

**Briefing for Equal Opportunities Committee  
30<sup>th</sup> January 2012****The implications of the Scottish Government's consultation on Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC ('the Consultation') published on 10<sup>th</sup> January 2012 for Friends of the Earth Scotland's Petition to the Scottish Parliament on the implementation of the Aarhus Convention.**

Friends of the Earth Scotland's Petition PE1372 calls 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.

We respectfully ask that the Equal Opportunities Committee reconsider its decision to await the outcome of the Consultation before looking at Petition PE1372 because its scope is limited to:

- Cases falling under the EU Public Participation Directive (PPD), not the Aarhus Convention as a whole;
- Judicial review and statutory review cases at the Court of Session, therefore excluding Aarhus cases that fall under the remit of other courts i.e. the Sheriff Court and only in any event those cases under the PPD;
- Cost capping ('Protective Expense Orders') only, therefore not tackling other aspects of the costs involved in PPD and other Aarhus cases such as the availability of legal aid;
- Further, they do nothing to remedy the lack of substantive review in the current system, which full compliance with both the PPD and Aarhus demands.

We question the Government's position that this Consultation will ultimately lead to action to put compliance with the PPD 'beyond doubt' due to its scope (being mainly concerned with Protective Expense Orders (PEOs)). Further, we think that the proposals in the Consultation paper, if implemented in their current form, are not adequate to avoid further legal action from the European Commission, even in relation to the PPD.

We therefore believe that in publishing this Consultation, the Government has missed an opportunity to consider not just PPD compliance, but Aarhus compliance as a whole (which is what our Petition is concerned with).

**Background to our petition**

The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, requires signatories to meet a certain standard in national legislation under each of the three 'Pillars' identified in its full title. The EU and the UK are signatories to the Convention, and, as justice is a devolved matter, the Scottish Government is bound to comply with it.

EU Directives<sup>1</sup> are in place to facilitate member state implementation of the first two pillars of Aarhus, and in Scotland these are translated into national legislation through into freedom of information<sup>2</sup> and environmental assessment<sup>3</sup> legislation.

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<sup>1</sup> 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.

The third pillar of Aarhus demands the right of open and effective access to justice if rights under the former pillars are denied or if national environmental law has been broken, in a way that is fair, equitable, timely, and free or inexpensive. It also requires that such justice relates to both “substantive and procedural legality of any decision, act or omission”.<sup>4</sup>

On ratification of Aarhus, the European Council (EC) made it very clear that the two Directives did not fully implement the Convention – in particular the Access to Justice provisions in Article 9(3)<sup>5</sup> – and that member states were responsible for complying with these remaining obligations.<sup>6</sup>

It is our position that the Scottish Government has not yet adequately complied with these obligations, and that this has a knock on negative effect on the performance of duties under the first two pillars of Aarhus. This is supported by the fact that in 2011 the EC referred the UK to the European Court of Justice (ECJ) for non-compliance with the access to justice provisions of Aarhus, with regards to costs, based on cases from England and Wales. Our research<sup>7</sup> shows that the Scottish situation regarding costs is demonstrably worse than in England and Wales. Ultimately our campaign is to ensure Scottish Government compliance with Aarhus.

### **The Scottish Government position**

The Scottish Government position is that the availability of legal aid and PEOs ensure Aarhus compliance on costs.<sup>8</sup>

However, it is extremely rare for legal aid to be awarded in environmental cases due to Regulation 15 of the Civil Legal Aid Regulations (2002) which requires that if other people would be affected by the case, they should be expected to help fund it, and therefore legal aid should not be awarded.<sup>9</sup> Because environmental cases, by their very nature, tend to impact on more than one person, this regulation has a particularly adverse effect on such applications. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue.

Only two PEOs have been issued by the Scottish courts, and both set an unaffordably high cap (in *McGinty* the cap was set at £30,000 in *Roadsense* at £40,000). Lord Gill in his 2009 review of the Scottish Civil Courts recommended codification of the rules of court on PEOs (to help provide a degree of certainty to potential litigants), and we lobbied the Government to ensure these rules were consulted on.<sup>10</sup>

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<sup>2</sup> Environmental Information (Scotland) Regulations 2004

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

<sup>3</sup> Environmental Assessment (Scotland) Act 2005 <http://www.legislation.gov.uk/asp/2005/15/contents> and Environmental Impact Assessment (Scotland) Regulations 2011

<http://www.legislation.gov.uk/ssi/2011/139/signature/made>

<sup>4</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9(2) <http://www.unece.org/env/pp/documents/cep43e.pdf>

<sup>5</sup> Aarhus Convention, Article 9(3) “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”

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

<sup>7</sup> See our ‘Tipping the Scales’ report: [www.foe-scotland.org.uk/tippingthescales](http://www.foe-scotland.org.uk/tippingthescales)

<sup>8</sup> See Scottish Government correspondence with the Public Petitions Committee

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>

<sup>9</sup> For a fuller examination of the problem with legal aid see Frances McCartney, ‘Public interest and legal aid’ in Scots Law Times: Issue 32: 15.10.2010

<sup>10</sup> This consultation was promised for the summer of 2011 in response to [PQ S4W-00947](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/40063.aspx) (answered July 2011) and we understand that the delay until now may be due to ongoing negotiations with the EC, however, the Government have been unforthcoming on this

The Government states in the Consultation that its purpose is to put compliance with the PPD 'beyond doubt' as a result of the EC's infraction proceedings. We consider that both the scope and nature of the proposals set out in the Consultation are insufficient to comply with the PPD, let alone with Aarhus as a whole which is what our Petition (and international law) calls for.

