland.org.uk**

www.foe-scotland.org.uk

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Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities.

As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.

Kofi A. Annan, former Secretary-General of the United Nations (1997 – 2006)

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Involving the public and civil society organizations in formulating and implementing a response to climate change is not a choice but a necessity.

Jan Kubis, UNECE Executive Secretary, High-level segment of the Sixty-third Session of the Economic Commission for Europe

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About Friends of the Earth Scotland

We are Scotland's leading environmental justice organisation, campaigning for the planet and its people.

We have a track record in fighting to protect the environment from harmful projects including: the Harris superquarry; Donald Trump's development at the Menie estate; the M74 extension; the Aberdeen Western Peripheral Route; the Hunterston coal-fired power station; and the Second Forth Road Bridge.

We successfully campaigned for the introduction of Freedom of Information and Strategic Environmental Assessment legislation in Scotland. We provided funding for the judicial review of the decision to include a coal-fired power station at Hunterston in the National Planning Framework, a case which has seen the first ever grant of a Protective Expense Order in Scotland.



1 Executive summary

This report briefly examines Scotland's Aarhus obligations in relation to access to justice and the current status quo; concludes that recent Government moves to properly implement the final Pillar of Aarhus could fall far short of compliance; and recommends that we build on learning from other jurisdictions to create fully Aarhus compliant access to justice.

Summary

The human right to a dignified life is fundamental, and there is a clear link between protecting this right and protecting the environment. However, the environment has no voice, and therefore depends on citizens for its protection. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters enables people to be that voice.

The Convention aims to improve the accountability, transparency and responsiveness of decision makers and authorities. In other words, Aarhus is about decision makers making better – and better informed and communicated – decisions.

Both the UK and the European Union have signed the Aarhus Convention, therefore Scotland is obliged to meet its standards. Legislation is in place to comply with the first two Pillars of Aarhus, regarding access to information and public participation in decision making.

Compliance with the third Pillar, on access to justice in environmental matters, is critical to ensure that the procedures established by the former two are properly adhered to; however, in this respect, Scotland falls considerably short of meeting its international obligations.

Aarhus demands broad and affordable access to justice, but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not) in Scotland; with the costs of taking a judicial review together with liability for expenses running into tens of thousands of pounds. In addition, rules on standing – and the interpretation of these rules by the courts

– are extremely restrictive, making it very difficult for individuals, communities and NGOs to demonstrate that they have 'title and interest' to take an environmental case.

England and Wales have made considerably more progress than Scotland with altering court procedures to comply with Aarhus, but despite this England has been found to be in non-compliance with Aarhus in relation to access to justice. Furthermore, the European Commission has recently commenced infraction proceedings against the UK (a case is being brought to the European Court of Justice) for non-compliance.

In light of this, Scotland must act quickly.

Going to court to defend the environment where a law has been breached is a form of participation which citizens should be encouraged to undertake, albeit as a last resort. Fears that an improved system will open the flood gates and see the courts grind to a halt are not justified. Evidence from other jurisdictions suggests that groups and individuals do not often resort to court actions, and a permission or leave stage can ensure that frivolous cases are weeded out at the onset.

The benefit of more open access to the courts comes from improved decision making by public authorities, who know that their decisions can be challenged. In other words, it is the credible threat of legal action which is important.

Indeed, if democratising access to justice does result in the floodgates opening, it would demonstrate a systematic problem with the interpretation or implementation of environmental laws, which government and decision makers would surely be quick to act on.

With climate change now widely recognised as one of the most serious threats to humankind – and world-leading climate legislation here in Scotland – it is clear that the nature of decisions affecting our environment are sufficiently important to society to merit greater investment in a sophisticated system of participation and review.

Environmental decision-making happens in a complex framework of legislation – not all specifically environment-related – and is initiated

and regulated by numerous public authorities and bodies. The requirement for Scotland to comply with Aarhus in relation to costs and standing offers the chance to rationalize and simplify this framework.

This is a timely opportunity to take advantage of learning from south of the border and other jurisdictions, not only to fully comply with Aarhus, but to develop world-class access to justice enabling better defence of our environment.

Recommendations

Friends of the Earth Scotland urges the Scottish Government as part of its 'Making Justice Work' programme, to take steps to:

- 1 Ensure that access to environmental justice through existing (and future) channels is free or inexpensive by:
 - > introducing qualified one-way cost shifting so that individuals and NGOs taking an environmental case or other public law case can be confident that they will not be liable for the other side's costs.
 - > removing the test for legal aid that effectively bars individuals from accessing aid if their case affects more than one person, and improving access to legal aid for community groups in environmental cases.
- 2 Introduce clear, rigorous guidelines for the new 'sufficient interest' test on standing so as to ensure that the application of such a test by the courts is in line with the legal right of *actio popularis* – action in the collective interest.
- 3 Improve First Orders procedure or introduce a 'permission' or 'leave' stage for judicial review to ensure that questions as to whether a case has merit; whether the petitioner has standing; and whether the petitioner should be liable for costs, are established at the earliest possible point, and without risk of high costs in getting to that stage.
- 4 Take measures to ensure that both the procedural and substantive legality – including the merits – of a decision can be reviewed. This could include:
 - > revision of judicial review to incorporate procedural and substantive legality in Aarhus Cases – including the merits of a case – and provide for appropriate remedy;
 - > setting up an Environmental Court or Tribunal to simplify environmental appeals and the regulatory system while increasing specialisation in environmental law.

These changes could be implemented through the passing of an Environmental Justice Act enshrining the Aarhus Convention in Scotland.

- 5 In addition, there is a clear need as identified by Lord Gill's Review of the Civil Courts to create a more streamlined, user-friendly court system with plain-English rules and provide help to users; and improve public legal education to help create a wider legal culture in which citizens recognize their legal, and environmental, rights and duties, and learn to recognize problems and injustices which may have a potential legal solution.

2 Introduction

2.1 Environmental justice

There is a clear link between the protection of human rights and the environment. Environmental justice is a concept which arose out of the civil rights movement in America, as a result of increasing recognition that poor ethnic minority communities were bearing the brunt of environmental damage and pollution.

While the concept has evolved from ‘environmental racism’, environmental damage – whether caused by climate change, pollution or over development – continues to affect the poor and disadvantaged disproportionately. This is true in present-day Scotland, as it is across the globe: a 2005 report found that people living in deprived areas in Scotland suffered disproportionately from industrial pollution, poor water and air quality.¹

There are two defining elements of environmental justice; that of *distributive* and that of *procedural* justice in relation to the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and as such, everyone has a right to a healthy and safe environment; i.e warm housing, clean drinking water, unpolluted air and food that is safe to eat.

Procedural environmental justice requires that in order to uphold the former, citizens need to be informed about and involved in decision making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices.

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters recognises that ‘adequate protection of the environment is essential to human well-being and basic human rights’² and sets out how *procedural* environmental justice should be achieved.

Since UK ratification of the treaty in 2005, Scotland is obliged to implement Aarhus, and a growing body of both domestic and international environmental legislation makes it imperative that we do so.

The importance of environmental justice was officially recognised in the early years of devolution by then First Minister Jack McConnell, in stating that the ‘people who suffer most from a poor environment are those least able to fight back, and I believe government is about standing up for them and changing that situation... I believe the biggest challenge for the early 21st century is to combine economic progress with social and environmental justice.’³

The present Government’s response to the recent Gill Review of Civil Justice in establishing the ‘Making Justice Work’ programme provides the perfect opportunity to build on progressive Freedom of Information and Strategic Environmental Assessment legislation, by finally implementing the last Pillar of Aarhus, and securing procedural environmental justice in Scotland.

1 SNIFFER, Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation, 2005 <http://www.sniffer.org.uk/Webcontrol/Secure/ClientSpecific/ResourceManagement/UploadedFiles/UE4%2803%2901.pdf>

2 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 Preamble <http://www.unece.org/env/pp/documents/cep43e.pdf>

3 Jack McConnell, ‘Environmental Justice’ speech Edinburgh, February 18th 2002

2.2 The Aarhus Convention

‘Parties to the Aarhus Convention [recognise] that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself [and] 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.’⁴

The Aarhus Convention is an international treaty designed to protect the right to a healthy environment and create legal obligations to defend it. The treaty was adopted by the United Nations Economic Commission for Europe (UNECE) in 1998, and came into force in 2001. The EU and the UK signed up to the Convention in 2005.

The Convention links environmental rights to human rights, and acknowledges our duty of care to future generations. Focusing on interactions between citizens and public authorities, Aarhus links government accountability to environmental protection.

Its full name – the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – identifies the areas in which rights are enshrined.

The Convention upholds the following ‘pillars’:

- I the right to be informed and have access to information about the environment;
- II the right to participate in environmental decision making; and
- III the right of easy and effective access to justice if the former rights are denied or if national environmental law has been broken, in a way that is fair, equitable, timely, and free or inexpensive.

In addition, the Convention states that access to justice under any of these headings must not be ‘prohibitively expensive’.

The last Pillar is crucial in challenging decisions that lead to environmentally damaging developments where the harm is not geographically limited, and in adding bite to the first two Pillars; if people are able to challenge the observation of their rights to information and participation, there is greater incentive to follow best practice in these areas.

By granting rights and imposing duties on public authorities under these three Pillars, Aarhus goes beyond environmental matters: the Convention is also about broader government accountability, transparency and responsiveness.

⁴ Aarhus Convention, Preamble

2.3 Barriers to accessing justice in environmental matters

The third Pillar of the Aarhus Convention enshrines:

'the right of easy and effective access to justice if the former rights are denied or if national environmental law has been broken, in a way that is fair, equitable, timely, and free or inexpensive.'

However, in Scotland the reality is significantly different:

A lack of public law culture and public legal education mean that people (and communities and NGOs) can struggle to identify where their rights or a law may have been breached.

The scale of cost of litigation in Scotland is incredibly off-putting. The cost of judicial review cases (under which most Pillar III cases would be taken), when taking into account your own legal costs and the possibility of having to pay the other side's expenses if you lose, can run into tens of thousands of pounds.

It is very difficult to get help to pay or limit these costs through legal aid or a capping order to limit how much of the other side's costs you would have to pay should you lose.

Partly as a result of these financial limitations, it can also be very difficult to find appropriate legal representation. This has a further negative impact on the development of environmental and public law culture and expertise within the Scottish legal profession.

It is also notoriously difficult to have to prove you have 'standing' in the court, or the right to have your case heard. Recent case law does not reflect the development of public law culture in other jurisdictions, and often individuals are required to show not only a private interest, but a direct personal impact from the decision, act or omission.

Further, the court system in Scotland can be intimidating and confusing. The question of whether a litigant will be found to have standing and whether they will be found liable for the other side's costs can be kept hanging over them until relatively late in the hearing. This lack of certainty has a 'chilling' effect which actively discourages people from even trying to defend the environment.

Should a litigant overcome all these barriers, there is little or no scope for the substance or merit of the decision, omission or act to be reviewed. Most actions challenging environmental decisions and to which the Aarhus Convention will apply to are via judicial review proceedings. However, judicial review generally only looks at procedural legality, and rarely touches on substantive legality, or the merit of the case.

In Scotland, therefore, the odds appear to be stacked against the ordinary citizen (or a community group or NGO) who wishes to challenge a decision, omission or act that may have had a detrimental impact on their environment.

The cumulative result of these barriers is such that effectively, access to the courts in relation to environmental justice is limited to extremely wealthy individuals (communities and NGOs) with a significant amount of spare time on their hands; even then, the substance of the decision is likely to remain unexamined.

3 Complying with Aarhus

Scotland has been an Aarhus signatory since the UK ratified the Convention in 2005, and therefore is legally obliged to guarantee access to information, participatory rights and easy and effective access to justice.

The EU is also a signatory; prior to ratification Directives were put in place for the first two Pillars⁵, and Member States were required to translate these into national legislation by 2005. A further Directive, implementing Pillar III, was created but has not yet been adopted, leaving Members States 'responsible for the performance of these obligations'.⁶

Environmental law is a devolved responsibility and therefore the Scottish Government is obliged to take forward implementation of the Aarhus Convention.

3.1 Aarhus in Scots Law

Existing legislation

There are two key pieces of legislation that bring Scotland into compliance with the first two Pillars of the Convention: the Environmental Information (Scotland) Regulations 2004⁷ and the Environmental Assessment (Scotland) Act 2005⁸.

The 2004 regulations brought the environmental provisions of the world-leading Freedom of Information (Scotland) Act 2002 into line with EU Directive 2003/4/EC on public access to environmental information.

The Strategic Environment Assessment Act ensures the systematic assessment and monitoring of significant environmental effects of public sector strategies, plans and programmes, and enshrines the need for consultation of the public and expert bodies.

In an effort to implement the access to justice provisions of Directive 2003/35/EC, regulations have been introduced extending 'title and interest' (the Scottish test as to whether an individual or organisation can pursue a case) to environmental NGOs.⁹

However, this provision is only in relation to cases alleged to have breached Environmental Impact Assessment legislation – not to broader environmental decision making – and provides only for environmental NGOs to take action, not for individuals or community groups. As the case studies in the Appendix demonstrate, attempts to use the EIA Directive to get access to the courts have been disappointing.

There is no further Scottish legislation in place to implement the rights granted by the last Pillar: that is, the right of easy and effective access to justice which enables the public to challenge instances where rights under Pillars I and II are breached as well as general breaches of environmental law, even if they have not suffered personal harm.

Arguably, existing legislation ensures adequate compliance with Pillars I and II: where Scottish compliance with Aarhus really falls short is in relation to Pillar III – the focus of this report – particularly in terms of costs and standing.

⁵ For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML>

⁷ <http://www.hms.gov.uk/legislation/scotland/ssi2004/20040520.htm>

⁸ <http://www.legislation.gov.uk/asp/2005/15/contents>

⁹ The Pollution Prevention and Control (Public Participation etc.) (Scotland) Regulations 2005 and The Environmental Impact Assessment (Scotland) Amendment Regulations 2006

Judicial review and regulatory appeals

Most actions challenging environmental decisions and to which the Aarhus Convention will apply to are via judicial review proceedings. This is common to both Scotland and England and Wales. Judicial review allows people to challenge decisions made by Scottish and UK Ministers, government departments and agencies, non-departmental bodies and local authorities. While seen as a last resort, judicial review has a crucial function in holding Scottish and UK public bodies to account.

Judicial review usually examines only the process and legality of decisions, not the merit of the decisions. In extreme cases where decisions are deemed to be totally irrational, or where the case involves a possible breach of human rights, the courts may look at the merits of the case, but the threshold for the former is set extremely high (the *Wednesbury* Test).¹⁰

This is in clear contravention of Aarhus Convention, which demands that members of the public are enabled to 'challenge the substantive and procedural legality of any decision, act or omission' [article 9]. The Court's role in judicial review has been compared to that of a 'schoolmaster who does not tell his pupils the answers to a problem but instead advises them they have got it wrong'¹¹.

The barriers discussed in this report relate largely to judicial review, because of its function in relation to the third Pillar of Aarhus. However, not all environmental cases involve this mechanism, and the specifically associated barriers to justice.

Many environmental cases fall under planning regulations. Planning inquiries are less formal and less expensive than court procedures, Reporters take a more active role than judges, and the decisions of the Reporters can ultimately be challenged by judicial review.¹²

However, it can still be extremely challenging for an individual or community to represent themselves in the planning system. If the case is against a developer, then chances are that the developer is a fairly frequent and therefore experienced litigant, with money to pay for legal representation.

There is little help at hand for an individual or community to fight their case: organisations like Planning Aid Scotland do not offer advocacy assistance, and there is a shortage of lawyers who are able and willing to act on behalf of community groups and NGOs in environmental cases.¹³

Further, there are around 50 different regulatory appeal provisions relating to environmental legislation, ranging from planning appeals to waste management licensing, which are governed by a variety of bodies. The system is complicated and lacks coherence, and according to a 2003 report, is not only unintelligible for the general public but difficult for regular users.¹⁴

However, these appeals have one thing in common, that only the individual or business directly affected by a decision has the right to appeal, i.e. a licence applicant or person served with a notice, therefore barring an appeal by a not directly affected person, or NGO whose interest is in defending the environment.

Recent developments in international and domestic environmental legislation, and the growing recognition of the importance of protecting the environment in relation to human rights, make a strong case for the creation of a specialist environmental court or tribunal system, which could provide for early involvement and mediation in environmental disputes, as well as providing adequate remedy at judicial review level.

¹⁰ The *Wednesbury* Test is applied in cases where a judicial review is sought on grounds of irrationality of a decision. In the *Wednesbury* case Lord Greene stated that for a claim to be successful the decision taken must have been 'so absurd that no sensible person could ever dream that it lay within the powers of the authority'. See SPICe Briefing, Judicial Review, 2009, at <http://www.scottish.parliament.uk/business/research/briefings-09/SB09-75.pdf>

¹¹ A O'Neill, *Judicial Review in Scotland, A Practitioner's Guide*, 1999, Butterworths, at p.4, para. 1.09

¹² Frances McCartney, *Access to environmental justice*, in *Paths to Justice? Essays prompted by the Gill Review*, 2007 http://www.scolag.org/group/PathstoJustice_Scolag2007.pdf

¹³ Frances McCartney, *Access to environmental justice* 2007

¹⁴ Macrory and Woods, *Modernizing Environmental Justice : Regulation and the Role of an Environmental Tribunal Centre for Law and the Environment*, 2003, at <http://www.ucl.ac.uk/laws/environment/tribunals/>

3.2 The price of justice

The Aarhus Convention states that access to justice should be ‘free of charge or inexpensive’ [Article 9:1] and ‘not prohibitively expensive’ [Article 9:4]. If costs are to be awarded they must by ‘reasonable’ [Article 3:8].

The reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not) in Scotland. The cost of taking a judicial review together with the liability for expenses can exceed £100,000¹⁵. Judicial review cases in Scotland can only be taken at the Court of Session, the most expensive civil court in which to take a case. Our system is based on the ‘loser pays’ principle, which can deter even those extremely sure of their ground, and this is particularly off-putting to those taking a public interest case. Why risk financial ruin if your own interests are not directly at stake?

When called upon by the Scottish Parliament Public Petitions Committee to demonstrate how access to the courts is Aarhus compliant in terms of costs¹⁶, the Scottish Government’s response focused around two key mechanisms: legal aid and Protective Expense Orders (PEOs).

Legal Aid

Litigants can apply to the Scottish Legal Aid Board (SLAB) for help with their own legal costs, which would be granted whether or not they win their case. Legal aid can be granted to provide for advice and assistance from a lawyer to help settle a dispute without going to court, and to help establish whether the case should go before the courts. A legal aid grant can also provide for help with the costs of a lawyer to prepare a case and take it to court, as well as the costs of an advocate and expert reports if required.

Furthermore, under the terms of the Legal Aid (Scotland) Act 1986, recipients of legal aid become an ‘assisted person’ in the eyes of the law which provides for protection against expenses in most circumstances. To qualify for legal aid, an individual must meet the financial threshold for legibility.

Recent reforms in Scotland mean that more adults now qualify for legal aid purely in financial terms¹⁷, with the Government claiming the system to be amongst the most generous in the world¹⁸. Arguably though, the funding provided to legal practitioners to carry out such legal aid work is in many cases so low as to render this generous provision for individuals meaningless; lawyers are not obliged to take legal aid work, therefore if an individual is granted legal aid they need to find a lawyer who is willing to take the case – and give it the detailed attention it requires – for the often limited financing on offer.

¹⁵ A judicial review case about a planning proposal by Canterbury College saw the College indicate that if the case went to court their costs would be around £126,000. When Friends of the Earth EWNI challenged the Environment Agency’s decision to issue a licence to scrap a number of ships in Hartlepool, they were faced with a possible £100,000 in costs. For a half day hearing, Greenpeace were faced with potential costs of £70,000 when seeking to prevent nuclear waste being imported to the UK. See the Environmental Justice Project, <http://www.ukela.org/content/doclib/116.pdf>

¹⁶ Petition 1372, by Duncan McLaren on behalf of Friends of the Earth Scotland calling on the Scottish Parliament to urge the Scottish Government to clearly demonstrate how access to the Scottish courts is compliant with the Aarhus convention on ‘Access to Justice in Environmental Matters’ especially in relation to costs, title and interest; publish the documents and evidence of such compliance; and state what action it will take in light of the recent ruling of the Aarhus Compliance Committee against the UK Government. Submitted 12 November 2010 see <http://www.scottish.parliament.uk/business/petitions/docs/PE1372.htm>

¹⁷ http://www.slab.org.uk/getting_legal_help/Extended_eligibility.html

¹⁸ Letter from the Cabinet Secretary for Environment and Rural Affairs to Bill Wilson MSP, 5/08/10

However, the real problem with legal aid in relation to our obligations under the Aarhus Convention is that the system has granted very few awards of legal aid for environmental cases, and effectively prohibits aid for public interest cases, which most Aarhus challenges are¹⁹. In addition, there is also no provision for the funding of community groups.

When deciding whether to grant legal aid, SLAB looks at whether 'other persons' might have a joint interest with the applicant²⁰. If this is found to be the case – as it would be in almost any Aarhus case imaginable – SLAB must not grant 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 applicant²¹. This has a particularly adverse effect in relation to Aarhus cases; environmental issues by their very nature tend to affect a large number of people. It seems perverse that people speaking up on behalf of their environment (and others affected by the same case) should be denied financial assistance in trying to protect the environment.

Community groups cannot apply for legal aid in Scotland. By contrast, England and Wales have a system which allows the joint funding of a case, where the Legal Services Commission grants legal aid to an individual subject to a wider community contribution, based on what the community group can pay. Although Scotland has provision whereby if a third party contributes to the cost of a case it can be paid over to the legal aid fund, these provisions were not designed for environmental cases, and would require reform to allow a system such as that which operates in England.

Protective Expense Orders

The petitioner in a judicial review in Scotland can apply for what is known as a 'Protective Expense Order'. A PEO caps the amount of the other sides' costs the petitioner would have to pay if he or she lost the case. Going to court can cost thousands and thousands of pounds, so if a petitioner knows that there is a set limit beyond which he/she will not have to pay, this can help provide certainty and clarity in relation to costs from an early stage. However, PEOs are granted at judicial discretion, with a number of hurdles to overcome. In fact, to date, only two have ever been issued, and both had a high cap on costs.

In *McGinty vs the Scottish Ministers*, the first ever PEO issued in Scotland, liability for the Ministers' costs was set at £30,000; added to McGinty's own estimated costs the amount the petitioner could end up being liable for totals a possible £110,000. In *Road Sense and William Walton vs the Scottish Ministers* the PEO was set at £40,000, leaving the petitioners liable for up to £70,000 when taking into account their own costs, which were artificially low due to *pro bono* work. (See appendix for more details on both these cases).

¹⁹ Frances McCartney, 'Public interest and legal aid' in Scots Law Times: Issue 32: 15.10.2010

²⁰ Civil Legal Aid (Scotland) Regulations 2002, Regulation 15

²¹ For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' as above

South of the border, use of the equivalent Protective Cost Order (PCO) is considerably more developed, and the criteria governing cost-capping orders in Scotland is taken from a leading English case²². The criteria determine that such orders be made under the following conditions:

- 1) the issues raised are of general public importance;
- 2) the public interest requires that those issues should be resolved;
- 3) the claimant has no private interest in the outcome of the case;
- 4) having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and
- 5) if the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

In addition, capping orders should be issued only in exceptional circumstances, and further, that *pro bono* representation (when lawyers offer to work for free) would favourably influence the decision to grant an order.

There are a number of problems with these criteria:

That a PEO is only granted in cases with wider public interest at odds with Aarhus. In addition, the criteria that they should be issued only in 'exceptional circumstances' is in clear contradiction of the broad, 'easy and effective', access to justice that Aarhus enshrines.

The fact that *pro bono* representation is taken into account when issuing capping orders not only restricts the possibility for individuals and NGOs to get both a lawyer *and* a PEO, but also undermines the development of environmental public law.

The Aarhus Compliance Committee has already indicated that having to rely on *pro bono* legal assistance breaches the Aarhus Convention²³.

Having regard to the financial resources of the parties on the face of it seems a reasonable criteria. For millionaire petitioners or respondents – whether an individual or multi-national corporation – arguably could well afford to pay some or all of the other side's costs, should they lose.

However, if the courts see merit in a public interest case it is not unreasonable that the public purse should pay to pursue it. Because judicial review cases are almost always against a decision of a public authority, or a private body acting on behalf of a public authority, essentially the public purse is often already funding the costs of that side.