### **Scope of the Consultation**

By its own admission the Scottish Government consultation on the codification of the rules of court for Protective Expense Orders only attempts to ensure compliance with the access to justice provisions of the Public Participation Directive. However, the Government makes clear that it believes the adoption of such rules would put Scottish compliance with the PPD 'beyond doubt'.<sup>11</sup>

The access to justice provisions within the PPD demand "fair, equitable, timely and not prohibitively expensive" access to justice to review both the "substantive and procedural legality of decisions, acts or omissions".<sup>12</sup>

The proposals laid out in the Consultation do nothing to tackle the issue of substantive review (in other words, the examination by the courts of the merits of a case, rather than just whether due process was followed). In fact, the Scottish Government has stated that in principle it objects to substantive review as a function of the courts.<sup>13</sup>

Nor do the proposals set out in the Consultation fully tackle the issue of prohibitive expense. When taking a case to court, costs fall into two categories: your own legal fees and outlays, and the potential for liability for the other sides' costs if you lose the case (the 'loser pays principle').

All that Protective Expense Orders can do is limit the amount of the other sides' costs a person, community or NGO would have to pay if they lost their case. The issue of raising your own legal fees to take forward an action remains. In judicial review cases costs can run into tens of thousands for your own side alone. Existing legal aid regulations effectively excludes people from accessing legal aid in public interest environmental cases, and lawyers are reluctant to act on a speculative basis due to the complexity of cases, a lack of specialism and case management within the court system.

Therefore, even if the Government's proposals in relation to PEOs were satisfactory (and we consider that they are not<sup>14</sup>), the area of consultation is too limited to put compliance with the PPD beyond doubt.

### **Compliance with Aarhus beyond the PPD**

The PPD only amends Directive 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control). Aarhus cases can fall under other, un-amended Directives such as the Strategic Environmental Assessment Directive, and Article 9(3) makes it clear that the Convention applies to national environmental legislation.<sup>15</sup>

Further, decisions of the ECJ have indicated that Aarhus principles apply to all questions of European environmental law even although not all relevant Directives were amended in light of the Convention.<sup>16</sup>

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<sup>11</sup> Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, para 21

<sup>12</sup> Public Participation Directive 2003/35/EC Article 3.7 and 4.4

<sup>13</sup> In Ministerial correspondence dated December 2011 (hard copies available)

<sup>14</sup> We will provide a full response to the Consultation, however, in brief: the presumed level of cap is set too high; and the inclusion of an automatic cross cap could leave individuals who take and win a public interest case considerably out of pocket for their trouble.

<sup>15</sup> Aarhus Convention, Article 9(3)

<sup>16</sup> In Case C-240/09, for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej

For example Marco McGinty's case against the Scottish Government's decision to include a coal fired power station at Hunterston in the NPF2 fell under the SEA Directive, and therefore would not be covered by the cost capping proposals outlined in the Consultation. Barriers regarding prohibitive expense and substantive review in relation to all environmental cases – not just those falling under the PPD – must be dealt with to ensure full Aarhus compliance.

Aarhus does not just cover environmental matters that are in the public interest. It also applies to private law matters<sup>17</sup> (e.g. actions for nuisance), which could be dealt with in the Sheriff Court or the Court of Session. Again, the Government proposals will do nothing to tackle this area of the law, as they are limited to 'judicial reviews and statutory reviews of decisions by public authorities covered by the PPD.'<sup>18</sup>

The Consultation notes that it is the Government's intention to take its "obligations under international law seriously" and that it will take them into account under a wider reform of civil litigation. Specifically, the Government points to the Taylor Review on the cost and funding of civil litigation, and moves to reform judicial review as recommended by Lord Gill.

However, the Taylor Review has no environmental expertise on it, nor a specific environmental remit (and we have concerns about the transparency with which appointments to its review group were made).<sup>19</sup> Further, it appears the Government deliberately confined the scope of the Consultation to PPD cases, while the Ministry of Justice and the NI Department of Justice are currently consulting on proposals for rules for Protective Cost Orders for cases falling under the Aarhus Convention as a whole, in those jurisdictions.<sup>20</sup>

The Scottish Government has clearly stated its objection to a fundamental aspect of Aarhus compliance, that of substantive review by the courts. Further, in correspondence via the Public Petitions Committee, the Government has repeatedly denied that they are in non-compliance with Aarhus.<sup>21</sup>

This implies that the Government is not committed to implementing full Aarhus compliance. The recent Consultation does little to allay that fear, which is why we would encourage the Committee to take action before it ends.

### **Next steps**

A Parliamentary investigation would hold the Government to account on what is a muddled position at best, and deliberately vague and contradictory at worst. An Inquiry could tap into expertise from NGOs and the legal community in Scotland and from other similar or exemplary jurisdictions.

We feel that Equal Opportunities Committee is particularly well placed to take a broad approach to this, because both the impacts of environmental injustice and the key barriers to accessing justice in environmental matters relate to the equal opportunities agenda. FoES focus is on access to justice in environmental matters for obvious reasons, but Aarhus provides a legally binding standard for access to justice that really should be applied to all areas of public law.

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republiky, judgement of Grand Chamber ECJ of 15th March 2011 "It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law". See Official Journal of the European Union C130/4

<sup>17</sup> Aarhus Convention, Article 9(3) relates to challenges to acts or omissions by 'private persons' as well as public authorities in relation to national environmental laws.

<sup>18</sup> Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, pg 8

<sup>19</sup> See Questions S4W-02456, S4W-02455, S4W-02454 answered by Kenny MacAskill on 8<sup>th</sup> September 2011 and Questions S4W-01007 answered 7<sup>th</sup> July 2011 and S4W-01008 answered 8<sup>th</sup> July 2011

<sup>20</sup> Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, para 25

<sup>21</sup> Most recently, see letter from Scottish Government to Public Petitions Committee dated 26<sup>th</sup> August 2011

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>