Were there not strong community support for both Mr McGinty's and Mr Walton's cases, the litigation would have been practically impossible in the face of these costs. However, even where there is strong community support there may not necessarily be the means or time to raise such funds to fight a case, and arguably, if the case is in the public interest and has sufficient merit, there should be little or no cost payable by the community in addition to their time and energy.

In addition, the Aarhus Convention covers all types of cases, not just cases with only public interest issues at stake. Some cases – perhaps with elements of neighbour nuisance – might involve both private interests and wider community interests.

In its response to Lord Gill's 2009 review of Scotland's Civil Courts, the Government has recognised the need to address the issue of costs through improved rules on PEOs, currently being drafted by the Court of Session Rules Council. However, it seems unlikely that the (as yet unpublished) rules will adequately reflect the objectives of Aarhus, or satisfy the European Commission. In particular, they appear to retain a significant degree of judicial discretion when taking into account the level at which a cap should be set and maintain a subjective approach to the financial means available to the petitioner.²⁴

²² The 'Corner House criteria' were developed in a leading English case, *Corner House Research v Secretary of State for Trade and Industry* C1/2004/2696, and were referred to in both of Scotland's PEOs.

²³ Compliance Committee rulings on communication, ACCC/C/2008/33, 132-134, at <http://www.unece.org/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf>

²⁴ see <http://www.scotcourts.gov.uk/opinions/2011CSOH10.html> para 22 which indicates that the rules would reflect a subjective approach, which has been criticized by the Sullivan Report. See also Minutes of the Court of Session Rules Council 14th Feb 2011 https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=13jY1o8bDMeDSLm3-7Egl_26obGIYLzdRvF7aCVxhq1BtrLvUP57O1J5oExGu&hl=en&authkey=CIXv9rYJ

One way cost shifting

It is critical therefore, that we take the opportunity of learning from other jurisdictions, most notably in this instance England and Wales, where two recent reviews have recommended introducing qualified one-way cost shifting as the best means of satisfying Aarhus requirements on cost.

The Jackson Review (2010) looked specifically at the costs of civil litigation in England and Wales, something the recently commissioned Taylor Review is now looking at in Scotland. The Sullivan report (2008) focussed specifically on Access to Environmental Justice in England and Wales. Following the Jackson Review, Sullivan issued an update report in 2010 to take account of those findings.

Jackson found that while PCOs can provide early certainty and control the level of a claimant's cost liability, the system currently does not provide for Aarhus compliance as PCOs are granted restrictively, and at the judges' discretion; therefore he recommended England and Wales should 'expand the [PCO] test and... introduce qualified one way cost shifting (QuOCS) for all judicial review claims, leaving the 'permission' requirement as a sufficient mechanism to weed out weak claims'.²⁵

One way cost shifting is defined as 'a regime under which the defendant pays the claimant's costs if its claim is successful, but the claimant does not pay the defendant's costs if the claim is unsuccessful'.²⁶ The 'qualification' test would determine whether the claim fell into a category which merits protection against liability for adverse costs.²⁷

The 'permission requirement'²⁸ applies to all public law cases and means that claimants must seek the court's permission to take a case, effectively ensuring that unmeritorious or poorly argued cases fall at the first hurdle. This requirement deals with the concern that cost shifting (or indeed any other measure to improve access to justice) would open the floodgates to time and money-wasting cases.

Sullivan's 2010 update report agreed with Jackson's findings, and recommended one-way cost shifting, instead of tinkering with the PCO system, finding this to be the simplest and most effective way of complying with the Aarhus demands that access to justice must not be prohibitively expensive, and to avoid the 'chilling effect' – where uncertainty about potential liability puts people off commencing cases – by ensuring all possible costs are up front from the start.

However, his proposal went further than Jackson in amending the qualification test, so that 'an unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings'.²⁹

²⁵ Jackson, Review of Civil Litigation Costs: Final Report (2010), part 5, chapter 30 para 4.1

²⁶ Jackson Review, Glossary xiii

²⁷ Jackson Review, part 5, chapter 30 para 4.1

²⁸ Arguably, in Scotland 'First Orders' (the initial review of the Petition by the judge) acts as a permission requirement in a judicial review. However, in order for one way cost shifting to work, the rules of procedure might have to be changed to allow greater discussion of the merits of the case at the First Orders hearing, or a permission or leave stage introduced, as recommended by Gill.

²⁹ Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 30

3.3 The right to justice

The environment has no voice, so it needs people to act on its behalf for its protection. But traditional rules on standing (the conditions a person or NGO must meet in order to be eligible to initiate a judicial proceeding), which require that the claimant is *individually or personally* affected by a decision or that the claimant has a *property interest* in the area, are not suitable where environmental harm is at stake or environmental laws are being broken, because such breaches can affect many people over wide geographical areas, extending beyond individual property.

Aarhus is designed to ensure wide access to justice, and explicitly includes the public likely to be affected by environmental decision-making³⁰ and non-governmental organisations promoting environmental protection.³¹

Therefore, the Aarhus Convention and EU Directive 2003/35 (Art 10a) require standing to be granted to members of the 'public concerned'. According to UN guidelines on the Aarhus Convention, the 'public concerned' refers to both members of the public who are likely to be affected by, and members of the public who have an interest in, the environmental decision-making³². The Guidelines note that this language goes well beyond the usual found in legal tests of 'sufficient interest' (the test currently used in England and Wales, and proposed for Scotland).

Title and Interest

In Scotland it is for the Courts to decide whether the applicant has standing. The rules on legal standing are extremely restrictive, requiring applicants to demonstrate both title (a legal relationship to the decision in question) and interest (in the subject matter) in order to take a case.

In practical terms this has been interpreted as requiring a demonstrable private interest, for example, a proprietary interest in the decision. However, even individuals with an apparently clear private interest can struggle to establish it in a court of law.³³ Moreover, those who succeed in establishing such a private interest are effectively prevented from getting a PEO, which under *Corner House Research v Secretary of State for Trade and Industry*, must only be granted in public interest cases³⁴. Members of the public faced with demonstrating 'title and interest' are clearly missing out on the rights granted under Article 10a.

NGOs in Scotland have found it particularly problematic to demonstrate standing when initiating a case on behalf of others.

A case taken by Age Concern, although not environmental in nature, demonstrates this clearly. The NGO sought judicial review of an official circular giving guidance on legislation on hardship payments for severe weather. The courts recognised their title (as a body constituted to represent the elderly) but rejected their interest, concluding that they would need a directly affected individual to bring the case.³⁵

While 'title and interest' has been extended to NGOs under the 2005 and 2006 regulations in relation to Environmental Impact Assessment cases, it is unclear under case law whether this has substantially improved the situation for environmental and community groups.

³⁰ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (1998), Art 2. Par 5

³¹ Aarhus Convention, Art 9. Par 2

³² The Aarhus Convention: An Implementation Guide, p 40

³³ See Appendix, *Forbes v Trump*

³⁴ Frances McCartney, 'Public interest and legal aid' in *Scots Law Times*: Issue 32: 15.10.2010

³⁵ Scottish Old People's Welfare Council, *Petitioners*, 1987 SLT 179, cited in Gill Review 2009

It appears that the threat of challenging standing has been included in legal grounds by defendants as a deliberate 'chilling' strategy, seeking to discourage applicants from proceeding with the case.³⁶ In *Skye Windfarm Action Group Ltd v Highland Council*, the Respondents took issue with title and interest in the written pleadings but did not argue it on the day. The challenge was to certain matters in the EIA and was ultimately unsuccessful. However, title and interest was kept 'hanging over' the group and the Council reserved the right to raise it again at a later stage.

More recently, when campaign group Road Sense and its chair William Walton challenged the decision of Scottish Ministers to give the go ahead to the construction of a bypass in Aberdeen on the basis of an inadequate EIA, the respondents confirmed that they would challenge Road Sense's title to take the case.³⁷ The campaign group were forced to drop the action and leave Mr Walton sole petitioner, because they could not afford the extra time in court required to fight a challenge to title, therefore leaving the burden of responsibility on Mr Walton alone.

The rules on title and interest need to be reformed to give clear rights to those bringing cases in the public interest and those with some private connection to the decision. At present only those who are very directly affected by a development – by perhaps their property being next door – can be confident of being able to take a challenge.

Shortly before this report went to print, an opportunity arose for Friends of the Earth Scotland to intervene in a Supreme Court judgement that included consideration of title and interest. Our submission to that case (*AXA and others v Lord Advocate and others*) is in Appendix 2.

Sufficient Interest

Following Lord Gill's 2009 review of the Civil Courts, the Government has acknowledged the need for a number of changes to judicial review procedure, and announced its intention to introduce a test of 'sufficient interest' in order to comply with Aarhus. However, it remains to be seen what such a test would look like, beyond Lord Gill's description 'that the test of standing should be whether the applicant has demonstrated a sufficient interest in the matter to which the proceedings relate'³⁸, how the courts would apply such a test.

Looking to the practices of other jurisdictions, the most progressive is seen to be Portugal, where protection of the environment by the state and the fundamental right of every citizen to a healthy and ecologically balanced human environment, are enshrined in the constitution. Portugal grants standing via the legal right of *actio popularis* (action in the name of the collective interest) to redress offences against the preservation of the environment. No property right, geographical vicinity or specific engagement in bureaucratic procedure criteria is necessary to initiate such a case.³⁹

Closer to home, the English courts' broad interpretation of the 'sufficient interest' test is seen to amount to *actio popularis*; however, while the general approach to standing is liberal, the courts seek to distinguish between those with a legitimate interest and 'busybodies'.⁴⁰

³⁶ *Skye Windfarm Action Group Ltd v Highland Council* [2008] CSOH 19.

³⁷ *RoadSense and William Walton vs Scottish Ministers*, [2011] CSOH 10 <http://www.scotcourts.gov.uk/opinions/2011CSOH10.html>

³⁸ Lord Gill's Review of the Scottish Civil Courts 2009, chapter 12, para 25 <http://www.scotcourts.gov.uk/civilcourtsreview/>

³⁹ See Millieu 2007, Country report for Portugal on access to justice in environmental matters

⁴⁰ See Millieu 2007, Country report for the United Kingdom on access to justice in environmental matters

In fact, while recent Scottish case law demonstrates that it is near impossible to take a public interest case under 'title and interest', this has not always been the case. The concept of *actio popularis* does exist in Scots Law, passed down from Roman Law, and in the 19th century numerous cases were taken – and accepted by the courts – in order to protect the common interest.

For example, in 1882 the petitioner in *Grahame v Magistrates of Kirkcaldy* sued to prevent the construction of municipal stables on land set aside for common use. Grahame petitioned as a member of the community rather than a landowner, and in doing so on behalf of the whole community, was entitled to claim for his expenses.⁴¹

Timing & Merit

Lord Gill's report also recommends the introduction of a three month time limit, and a permission or leave stage to filter out unmeritorious or frivolous cases.⁴² The Government's response that it will consider whether the former proposal is too strict for complex cases is welcome.⁴³ Three months leaves very little time for a community or NGO, let alone an individual, to consider whether they can pull together the resources necessary to mount a challenge. Changes would also be required to the legal aid system to ensure that those relying on legal aid to fund their case could have a case raised in a short period. Arguably, cases which fall under the principles of the Aarhus Convention are of comparable importance to Human Rights cases, which have a time limit of a year.

Further, the Government's response that a permission or leave stage would not only weed out cases with little merit but also provide an opportunity for an early case management hearing is also welcome⁴⁴; such a hearing could be used to establish from the outset the question of standing, costs and merit of the case, therefore dealing with the 'chilling effect' that uncertainty about these things currently creates.

⁴¹ The Idea of Public Interest Litigation in Scots Law, Dec 2009, Aidan O'Neill QC <http://www.shrlg.org.uk/2009/12/09/the-idea-of-public-interest-litigation-in-scots-law/>

⁴² Review of the Scottish Civil Courts, paras 66 and 67

⁴³ Scottish Government response to the recommendations of the review of Civil Courts 2010, para 172

⁴⁴ Ibid para 173

Cases which failed due to costs and standing

Research conducted by the Environmental Law Foundation indicates the extent to which costs serve to put off potential litigants in England and Wales.⁴⁵ While similar research has not been carried out in Scotland, evidence from the Environmental Law Centre Scotland indicates that the combined impact of uncertainty over costs and standing results in an even greater 'chilling effect' – of over 50 cases advised on in two years, only 15% reached court.

For those that do reach court, the struggle is far from over:

In 2003 William Smith, a disabled local resident concerned that the construction of a new bridge over the Clyde in Glasgow would impede dredging and elevate the risk of flooding, sought to challenge the permission granted for construction. He was denied legal aid, despite appealing, and his action was dismissed on the basis that he could not be expected to be able to fund representation. The respondents also challenged his title and interest to sue, although the court made no ruling on that matter.

In 2006 Friends of the Earth Scotland sought to overturn the Scottish Executive's decision to permit the extension of the M74 through southern Glasgow against the recommendation by the Planning Reporter that permission should be rejected. A PEO was applied for, but the Inner House indicated that it would not grant a PEO in principle, and that the desirability of PEOs being introduced in Scotland should be aired more widely through the Rules Council. The applicants eventually and reluctantly withdrew the case to conserve scarce funds and in the face of a potential liability for expenses.

In 2009 a local resident, Mary Buchan Forbes, sought to halt works (for which no full Environmental Impact Assessment had been obtained) for Donald Trump's golf and hotel development at Menie in Aberdeenshire. It was alleged by the Petitioner that these works were environmentally damaging, and that an Environmental Statement was required but not obtained, and thus proper procedures had not been followed. Although the court did grant permission for the case to proceed, the judge considered it was 'highly doubtful' the Petitioner had title and interest to sue which she took into account in refusing the interim interdict. Mrs Forbes' standing was questioned by the judge on the basis that although a neighbour to the site, her dwelling stands a kilometre from the works being carried out. Despite making reference to the Aarhus Convention the judge concluded that current Scottish standing rules should be applied.

In Appendix 1 there is a more detailed case studies of three recent cases where costs and standing caused difficulties for the petitioner, including a more detailed look at *Forbes vs Aberdeenshire and Trump*.

⁴⁵ See the Environmental Justice Project, <http://www.ukela.org/content/doclib/116.pdf>

3.4 UK non-compliance with Aarhus

The Aarhus Convention Compliance Committee is the UN body that ensures states signed up to the Aarhus Convention are in compliance with its provisions. It, along with the European Commission have recently found the UK (England and Wales) to be in non-compliance with the Convention, particularly in relation to costs.⁴⁶

While these findings are in relation to complaints raised regarding cases in the English courts, this ruling suggests that Scotland could be in greater breach of the Convention than the rest of the UK, given its narrower approach to costs and standing.

How Scotland compares with England and Wales

Although the Scottish legal system is distinct from the English courts, Aarhus-related legal proceedings and functions are largely very similar, and Scottish courts often use English case law in their rulings.

The key Aarhus-relevant areas of difference between the jurisdictions are;

- **Costs:** English courts are considerably ahead of Scottish courts in awarding the English equivalent of PEOs, in terms of frequency and level, with PCOs being granted for as little as £1,000. In addition, the Legal Services Commission in England and Wales often awards legal aid in public interest environmental cases, or with a cost sharing arrangement whereby the Commission will pay part of the costs. However, it is normal practice for courts to award costs against NGOs.
- **Standing:** in England a test of 'sufficient interest' is applied, which is considerably less restrictive than the Scottish 'title and interest', and courts tend to accept the standing of well-known environmental NGOs. The application of the test is seen to effectively establish a right of *actio popularis*;

- **Timing:** an application for judicial review in England and Wales must be made 'promptly and in any event no later than three months'; however, even if a claimant meets the three month limit, they may unwittingly breach the requirement for promptness, which is down to judicial discretion. In Scotland there is at present no such time limit (although Lord Gill recommends introducing one), but an application for judicial review must be 'timeous' – a matter that is entirely down to judicial interpretation.

Aarhus Compliance Committee

In September 2010 the Aarhus Compliance Committee found the UK to be short of compliance with the Convention. In response to a Communication from Client Earth and others, concerning the failure to provide Aarhus compliant access to justice to challenge a Government license for contaminated materials disposal issued to the Port of Tyne, the Committee found against the UK in relation to costs, and timing, and was critical of the approach to substantive review.

- **Prohibitive Expense:** similarly to the Scottish Government, the UK contends that provisions including legal aid, Conditional Fee Agreements (CFAs – akin to 'no win, no fee'), Protective Costs Orders (PCOs – orders limiting the costs the losing side will have to pay) and extensive judicial discretion amount to compliance. However the Compliance Committee has found that even taken together, these measures 'do not ensure that the costs remain at a level which meets the requirements under the Convention', in particular noting that the 'considerable discretion of the courts... without clear, binding direction from the legislature or judiciary' leads to off-putting uncertainty for potential litigants.⁴⁷

⁴⁶ Compliance Committee rulings on communications ACCC/C/2008/33 and ACCC/C/2008/27 and EC Reasoned Opinion IP/10/312 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/312&format=HTML&aged=0&language=EN&guiLanguage=en>

⁴⁷ Compliance Committee rulings on communication, ACCC/C/2008/33, 132-134, at <http://www.unece.org/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf>. For a consideration of how the matters relied upon in an English context apply in Scotland, see McCartney 'The Aarhus Convention: Can Scotland Deliver Environmental Justice?' Edinburgh Law Review Volume 15 pages 128-133

- **Timing:** an application for judicial review in England and Wales must be made ‘promptly and in any event no later than three months’ (the starting point of which may vary depending on the case); however, even if a claimant meets the three month limit, they may unwittingly breach the requirement for promptness, which is down to judicial discretion. This discrepancy led the Committee to conclude that the UK was failing in its duty to be ‘fair and equitable.’⁴⁸ In Scotland, an application must be ‘timeous’, and the interpretation of this is up to judicial discretion.
- **Substantive Review:** while the Compliance Committee fell short of noting non-compliance under this point, it expressed concern as to the ‘availability of appropriate judicial or administrative procedures, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review’.⁴⁹

EC Reasoned Opinion and Court Summons

In response to a complaint from a coalition of leading environmental NGOs⁵⁰, in March 2010 the European Commission issued the UK with a ‘reasoned opinion’ over the matter of costs. The EC found that ‘the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases against public bodies [in the UK],’ in legitimate public interest cases.⁵¹

A ‘reasoned opinion’ is one step away from the European Commission taking the UK to the European Court of Justice (ECJ) and therefore, as the UK failed to adequately respond, the case was referred to the ECJ in April 2011.

Although it could be years before a decision is made, Scotland must act now to play its part in ensuring that the UK as a whole fully complies with Aarhus. Failure to do so could see Scotland paying a proportion of fines such as those recently imposed on Ireland by the ECJ for inadequate implementation of Aarhus in relation to costs; a one off €26 million fine was imposed in 2009 with additional daily fines of €33,000 until a remedy is in place.⁵²

The odds are stacked against the UK in terms of the outcome of such rulings: between 1978 and 1999 the Commission referred only ten per cent of cases of non-compliance to the ECJ; however 95 per cent of the cases heard by the Court resulted in decisions against the member-state.⁵³

⁴⁸ ACCC /C/2008/33, 136-137

⁴⁹ ACCC/C/2008/33, 125

⁵⁰ Coalition for Access to Justice for the Environment, comprising of Friends of the Earth England, Wales & Northern Ireland, WWF UK, Greenpeace, RSPB, the Environmental Law Foundation and Capacity Global

⁵¹ EC Reasoned Opinion, IP/10/312

⁵² European Court of Justice in Case C-427/07, *Commission v Ireland* emphasised that the discretionary nature of the practise of Courts in relation to costs was an insufficient implementation of Aarhus obligations [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$docrequire=alldocs&numaff=C-427/07](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-427/07)

⁵³ Data from Tanja Boerzel and Rachel Cichowski, *State of the EU: Law, Politics and Society*. Oxford: Oxford University Press. See in particular figure 9.5 of Boerzel’s chapter for more specific figures

4 Learning from other countries

4.1 EU Member States

Methods of implementing Aarhus across Europe vary greatly; however examining practical application in other states can help illustrate the options for better implementation in Scotland.

Overcoming prohibitive costs

It is enshrined in **Portuguese** law that access to justice cannot be denied for economic reasons. All individuals who can demonstrate that they can't afford in part or whole to meet the costs of procedures can be granted legal aid, including legal assistance in bringing the case before the court and exemption from court and attorney's fees. NGOs are exempt from court fees and legal charges, the main cost barrier being their own legal representation which sees the overall cost of taking a case at around €2,000 – €3,000 (significantly lower than the UK).

This comprehensive system of legal aid and NGO cost exemption has not led to the courts being overrun by cases; in fact, Portugal has one of the lower numbers of environmental court cases in Europe.⁵⁴

In **Denmark**, a system of independent administrative appeal boards, with legal and technical expertise, provides an efficient and far cheaper alternative to an expensive judicial system. The claimant must pay a small fee (approx €65), which is reimbursed if the appeal is won. While the Judicial route is more expensive, it is less often required due to the comprehensive nature of the appeal boards, and there is the possibility of legal aid both for individuals and NGOs.⁵⁵

In **Spain**, the system of legal aid goes a considerable way to compensating for the expenses of judicial procedure. Moreover, the loser pays principle in practice only applies when the loser is the administration: only in cases of *mala fides* ('bad faith') do the courts impose costs on a private losing party.

Likewise, in **the Netherlands**, only if the party has made an unreasonable use of the right to initiate a lawsuit do the courts impose costs on the loser, while in **Finland** the loser does not pay if the action is against a public authority.⁵⁶

Overcoming restrictive interpretations of standing

Denmark's administrative appeal boards system admits appeals from organisations whose main objective is to protect nature and the environment; or to safeguard recreational interests; as well as any party or individual with a significant interest in the outcome of the case.

Protection of the environment by the state and the fundamental right of every citizen to a healthy and ecologically balanced human environment, are enshrined in **Portugal's** constitution. This progressive legal framework grants standing via the legal right of *actio popularis* (action in the name of the collective interest) to redress offences against the preservation of the environment. No property right, geographical vicinity or specific engagement in bureaucratic procedure criteria is necessary to initiate such a case.

Spain's constitution also recognises environmental rights, and environmental NGOs are granted standing. For individuals with a case that does not fall within *actio popularis* courts require demonstration of a 'legitimate interest', but this need not be direct or individual. Indeed, 'environmental interest' has been recognised as one of the legitimate interests that may allow for an individual to be granted standing. Nevertheless, that interest has to be 'real, effective and actual', but it is enough to show an advantage or legal utility derived from the reparation demanded, and this advantage or benefit does not have to be economic or material but it can be moral.

⁵⁴ For more detailed analysis see Milieu 2007, Country report for Portugal on access to justice in environmental matters

⁵⁵ For more detailed analysis see Milieu 2007, Country report for Denmark on access to justice in environmental matters

⁵⁶ See Milieu country reports http://ec.europa.eu/environment/aarhus/study_access.htm

4.2 New South Wales

Environmental courts

The number of environmental courts and tribunals (courts specifically designed to hear environmental cases) worldwide more than doubled between 2007-2009; there are now over 350 environmental tribunals in 41 countries.⁵⁷ As environmental law becomes not only increasingly technical and complex, but increasingly important to society, it is seen to merit specialisation. Environmental courts therefore allow judges to become specialists and draw upon relevant scientific expertise in a way that is not possible in the normal courts.

Australia, although not a signatory to Aarhus, has taken the lead in establishing environmental courts and tribunals, and has been praised for the innovative techniques they used, such as mediation and arbitration to resolve disputes.

New South Wales, Queensland and South Australia have separate environmental courts to hear environmental cases, while the remaining five states have specialist tribunals within the courts to hear environmental cases. The courts are seen to have greater independence and higher status than tribunals; they have greater powers and can conduct judicial review.⁵⁸

Standing

New South Wales provides 'open standing' to enforce breaches of provisions of the 1979 Environmental Planning and Assessment Act at the Land and Environment Court. What's more, since 1997 this also applies to the 'breach or threatened breach of *any Act* if the breach is causing or is likely to cause harm to the environment'.⁵⁹ This allows

any person to bring proceedings at the Court, whether or not their rights have been infringed as a consequence of the breach.⁶⁰ However, this remarkably liberal provision on standing has not seen the courts flooded with litigation, with statistics showing that individuals and NGOs only account for a maximum of 20% of registrations for proceedings of civil enforcement and judicial review within any year.⁶¹

Costs

Under Australian law costs follow the case, and the loser pays principle applies. As in the UK this results from the development of public law out of a private law culture. The potential cost of litigation is almost certainly the most restrictive aspect of accessing environmental justice in New South Wales, with the 'legal aid tap at times turned-off or half off'. However the Land and Environment Court has a practise of not awarding costs in public interest cases.⁶²

Substantive review

The broad application of standing has been interpreted by the courts as indicative of the 'true role' of the courts, that is, 'administering social justice'⁶³; and that for open standing to 'be of any value' any order of the courts 'must respond to the interests of the general community'⁶⁴. Indeed, the Land and Environment Court has broad discretion when it comes to applying remedies: under the 1979 Act, the court may 'make such order as it thinks fit to remedy or restrain a breach' that has already been committed or that will be committed unless restrained by the court.⁶⁵ Furthermore, the view of the courts is that this system has 'significantly enhanced the quality of environmental decision-making'.⁶⁶

⁵⁷ Greening Justice, 2009 <http://www.accessinitiative.org/resource/greening-justice>

⁵⁸ Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600

⁵⁹ Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600

⁶⁰ See http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/s123.html

⁶¹ Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600, and Access to Justice in Environmental Law – An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

⁶² New directions in the prevention and resolution of environmental disputes - specialist environmental courts, Lord Justice Stein 1999 http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399a

⁶³ F Hannan Pty Ltd v Electricity Commission of New South Wales, in Access to Justice in Environmental Law – An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

⁶⁴ Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

⁶⁵ Environmental Planning and Assessment Act 1979 Section 124

⁶⁶ Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

5 Conclusion

5.1 Why Aarhus matters

'The more Member States accept that citizens have legitimate interest to see the quality of the environment preserved, protected and improved, the more they maintain contradictions, if they do not allow citizens to defend this legitimate interest in courts. It is not by chance that the Member State with the most liberal access to the courts – Portugal – is also a Member State which has recognised, in its constitution, a right of each individual to a clean environment.'

*'Asking citizens to help stop the loss of biodiversity, to save water, energy and other natural resources and to behave environmentally responsible, but restricting the possibility of citizens to have access to the courts, is, in the long term, an inconsistent policy.'*⁶⁷

Aarhus enshrines the fact that the environment belongs to all, demands that individuals have the opportunity to participate in decision making that affects the environment, but recognizes that the state 'has great powers to positively or negatively influence the environment, by acting or omitting to act', and therefore that the courts must act as arbiters between the administration and the individuals in the case of controversy.⁶⁸

As signatories to Aarhus, as members of the EU and UK as a whole, we have a legal obligation to comply with the Convention. Given the recent summons to the European Court of Justice, Scotland must improve access to justice to make it *fair, equitable, timely, and free or inexpensive*, and so finally comply with the third Pillar of Aarhus.

The fear that opening up access to the courts in environmental cases would open the flood gates on litigation simply does not stand up to scrutiny. While data from states with more open access to justice implemented shows that these apprehensions are unfounded (as the number of court cases in environmental matters remains small), if improved access to justice *did* see a significant increase in meritorious litigation it would demonstrate a systematic problem with the interpretation or implementation of environmental laws, which government and decision makers would surely be quick to act on.

Put simply, are public authorities breaking the law so often that if citizens are properly enabled to challenge them, the courts would grind to a halt? Going to court to defend the environment is a form of citizen participation which, should be encouraged, albeit as a last resort.

The benefit of more open access to the courts comes from improved decision making by public authorities, who know that their decisions can be challenged. Therefore, it is the credible threat of legal action which is important.

The Scottish Government needs the help of Scottish citizens to meet climate change, energy and biodiversity targets. To demand such support whilst restricting citizens' recourse to scrutinize Government will do little to build public confidence in Government decision-making. Complying with Aarhus will significantly benefit the relationship between the government and the public.

⁶⁷ Milieu, Summary report on the inventory of EU Member State's measures on access to justice in environmental matters (2007)

⁶⁸ Milieu, Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters (2007); pp 21-22

5.2 Why recent Scottish moves are not enough to ensure compliance

In his response to the Gill Review, Cabinet Secretary for Justice Kenny McAskill acknowledged that:

‘Our civil courts are still based on a largely unreformed Victorian model... the system has not kept pace with the rapid social changes of the 20th Century and was not designed to serve a property owning, insurance reliant, rights based, socially democratic, welfare state in membership of the European Union.’⁶⁹

He noted that Lord Gill’s recommendations had received broad support from Government, Parliament and the legal community, and that while reform must take account of pressures on the public purse, this makes the reform more necessary in order to address inefficiencies in the system.

These are welcome words, as are a number of the Government’s plans for reform. However, evidence from Aarhus Compliance Committee rulings and European Commission decisions in relation to similar jurisdictions suggest that certain aspects of the proposed reforms will be insufficient to comply with Aarhus.

Judicial review

Government plans to revise judicial review procedures include clarification of who is entitled to bring an action by introducing a test of sufficient interest (see below); the introduction of a time limit and a permission stage; and new Rules of Court on Protective Expense Orders in environmental cases (see below).

While we support the move to clarification, it is critical that what is clarified ends up complying with our Aarhus obligations. The introduction of a ‘leave’ or ‘permission’ stage (or reformed use of the First Orders procedure) could play a welcome role in allowing a system of qualified one-way cost shifting to be introduced, as recommended by Sullivan and Jackson. It could also ensure that the issues of whether the case had merit, and/or was in the public interest, and whether the petitioner has standing, were established from the earliest possible point, therefore diminishing the ‘chilling effect’.

The introduction of a time limit might cause problems in complex cases and particularly where there is uncertainty in funding. There would be serious concerns about the introduction of a time limit of 3 months or less, particularly given that in Scotland we have a historical culture of lack of awareness of legal rights. Given this, and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, they should consider a time limit of a year for such cases.

While we recognise the need to ensure the courts do not become a ‘vehicle to articulate what are essentially political arguments’⁷⁰, there is scope to revise judicial review to incorporate a substantive element, including merit, although an Environmental Court or Tribunal, could equally well, if not better, serve this purpose. Judges could verify whether a case fell within the scope of Aarhus and/or was in the public interest at the permission stage, and such cases qualify for special rules and remedies.⁷¹

⁶⁹ Ministerial Forward to Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review, November 2010 <http://www.scotland.gov.uk/Publications/2010/11/09114610/1>

⁷⁰ Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review, November 2010 <http://www.scotland.gov.uk/Publications/2010/11/09114610/1>, 168

⁷¹ See The Environmental Justice Project, A report by the Environmental Law Foundation, <http://www.ukela.org/content/doclib/116.pdf>

Standing

While the move to reform standing – introducing a test of ‘sufficient interest’ in place of ‘title and interest’ – is welcome, without strong guidelines for its application in court, it could turn out to be a meaningless gesture. In *Mary Buchan Forbes v Aberdeenshire Council and Trump International Golf Links* Lady Smith referenced the Aarhus demand for providing standing under national law but ‘consistently with the objective of giving the public concerned wide access to justice’⁷² (see appendix), yet despite this acknowledgement failed to find that Mrs Forbes had sufficient interest on the grounds that she did not show she was ‘affected in some identifiable way’.⁷³

It is critical that there is a new understanding in Scotland as to why a sufficient interest test is being introduced, and that clear and robust guidelines are crafted, explicitly ensuring that ‘sufficient interest’ creates a legal right of *actio popularis*.

Costs

The principle behind Protective Expense Orders is to provide early certainty and a reasonable limit on the level of costs the applicant may be expected to pay; yet both the extreme rarity and the very high cost cap set, mean that PEOs in Scotland do not amount to Aarhus compliance.

There are strong indications that the new PEO rules will still be insufficient to comply with Aarhus. Minutes of a recent meeting of the Rules Council reveal that following the European Commission’s rejection of the first draft submitted – largely on the basis of continued judicial discretion – the revised draft maintained a subjective element (i.e. would take into account a petitioner’s financial situation), and would not apply to unincorporated associations.⁷⁴

The subjective approach has been rejected by Sullivan and is against the spirit of access to justice in the collective interest; arguably the wealthy should be expected to contribute more financially than the poor to the achieve environmental justice (as arguably they should contribute to society as a whole), but up front courts costs is the wrong way to go about this and will only act as a barrier to building up a body of relevant case law.

We support the recommendation of Sullivan and Jackson that one way cost shifting be introduced in all judicial review cases, as the most effective way of complying with Aarhus.

However, it is doubtful that this alone will satisfy the Aarhus Compliance Committee, as a petitioner’s own legal fees can be so high as to prove an insurmountable barrier in themselves. Therefore the Government must review the rules which restricting legal aid in environmental and public interest cases.

Beyond Aarhus

There is also a clear need to tackle broader cultural barriers to environmental justice. We welcome the Government’s commitment to develop new plain-English court rules, and consistent practice across courts.

We also welcome the proposal for greater judicial specialisation, which should be considered alongside the case for special environmental courts or tribunals – which the new Government committed to looking into in their 2011 election manifesto⁷⁵ – as part of the wider review of judicial structures and environmental regulation.

We further urge the Government to ensure that greater public legal education aims to create a culture in which citizens recognize their legal, and environmental, rights and duties, and learn to recognize problems and injustices, which may have a potential legal solution.

⁷² *Mary Buchan Forbes v Aberdeenshire Council and Trump International Golf Links*, para 13 <http://www.scotcourts.gov.uk/opinions/2010CSOH1.html>

⁷³ *Forbes v Trump*, 16 <http://www.scotcourts.gov.uk/opinions/2010CSOH1.html>

⁷⁴ Minutes of the Court of Session Rules Council 14th Feb 2011 https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=13jY1o8bDMeDSLm3-7Egl_26obGIYLzdRvF7aCVxhq1BtrLvUP57O1J5oExGu&hl=en&authkey=CIXv9rYJ

⁷⁵ SNP Manifesto 2011, page 39 at http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf

5.3 Recommendations

Friends of the Earth Scotland urges the Scottish Government as part of its 'Making Justice Work' programme, to take steps to:

- 1 Ensure that access to environmental justice through existing (and future) channels is free or inexpensive by:
 - > introducing qualified one-way cost shifting so that individuals and NGOs taking a environmental case or other public law case can be confident that they will not be liable for the other side's costs.
 - > removing the test for legal aid that effectively bars individuals from accessing aid if their case affects more than one person, and improving access to legal aid for community groups in environmental cases .
- 2 Introduce clear, rigorous guidelines for the new 'sufficient interest' test on standing so as to ensure that the application of such a test by the courts is in line with the legal right of *actio popularis* – action in the collective interest.
- 3 Improve First Orders procedure or introduce a 'permission' or 'leave' stage for judicial review to ensure that questions as to whether a case has merit; whether the petitioner has standing; and whether the petitioner should be liable for costs, are established at the earliest possible point, and without risk of high costs in getting to that stage.

- 4 Take measures to ensure that both the procedural and substantive legality – including the merits – of a decision can be reviewed. This could include:

- > revision of judicial review to incorporate procedural and substantive legality in Aarhus Cases – including the merits of a case – and provide for appropriate remedy;
- > setting up an Environmental Court or Tribunal to simplify environmental appeals and the regulatory system while increasing specialisation in environmental law.

These changes could be implemented through the passing of an Environmental Justice Act enshrining the Aarhus Convention in Scotland.

- 5 In addition, there is a clear need as identified by Lord Gill's Review of the Civil Courts to create a more streamlined, user-friendly court system with plain-English rules and provide help to users; and improve public legal education to help create a wider legal culture in which citizens recognize their legal, and environmental, rights and duties, and learn to recognize problems and injustices which may have a potential legal solution.

Appendix 1: Case studies

Marco McGinty v Scottish Ministers⁷⁶

In *McGinty v Scottish Ministers*, the petitioner sought to take the Scottish Government to Judicial Review over the decision to include the development of a coal fired power station at Hunterston, North Ayrshire, in the National Planning Framework (NPF).

Once a development is included in the NPF, local residents are denied the opportunity to object to the need for it during the planning process, and input is limited to relatively minor aspects of the exact siting and look of the development. Therefore, developments must be consulted on and subject to Strategic Environmental Assessment (SEA) before they are signed off in the NPF.

Although a consultation on the original draft NPF and the accompanying SEA was carried out, subsequently, the Scottish Government wished to consider additional developments for inclusion in the NPF, amongst which was the coal fired power station at Hunterston. These developments were subject to consultation through an additional SEA consultation, advertised only in the Edinburgh Gazette and not anywhere local to the Hunterston area.

An unemployed local bird watcher – with much support from his local community – plucked up the courage to take the Government to task because the development would destroy the SSSI site he visited daily to pursue his hobby. However, the biggest barrier he faced was cost.

A ground breaking 2010 ruling saw Mr McGinty awarded the first ever PEO in Scotland. Yet the court capped his liability for the defendant's costs at £30,000, which, when added to the estimated costs of up to £80,000 he would face in bringing the case (having been denied legal aid), amounts to a sum that only very financially privileged individuals could afford.

⁷⁶ Marco McGinty and another vs the Scottish Ministers [2010] CSOH 5, <http://www.scotcourts.gov.uk/opinions/2010csoh5.html>

Road Sense and William Walton vs Scottish Ministers⁷⁷

Campaign group Road Sense lodged a statutory review of the Scottish Government's go-ahead for the construction of the Aberdeen Bypass (or Aberdeen Western Peripheral Route), arguing that public participation in the decision making process had been restricted and inadequate, and that the case against the need for the Bypass had not been properly considered.

In February this year, Road Sense were granted the second PEO in Scotland, in a ruling that capped the campaigners' potential liability for the other side's costs at £40,000.

While the Road Sense ruling runs to 26 pages with multiple references to the Convention, and the need to comply with it, Lord Stewart's opinion dismissed recent progressive thinking on Aarhus implementation from south of the border, and set the PEO considerably higher than that in the Hunterston case.

The cap was set at exactly the amount Road Sense estimated they could raise from existing funds and pledged support for legal proceedings, minus their own estimated fees (which are lower than normal due to *pro bono* work from senior counsel). Effectively, the campaigners' liability for total potential outgoings was reduced from a maximum of £90,000 to a still very costly £70,000.

In England, this subjective approach to the affordability of proceedings has been criticised by Lord Justice Sullivan, on the basis that it is not consistent with the objectives of Aarhus.

Furthermore, because the respondents confirmed that they would challenge Road Sense's title to take the case, the campaign group were forced to drop the action and leave Mr Walton sole petitioner, because they could not afford the extra time in court required to fight a challenge to title.

While the ruling is in a sense, only the opinion of one judge, the conservative reasoning behind the ruling and the high level at which the cap was set highlights how far we have to go before the objectives of Aarhus permeate our public law.

⁷⁷ Road Sense an unincorporated association, and William Walton, Chairman of Road Sense, as its representative and as an individual vs the Scottish Ministers [2010] CSOH 10, <http://www.scotcourts.gov.uk/opinions/2011CSOH10.html>

Mary Buchan Forbes vs Aberdeenshire Council and Trump International Golf Links⁷⁸

Pensioner Mary Forbes is one of a number of local residents who faced the prospect of compulsory purchase of their homes to make way for multi millionaire Donald Trump's luxury golf course development, in Menie, Aberdeenshire. As the petitioner in *Mary Buchan Forbes v Aberdeenshire Council & Trump International Golf Links* she has struggled both to establish standing and with the issue of costs.

The development has been under the spotlight since first touted in 2006, with the original planning application rejected, and a public inquiry before the golf course was finally given the go-ahead in 2008. However, the golf course still faces resistance in the local community, particularly from those whose homes are at risk.

Title and interest

Mrs Forbes objected to the development during the course of the Public Inquiry, which granted outline planning permission in late 2008 subject to a number of conditions.⁷⁹ Subsequent applications for full planning permission were submitted in October 2009 for various aspects of the development, including for preparatory earth works that involved the planting of marram grass to stabilise sand dunes.⁸⁰ Within a month, the Local Authority granted full permission, again subject to certain conditions, and work to stabilise the dunes commenced a week later.

Shortly after, Mrs Forbes petitioned for Judicial review of the decisions to grant planning permission for the 6 applications, on the basis that the respondents did not follow correct Environmental Impact Assessment (EIA) and consultation procedures.

Mrs Forbes sought an interim interdict to halt the ongoing works on the dunes. In the January 2010 decision, the judge noted the need under the Aarhus Convention to interpret the test of standing so as to be 'consistent with the objective of giving the public concerned wide access to justice'⁸¹. However, the court found that Mrs Forbes had failed to show that she was 'affected in some identifiable way' and therefore did not show she had sufficient interest.

Mrs Forbes' case fell largely on the grounds that she failed to adequately demonstrate title and interest; in light of the fact that she failed to submit objections to the 6 applications for full planning permission, and that her property did not strictly speaking 'neighbour' the sand dunes (being 1km away, and not visible from her home), Lady Smith ruled that she did not *prima facie* have a case of 'sufficient interest'.⁸²

The judgement appears to be contradictory. On the one hand the judge ruled that Mrs Forbes did not have standing, nor should she have expected to be invited to attend a pre-determination hearing⁸³, because she failed to object to the applications for full planning permission.⁸⁴ Yet, on the other hand, Lady Smith agreed with the respondents view that the outline planning permission of 2008 and the 6 applications of October 2009 should be regarded as a 'single package', and on this line of argument found in favour of the respondents in relation to EIA.⁸⁵ Mrs Forbes had, however, objected to the application for outline permission in 2008.

It seems the judge took a limited view of the case before her, and was unwilling to consider the wider implications of the work on the sand dunes in relation to the 6 planning applications that Mrs Forbes sought to review. Whether pursuing the case simply out of individual interest or with a view to the wider public interest, what seems clear is that a high test for standing was used in the case.

⁷⁸ *Mary Buchan Forbes vs Aberdeenshire Council and Trump International Golf Links*, [2010] CSOH 1, <http://www.scotcourts.gov.uk/opinions/2010CSOH1.html>

⁷⁹ Condition 11 required the submission and approval of an Environmental Management Plan prepared to industry standards (IS400001 or EMAS) following consultation with SNH; which would relate both to construction and operational periods of the development; and specifically include full details of methods and areas of dune stabilization.

⁸⁰ APP/2009/1620, APP/2009/1623, APP/2009/1629, APP/2009/1631, 2009/1633 and for the planting of marram grass 2009/2479. See <http://www.aberdeenshire.gov.uk/planning/apps/>

⁸¹ [2010] CSOH 1, [13]

⁸² [2010] CSOH 1, [26]

⁸³ [2010] CSOH 1, [33]

⁸⁴ [2010] CSOH 1, [7]

⁸⁵ [2010] CSOH 1, [28]

Timing and merit

In ruling that Mrs Forbes had no prima facie case in relation to EIA because the application for marram grass planting was part of a 'single package' including outline permission (which had been subject to EIA), Lady Smith highlights the fundamental problem that essentially at no point was the decision to allow the whole development to go ahead subject to review, because of the timing of the case.

Had Mrs Forbes petitioned for judicial review within 6 weeks of the Scottish Ministers' decision to grant outline planning permission, then that decision could have been subject to review.⁸⁶

It appears that the justice system as a whole has badly let down Mrs Forbes and her community, with the substance of the decision inscrutable because of the strict interpretation of 'neighbour' and the unyielding precondition that the correct bureaucratic procedure must have been followed.

Costs

According to the Scottish Legal Aid Board (SLAB), Mrs Forbes was denied assistance with the costs of her case because her 'application did not meet the "reasonableness" test for civil legal aid as there were other people with an interest in the case who could have helped to fund a court action'.⁸⁷

When Mrs Forbes lost her initial hearing, she was faced with the prospect of paying thousands of pounds of the other side's costs (having a private interest in the case, the petitioner had not sought a Protective Expense Order), and subsequently dropped the proceedings. It lies with judicial discretion as to whether to award costs and what amount to award in favour of the developers. A decision on expenses from the court is awaited.

However Mrs Forbes applied for legal aid for a further judicial review, this time of SLAB's decision to refuse her original application. In January 2011 Mrs Forbes' second application for legal aid was granted, and SLAB offered to re-open and review the original application. Had Mrs Forbes been awarded legal aid for the initial judicial review from the outset, she would have been able to seek modification of her liability as an assisted person.

⁸⁶ <http://www.scotland.gov.uk/Topics/Built-Environment/planning/publications/foi/MenieEstate/formalconsentletter1>

⁸⁷ <http://www.slab.org.uk/profession/documents/MaryForbesandspecialurgencyupdateforweb21Dec2010.pdf>

Appendix 2

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

FROM THE COURT OF SESSION, FIRST DIVISION

BETWEEN:

AXA GENERAL INSURANCE LIMITED AND OTHERS

(Appellants)

AND

(1) THE LORD ADVOCATE

(2) THE ADVOCATE GENERAL FOR SCOTLAND

AND

(3) DANIEL FLEMING AND OTHERS

(Respondents)

AND

(1) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

(2) THE FIRST MINISTER FOR WALES

AND

(3) FRIENDS OF THE EARTH SCOTLAND

(Interveners)

CASE FOR THE INTERVENER

FRIENDS OF THE EARTH SCOTLAND

INTRODUCTION

- 1 Friends of the Earth Scotland (FoES) submits that the First Division erred in finding that the Third to Tenth Respondents lacked title and interest and that they should not have been permitted to be parties to the proceedings. Accordingly FoES moves the Court to allow the Third to Tenth Respondents' cross appeal, and to restore the interlocutors of the Lords Ordinary on this issue.
- 2 Although the Appellants now offer no substantive argument to the contrary in their written case, the issue of the title and interest of the Third to Tenth Respondents remains one which the Court must determine. And although the issue relates to title and interest to defend the present proceedings, the applicable law also bears heavily on the question of standing to pursue public law proceedings generally. In particular, it bears on the standing of persons who have a legitimate and sufficient interest in seeking to hold others to account for the commission of public law wrongs, but cannot assert infringement of any private law rights or interests. More particularly still, it bears on the standing of responsible non governmental organisations to bring judicial review proceedings in Scotland in relation to matters of public interest, including matters of environmental law.
- 3 FoES is such an organisation, and is accordingly grateful to the Court for this opportunity to make submissions on this issue. FoES is a body with a genuine concern for the environment, who with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology and environmental policy is in a position to mount carefully selected, focussed, relevant and well argued legal challenges: cf. *R v Her Majesty's Inspectorate of Pollution ex parte Greenpeace Ltd* [1994] Env LR 76 at 101. FoES do not wish to take legal action on a frequent or regular basis. However, it considers that there are a number of environmental issues in Scotland that are unlikely to be litigated by any other organisation or person. Currently these issues include discrepancies between decisions taken by public bodies and the duties to maintain the targets for reduction in climate change emissions under the Climate Change (Scotland) Act 2009. On the law of title and interest held by the First Division in the present case, FoES doubts that it would have standing to bring proceedings in relation to such issues.
- 4 Further information regarding recent public interest activity by FoES is set out as the Appendix.

THE PROBLEM

- 5 It has been widely recognised for many years that the law in Scotland on title and interest in judicial review is overly restrictive, and is itself in need of judicial review: Lord Hope of Craighead: *Mike Tyson Comes to Glasgow: a question of standing* [2001] PL 294 at 307; and see also Munro: *Standing in Judicial Review* 1995 SLT (News) 279. The fundamental problem is that the law remains rooted in an approach derived from private law, insofar as it continues to require a would be litigant to establish the existence of a right owed to him personally, and to allege an infringement of that right affecting his personal or private interests. But public law is not at base about private rights but public wrongs, and it is a lacuna in a properly developed system of public law that outdated technical rules of locus standi should stand in the way of permitting those with sufficient interest from bringing such wrongs to the attention of the court in order to vindicate the rule of law: *IRC v National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617 per Lord Diplock at 644; *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 per Sedley J at 121. This appeal accordingly presents an opportunity for Supreme Court to bring about a much needed review and development of the law of Scotland in this area.

BACKGROUND

- 6 Historically, Scots law has sometimes been liberal in the question of standing in relation to public wrongs. In *Duke of Atholl v Torrie* three individuals sought declarator that the passage of Glen Tilt was a public road. Both the Inner House (1849 12D 328) and the House of Lords (1852 1 Macq 65 per the Lord Chancellor at 74 – 75) robustly rejected the Duke's submission that individuals whose private interests were not infringed were not entitled to bring proceedings to vindicate a general public right: "...the right to sue must be commensurate with the right to use; that whoever has the right to use, has also the right to sue... any member of the community can maintain an action to establish a general right on behalf of the public..." Objections that persons having no connection with Glen Tilt might thus sue, or that the Duke could himself seek to establish his rights in an action against an indifferent stranger, were dismissed as "...extravagant possibilities, which, if they should arise, would be an abuse of the law and would be sure to be corrected."
- 7 And in *Macfie v Blair & Scottish Rights of Way and Recreation Society (Limited)* 1884 11R 1094 the Society sought to be sisted as a defender in an action by a proprietor for declarator that his lands were free from alleged servitudes of rights of way. The pursuer disputed title and interest to defend on the ground that as an incorporated company, the Society could not use the alleged right of way, that it was a self constituted body which did not represent the public, and that a verdict against it would not be res judicata in a question with the public. The Inner House rejected these arguments and sustained the Society's title to be sisted as a defender, holding that judgment against it would be res judicata in a question with the public. Although the Court's opinion is very brief, the decision can be seen as the Court recognising the standing of a 'public interest group', not itself a member of the public, to be a party to an action in which it had no private right or interest, in order to seek to vindicate a public right, the promotion of which was one of its aims.
- 8 But more recently it has been held that in order to bring or defend proceedings in matters of public law in Scotland a party must be able to establish title and interest to sue. The classic description of title is as formulated by Lord Dunedin in *D & J Nicol v Dundee Harbour Trs.* 1915 SC (HL) 7 at 12: "... he must be a party (using the word in its widest sense) to some legal relation which gives some right which the person against whom he raises the action either infringes or denies." This statement is recognised to be descriptive not definitive: Clyde & Edwards: Judicial Review (2000) at paragraph 10.05. It has been recognised that it was said long before the huge development of administrative law and judicial review that has occurred in recent decades: *Rape Crisis Centre v Secretary of State for the Home Department* 2000 SC 527 at 534C – D. And as the First Division put it in the present case (Opinion of the Court, paragraph 42) the concept of title to sue "requires to be sufficiently flexible to accommodate developments in the law".
- 9 Thus in *Wilson v Independent Broadcasting Authority* 1979 SC 351 Lord Ross said (at 356) that he could "see no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that public body to the public." And in *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179 Lord Clyde applied that approach, and moreover (at 185K – L) could "see no reason in principle... why, simply because of a group of members of the public combine to sue where each could do so as an individual, the mere fact of their combining together should deprive them of a title." Yet in *Rape Crisis Centre* Lord Clarke held (at 534F) that it was "a fallacy to suppose that because of the public interest in ministers acting lawfully and fairly that public interest by itself confers on every member of the public a right to challenge a Minister's act or decision." Accordingly for his Lordship "...the individual or body seeking to challenge the Minister's act or decision must show that, having regard to the scope and purpose of the legislation, or measures, under which the act is performed, or the decision is made, he or they have had such a right conferred upon them by law, either expressly or impliedly." On these authorities, therefore, the question of title to sue in public law, for both individuals or organisations, remains dependent on establishment of a right owed to them, not the identification of a wrong done contrary to public law. It remains far from clear that a body, seeking to proceed on a pure public interest rather than associational basis (cf. the classification in *Cane, Standing Up for the Public* [1995] PL 276) would have title to sue.

- 10** In relation to interest, the classic statement remains that of Lord Ardwall in *Swanson v Manson* 1907 SC 426 at 429: “The grounds of this rule are (1) that the law courts of this country are not instituted for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary right or his status; and (2) that no person is entitled to subject another to the trouble and expense of litigation unless he has some real interest to enforce or protect.” Yet *Swanson* had nothing to do with public law: it was an action for reduction of a will. As with *D & J Nicol*, the concepts and language are essentially those of private law. It has been said that “a pecuniary stake in the outcome of a case assists in establishing interest” although “it has generally been considered that Scots law adopts the narrow approach” to interest (St Clair & Davidson: *Judicial Review in Scotland* (1999) at pages 65, 93). But application of what constitutes sufficient interest has been inconsistent.
- 11** In *Wilson* Lord Ross held that the petitioners had interest to seek interdict of broadcasts allegedly failing to maintain statutorily required balance in relation to a forthcoming referendum. Sufficient interest was held to lie in the petitioners entitlement to vote, their membership of a group advocating a negative vote, and the wish of the petitioners to persuade others to do likewise. There was therefore no economic interest advanced, and in essence the interest lay in the desire to forward a campaign designed to promote the beliefs held by the petitioners: see Clyde & Edwards, *Judicial Review* (2000) at paragraph 10.14. In *Scottish Old People’s Welfare Council*, Petitioners Lord Clyde recognised that in the light of *Wilson* Lord Ardwall’s dicta should not be regarded as “exhaustive or a complete description of what may comprise interest... [but that] The interest must be such as to be seen as material or sufficient... There must be a real issue. But the existence of a sufficient interest is essentially a matter depending on the circumstances of the case” (at 186K – 187A). But it was held that the petitioners had no interest to challenge the terms of a circular relating to social security benefits in circumstances where no claims for that benefit had yet been made. In *Rape Crisis Centre*, Lord Clarke inclined to the view that had the petitioners had title to sue, they would also have had interest “to ensure that the decision taken by the Secretary of State... was arrived at in accordance with the law” and that “in the field of administrative law and judicial review there must be few cases where there is title but no interest.” (535G – H) But in *Forbes v Aberdeenshire Council & Trump International Golf Links* [2010] CSOH 01 Lady Smith held that in order to challenge a grant of planning permission the petitioner required to show that she was “affected by it in some identifiable way”, and that merely being a member of the public who lived in a site surrounded by the development did not demonstrate this, having regard to the fact that her home was located about 1 kilometre away and that “the works are not visible from where she lives” (paragraphs 5, 17, 26).

THE PRESENT CASE

- 12** In the present case, at paragraph 42 of its Opinion, the First Division held that, while there was no precise or fixed definition of standing in Scots law, even in matters of public law rights of action were restricted to those with a “real and legitimate interest to protect.” Thus while as a generality it was said that it may not be particularly difficult to establish title to challenge the legality of an administrative act, “it will usually be more difficult to establish some real and practical interest.” Parties whose interest is “remote, tenuous, academic or theoretical” are therefore to be excluded. Further, at paragraph 54, the First Division held that persons or organisations not themselves “adversely affected” by a planning decision, would not have interest entitling them, in judicial review proceedings challenging that decision, to be sisted as respondents. It follows that no more would such a person or organisation have interest to institute judicial review proceedings to challenge the decision, even if it was unlawful, and even if no person whose private rights or interests had been infringed was willing or able to do so.

- 13** It seems therefore that notwithstanding its statement that the concept of title to sue “requires to be sufficiently flexible to accommodate developments in the law”, the First Division’s approach to ‘interest’ remains rooted in a requirement that the would be party must be able to establish infringement of a right or interest akin to those actionable in private law. At best, however, the position remains confused and inconsistent, exemplified by the decisions of the First Division in relation to the title and interest of the Appellants on the one hand and that of the Third to Tenth Respondents on the other. In itself that lack of clarity represents a barrier to the court for public interest groups if only in respect of the uncertainty raised, and the consequent fear of wasting scarce resources in litigation only to be turned away from the court for want of standing: see McCartney ‘Access to environmental justice’ in *Paths to Justice: essays prompted by the Gill Review 2007* SCOLAG (special edition) 12. In FoES’ view, this barrier is a significant reason why there are relatively few attempts to bring public interest litigation in Scotland.

ENGLAND AND WALES

- 14** English law does not take the approach that an interest must be personal in order to establish standing in public law proceedings. Moreover in recent years there has unquestionably been a liberalisation of what is required to found sufficiency of interest for this purpose. It is recognised that a claimant who has no private interest should not be accorded standing merely because he raises an issue which is, objectively speaking, of public interest. But the court will consider the motives of the claimant. If the application raises a matter of genuine public interest, and is genuinely made in the public interest, then it is right to hold that the claimant has sufficient standing to proceed. On the other hand if the Court considers that the claimant is prompted by an ill-motive, or that the claimant is a busy body, a trouble maker, or acting from some other improper purpose, then the absence of a private interest will preclude his being accorded standing – indeed it may be abuse of process for such a claim to be permitted: *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 1761 per Dyson LJ at paragraphs 21, 23. Thus in broad terms standing to bring judicial review can arise from a genuine public motive, as well as a genuine private interest.
- 15** The rationale for such an approach is clear, and – in FoES’s submission – unanswerable. Public law is at base not about private rights but public wrongs, that is to say, misuses of public power. Thus persons or organisations with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the Court to an apparent misuse of public power: *ex parte Dixon*, per Sedley J at paragraph 28. Thus the real question is whether the applicant for judicial review can show some substantial default or abuse, and not whether his personal rights or interests are involved. Far from there being a public interest in seeking to exclude such persons or organisations from the court, a public interest lies in bringing judicial scrutiny and remedies to bear on improper acts and decisions of public bodies: *Land Securities Plc v Fladgate Fielder* [2010] 2 WLR 1265 at paragraph 70 per Etherton LJ. Such an approach recognises the perceptive observation of Schiemann J (as he then was) that wherever a person is excluded from the courts by reason of the rules of locus standi, the law is in effect regarding it as preferable that an illegality should continue than that the person concerned should have access: [1990] Public Law 342 at 342.

- 16** To reject the proposition that only an identifiable personal right or interest can entitle a claimant to bring or defend public law proceedings is to make clear that public interest groups without such rights or interests will not for this reason be denied standing. And the consequence in England and Wales has been that responsible pressure groups, including environmental interest groups, are now routinely permitted to make public law challenges in appropriate cases: *R (on the application of Feakins)* at paragraph 20; *R v Her Majesty's Inspectorate of Pollution ex parte Greenpeace Ltd* [1994] 4 All ER 329 at 350 per Otton J. FoES submits that this has been to the advantage of the development of public law in England and Wales. For example, in *R v Secretary of State for Social Services ex parte Child Poverty Action Group* [1990] 2 QB 540 the applicant challenged the treatment of many thousands of claimants for supplementary benefit whose claims were unlawfully delayed rather than decided (see in particular the judgment of Woolf LJ at 555). Had it been necessary to identify a private interest in order to bring proceedings, applying *Scottish Old People's Welfare Council*, Petitioners, only an individual whose claim had actually been delayed could have done so. Woolf LJ rejected this approach (at 556). But had such an individual claim been made it would surely have been compromised extra judicially, and a decision on the legality of the Secretary of State's action would have been prevented.

THE SOLUTION

- 17** As a distinguished academic commentator has pointed out, the truth is that the most distinctive aspect of Scots law on standing – the separation of title and interest “...serves no useful function. First the requirement to show title is not necessary for the purpose of distinguishing between the frivolous litigant and those with a serious interest in the outcome of the litigation; the requirement of interest is perfectly capable of performing that function on its own. Second, the requirement to show title may exclude those who have a substantial personal interest in challenging illegal acts, such as trade competitors. Third, it adds confusion because litigants are not able to predict when lack of title will be successfully argued against them. And finally, the separation of title from interest causes particular confusion in the context of public interest standing because public interest petitioners are told in some cases that they have title but lack interest, but in others that they have interest but lack title, with the reasons for the difference not being clear”: Mullen: *Standing to seek judicial review*, in McHarg & Mullen: *Public Law in Scotland*, pages 241 – 261.
- 18** And as Lord Hope of Craighead has said “No-one can question the fact that it is unsatisfactory that there should be a difference of view as to standing between England and Scotland in public law cases. The pressures relating to matters of public interest which have led to developments in England and Wales are to be found on both sides of the border... An approach to standing which applies a private law test to issues of public law is at risk of being out of touch with the public interest in having matters of that kind, about which a section of the public has a genuine grievance, litigated in the Courts”: Lord Hope of Craighead, *op. cit.*, page 306.
- 19** FoES agrees. The solution is to free Scots public law from its private law shackles, and to recognise ‘sufficient interest’ as the proper test for standing in judicial review. The rules on standing in Scotland, like those in England and Wales, are rules made by judges and which can be changed by judges, so as to meet the need to preserve the integrity of the rule of law: *IRC v National Federation of Self Employed and Small Businesses Ltd.* at 638. There is therefore no legal impediment to this Court developing the law in Scotland in this area, and strong reasons why it should do so.
- 20** FoES therefore invites the Court to hold that, in matter of public law, a party, whether an individual or body (however constituted) henceforth need only establish that he or it has sufficient interest in the subject matter of the action. Further, FoES invites the Court to hold that such a person or body should not be denied standing in judicial review proceedings in a matter of public law in Scotland merely because they cannot establish a genuine private interest in the outcome, if they can instead establish that they have a genuine public motive in seeking to bring or defend the proceedings.

AARHUS CONVENTION

21 The 1998 *Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters* ('the Aarhus Convention') was ratified by the United Kingdom and by the European Union in February 2005. FoES agrees with, and adopts, the submissions of the Third to Tenth Respondents as regards the Aarhus Convention set out at paragraphs 2.13 to 2.20 of their written case. And see generally, McCartney: *The Aarhus Convention: can Scotland deliver environmental justice?* (2011) 15 Edin. LR 128. In summary:

I. Article 9(2) of the Convention provides that :

"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."

II. Article 2(5) of the Convention defines 'The public concerned' as meaning:

"the public affected or likely to be affected by, or having an interest in, the environmental decision making; for the purpose of this definition, non governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

III. Article 9(2) of the Convention has been transposed into EU law by the Public Participation Directive 2003/35/EC, which amended the Environmental Impact Assessment Directive 85/337/EEC by inserting a new Article 10a with a view to securing Aarhus compliant rights of access to justice in relation thereto.

IV. On its face Article 9(2) of the Convention refers back to national law as regards whether what constitutes 'impairment of a right' entitling the bringing of an action concerning the environment. Thus it might appear that environmental protection organisations in Scotland would still have to qualify title and interest in order to bring actions on matters falling within the Convention: cf. Forbes per Lady Smith at paragraph 10.

V. But in considering Article 10a of Directive 85/337/EEC the CJEU has held that the principle of effectiveness requires that environmental protection organisations are able to rely on rules of EU environment law which enable protection of the public interest. Accordingly it has held that the concept of 'impairment of a right' cannot depend on conditions which only physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering the effects of the installation operation: Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* 12 May [2011] ECR I-nyr at paragraph 44 – 47.

AARHUS CONVENTION

- VI. Thus it would appear that as regards actions falling within the scope of the Directive, an environmental protection organisation in Scotland cannot be denied standing on the grounds that, for example, it is seeking to protect the public interest rather than complaining that its own private rights have been impaired. The Directive, and Article 9(2) of the Convention, therefore require the rules of title and interest to be interpreted accordingly, and to that extent, require innovation on the existing law: contra the Opinion of the First Division at paragraph 43.
- VII. Furthermore, Article 9(3) of the Convention provides that:

“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.”

While ‘the public’ means “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”: Article 2(4).
- VIII. Article 9(3) has now been held to fall within the ambit of EU law, and to have indirect effect: Case C-240/09 *Lesoochrannarske zoskupenie VLK v Slovakia* 8 March 2011 ECR I-nyr. Accordingly national procedural rules relating to the conditions to be met in order to bring proceedings must be interpreted and applied in accordance with the objectives of Article 9(3) and of effective judicial protection of EU law rights.
- IX. Thus the law of title and interest must be interpreted and applied in Scotland so as not to deny standing to associations, organisations or groups seeking to bring proceedings on the grounds that a measure or action is contrary to EU environmental law. Again, to that extent, the Convention, as applied through EU law, requires innovation of the law of title and interest in Scotland for environmental public interest groups.
- X. Furthermore although for the purposes of domestic law, the Aarhus Convention has only the status of an international treaty, the provisions of which have not yet been formally incorporated into national law, its provisions may be relied upon before and indirectly enforced by the court which should have regard to them where an issue of access to justice in relation to an environmental matter arises. The Convention therefore affects the interpretation of ambiguous statutory provisions and the interpretation of the common law so as to arrive at a result which does not place the United Kingdom in breach of what has been agreed to internationally: *Forbes*, at paragraph 11.

22 FoES submits therefore that the substitution of a sufficient interest test for standing in Scots public law which it has proposed above should now be recognised and applied as regards the standing of environmental protection organisations to bring public interest litigation in the field of EU environment law without requirement to establish a private or personal right or interest to do so. But it would be unsatisfactory if that were to be the extent of the development of the law, as it would result in one set of rules of standing for particular public interest groups in this particular area, and a different set of rules otherwise.

FURTHER ISSUES

- 23** It may be argued that the present case, involving neither a public interest group nor environmental law, is not an appropriate case in which to make the development suggested above. However in practical terms it is hard to see how such a case will ever arise, if not this one. Nearly a hundred years have passed since title and interest was last directly before the supreme civil court in a Scottish appeal (*D & J Nicol*). The law requiring personal or private rights and interests is now too well settled at Outer House level, notwithstanding occasional glimpses of modernity (for example *Wilson*). The prospects of success at that level accordingly are at best uncertain; indeed the Opinion of the Inner House in this case suggests that the solution favoured by FoES could not be obtained short of a further appeal to this Court. But it is hard to see any individual, let alone a public interest group with scarce resources, being willing or able to conduct such satellite litigation, particularly when their real interest will be in the substantive issues in the action.
- 24** Further, it might be suggested that there is no practical need to develop the law as suggested, in that it is possible for environmental claims to be made by individuals who are eligible for legal aid in effect as representative for others, or in partnership with an public interest group. It may be that legal aid is available for such purposes in England and Wales: see Note of Oral Presentation by James Eadie QC to the Aarhus Convention Compliance Committee re Communication ACC/C/2008/33 (The Port of Tyne Case) on 24 September 2009. In Scotland, however legal aid is in practical terms rarely available to enable individuals to bring public interest litigation, particularly on matters of environmental law: see generally, McCartney: *Public interest and legal aid* 2010 SLT (News) 177.
- 25** Section 14(1) of the Legal Aid Scotland Act 1986 provides that civil legal aid shall be available to a person if the Scottish Legal Aid Board “(a) ...is satisfied that he has a *probabilis causa litigandi*; and (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid. However the Board’s guidance on what constitutes ‘reasonableness’ (*Civil Legal Assistance Handbook* (November 2010)) states “3.22 Insufficient interest: All applicants must show they have a right, title and interest to be a party to the proceedings. Even where such an interest is demonstrated, the amount of interest the applicant has may not justify the use of public funds. As a general proposition, litigation that would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle would not be reasonable.” In practice this means that it may be more difficult to obtain legal aid in public interest cases than in cases where there is no public interest at all.
- 26** Furthermore, regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 SI 2002/494 provides that “Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied (a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or (b) it would be reasonable or proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.” Environmental cases, almost by definition, are of common interest to which regulation 15 applies. In that regard the Board’s guidance states that “3.17 Applications by persons with joint interests: ...Where there are a number of individuals who all appear to share a broadly similar objective in an action public funding will not generally be made available to fund the case unless strong evidence is provided to show that an individual will suffer serious prejudice... Examples of cases where an applicant will not suffer serious prejudice include closure of a school, community centre, swimming pool, or other cultural or leisure institution.” Again in practice this means that legal aid will rarely be available to litigate matter of common interest in environmental matters or otherwise.

27 Finally, it may be said that if the law of title and interest is to be changed, it should be a matter for legislation by the Scottish Parliament. However that change was first called for more than a quarter of a century ago, by Lord Dunpark's 1984 working party whose report led to the introduction of judicial review procedure in the Court of Session. If, as FoES submits, the problem and the solution are as outlined, and it is within this Court's power to develop the law accordingly, then it can do so without further delay. True it is that Lord Gill has recently recommended the abolition of the separate tests of title and interest and their replacement by a single test: whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings: Lord Gill: *Civil Courts Review* (2009), chapter 12, paragraph 25. But it is also recommended there that this test be construed by reference to the approach in *Scottish Old People's Welfare Council, Petitioners*, and establishing 'a real issue between the parties'. This seems again to hark back to personal or private law conceptions of standing, and perhaps also to confuse the issue of standing with the question of litigating academic issues, forgetting that the Court in Scotland has now (exceptionally) been willing to entertain such issues in public law cases: see *Napier v Scottish Ministers* 2005 SC 307 per the Lord President (Cullen) at paragraphs 4 to 7. It therefore remains to be seen whether, if so when, and in any event what form, any legislation on this issue will be forthcoming.

SIMON COLLINS, Advocate

Acting *pro bono*

FRANCES McCARTNEY

Patrick Campbell & Co. Solicitors

Acting *pro bono*

6 June 2011

APPENDIX

- 1 Friends of the Earth Scotland ('FoES') is a registered society under the Industrial and Provident Societies Acts 1965 to 1978 with its registered office at Thorn House, 5 Rose Street, Edinburgh EH2 2PR. It is a leading campaigning organisation on environmental issues in Scotland, with more than 3000 members. Its objects include promoting and effecting the conservation, restoration and rational use of the environment for the benefit of the community, and disseminating information to the public regarding these matters. FoES has taken part in a number of high profile campaigns on environmental issues, including recently in relation to the Climate Change (Scotland) Act 2009. It makes regular submissions to government policy consultations on environmental issues. It has an ongoing campaign in relation to access to environmental justice, has taken part in numerous planning enquiries, and assisted individuals involved in litigation on environmental issues. It has contributed to Lord Gill's review of civil justice in relation to compliance in Scotland with the Convention on Access to Information, Public Participation and Access to Justice ('the Aarhus Convention').
- 2 Between 2003 and 2006 FoES received funding from the then Scottish Executive to provide environmental and planning advice to local community groups as part of a project entitled Environmental Defence Advocacy. Around 360 local environmental or community groups across Scotland were assisted and advised on local environmental issues or concerns. Some groups were represented at public local inquiries by FoES staff. In addition to representing communities at public local inquiries, FoES have also objected to numerous planning applications which they consider to be of national significance.
- 3 In 2005, FoES lodged a statutory appeal in terms of the Roads (Scotland) Act 1984 against various road orders made to promote a motorway through the south side of Glasgow, referred to as the M74 extension. During the course of that litigation the Inner House of the Court of Session considered a request from FoES for a Protective Expenses Order. The Inner House refused to make such an order, indicating that a change viewed to be of such significance required to be wider considered and debated. During the course of the application, it was considered that the Rules Council would be an appropriate forum to consider such a rule. During the course of the hearing on the case, the Inner House appeared to cast some doubt on whether FoES were an aggrieved person for the purposes of the 1984 Act; the application was subsequently withdrawn on agreement with the Scottish Government that the appeal would be dismissed with no expenses due to or by.
- 4 In 2009 FoES were awarded funding to specifically campaign on access to environmental justice in Scotland. As part of this campaign, a Petition was submitted to the Public Petitions Committee of the Scottish Parliament. The Petition urged the Scottish Government to clearly demonstrate how access to the Scottish courts is compliant with the Aarhus Convention especially in relation to costs, title and interest; to publish the documents and evidence of such compliance; and state what action it will take in light of the recent ruling of the Aarhus Compliance Committee against the UK Government. The Committee, which is still considering the Petition, has obtained information from the Scottish Government, the Scottish Legal Aid Board and other interested bodies on matters arising from the Petition.
- 5 In 2009, during the passage of the Climate Change (Scotland) Bill, FoES with legal assistance, drafted a number of amendments to the Bill, which sought in particular to permit review by the courts of a failure to act in accordance with the Act. The Climate Change (Scotland) Act has been referred to as "world leading" and places various targets on the Scottish Government to set and thereafter meet cuts in climate change emissions. Public bodies including the Scottish Government have various statutory obligations to meet such targets. The draft clause, referred to as the 'justiciability clause' would have provided that when a court was considering any issue of compliance with the Act, that the traditional common law test of title to sue would have been shown by having "sufficient interest" in the subject matter. Reference was made to the provisions of the Aarhus Convention. In addition, the proposed clause would have provided that the court had an obligation to make rulings in advance on the level of costs, if those costs were likely to deter the proper pursuit of a case. The proposed amendment was debated and withdrawn on the Minister advising of discussions with the Lord President that rules on protective expenses orders were being considered by the Court of Session Rules Council, and on the Minister advising that "no evidence from past cases in the environmental field suggests that the Court of Session would not take a suitably wide approach to title and interest in cases that fell within the scope of the convention. Therefore, there is no need for those subsections." The proposed amendment was withdrawn at the Stage 3 debate on 24th June 2009. FoES note that no rules introducing Protective Expenses Orders have yet been finalised, although it is understood that the Rules Council have considered drafts of such rules at various stages. The Lord President's optimism regarding a wide approach to title and interest predates his view in the present case that Aarhus requires no innovation on the law of title and interest in Scotland (Opinion of the First Division, paragraph 43).

Friends of the Earth Scotland

5 Rose Street
Edinburgh
EH2 2PR

Tel: **0131 243 2700**

Email: **info@foe-scotland.org.uk**

www.foe-scotland.org.uk

Friends of the Earth Scotland is a registered Scottish charity SC003442