



Parliamentary briefing: Courts Reform (Scotland) Bill

Friends of the Earth Scotland and the Environmental Law Centre Scotland

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Introduction

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) welcome the opportunity to brief Parliament on the Courts Reform (Scotland) Bill. Our interest in this legislation stems from our campaign for full compliance with the UNECE Aarhus Convention in order to tackle the barriers that individuals, communities and NGOs face in attempting to undertake legal action to protect the environment.

While we broadly welcome the Bill, which implements many of the recommendations of Lord Gill's Review of the Scottish Civil Courts, its impact on key areas of Aarhus compliance, particularly costs and substantive review is very limited.

We note and **warmly welcome the Justice Committee's recognition of "the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law"** and its "[sympathy] to calls for the introduction of an environmental tribunal for Scotland,"¹ as an important step towards a fair, just and Aarhus-compliant legal regime.

The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the 'Aarhus Convention'), to which the EU and the UK are signatories, recognises every person's right to a healthy environment – as well as his or her duty to protect it.

Aarhus places an active duty on citizens to 'protect and improve the environment for the benefit of the present and future generations'.² This illustrates the wider policy issues that drive environmental law and set it apart from other areas of public civil law. It also explains why the Government is obliged to improve access to justice in environmental matters, and why it must ensure that ongoing reform to the civil justice system complies with Aarhus in this respect.

It is our position that **Scotland is in breach of obligations in relation to access to justice in environmental matters, and that there are systemic issues with obtaining access to justice in environmental matters in Scotland**. This is supported by the recent ruling of the European Court of Justice against the UK.³ We outline the key issues below.

Concerns regarding the Court Reform Bill

We are concerned that aspects of the Bill could actually exacerbate certain barriers to access to justice in environmental cases. In particular, **the introduction of a three-month time limit for Petitioners, where no time limit has previously been in place will cause problems for petitioners in complex cases and particularly where there is uncertainty in funding**. There is a real issue in Scotland with a finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, and the introduction of a presumptive three-month time limit will exacerbate this. It will also create a particular barrier for community groups who will find it extremely time-consuming to

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

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

² Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

³ European Commission vs United Kingdom of Great Britain and Northern Ireland Case C-530/11, <http://bit.ly/1cyQM1y>

organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

We note that there is often a considerable grey area as to when exactly the time limit starts from in respect of the exact decision to be challenged. Although a degree of flexibility is contained in the Bill, with the possibility for granting of extensions, a presumptive three-month limit is likely to put potential litigants off (the 'chilling effect').⁴ While we are broadly supportive of the introduction of a leave to proceed stage for judicial review under the Bill, we note that there is a risk that combined with a three month time limit, a leave stage could actually hinder access to justice as petitioners struggle to access funds and lawyers to marshal the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

Given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, **if the Government proceed with introducing time limits, it should instead consider a presumptive time limit of a year for such cases.**

Prohibitive Expense

Aarhus requires that access to justice in environmental cases 'must not be prohibitively expensive'. In Scotland, raising challenges to environmental decisions will generally be by way of judicial review or statutory review. While the introduction of Protective Cost Orders (PEOs) is a step in the right direction, the rules ultimately assume that a sum of £35,000 – the presumptive amount an unsuccessful petitioner would be expected to pay – is not prohibitively expensive. Yet average annual earning in Scotland fall well below this sum, and evidence suggests that deprived communities suffer from the brunt of poor environmental decision making, with people living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality,⁵ this limit therefore disproportionately impacts on these communities. The PEO rules do not apply to all Aarhus cases,⁶ and in the context of barriers to accessing legal aid in public interest cases and increases in court fees,⁷ there is **no doubt that judicial review remains very expensive, prohibitively so for the ordinary person.**

It is **beyond the scope of the Court Reform Bill to tackle the issue of prohibitive expense in environmental (or any) cases.** Nor has Sheriff Principal Taylor's Review of the costs and funding of civil litigation mopped up any outstanding issues in this respect,⁸ as the remit of the review did not extend to examining the obligations regarding expenses and funding of environmental litigation under the Aarhus Convention despite Government assurances that it would.⁹ The Government must act to avoid further legal proceedings from the European Commission.

Substantive Review

Aarhus requires both procedural and substantive review, however, the Scottish Courts rarely stray into this territory (in other words, an examination of the merits of a case, rather than just whether

⁴ See for example *Bova and Christie v The Highland Council and others* [2013] CSIH 41 <http://www.scotcourts.gov.uk/opinions/2013CSIH41.html> and also *R (on the application of Maria Stella Nash) v Barnet London Borough Council & (1) Capita Plc (2) EC Harris LLP (3) Capita Symonds (Interested Parties)* [2013] EWHC 1067 (Admin)

⁵ 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>

⁶ The Rules only apply to cases falling under the Public Participation Directive. A number of high profile cases including *McGinty vs Scottish Ministers* and *Uprichard vs Fife Council* with significant expenses would not fall under the scope of the rules.

⁷ When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, the Scottish Legal Aid Board (SLAB) looks at whether 'other persons' might have a joint interest with the applicant. If this is found to be the case 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. See our briefing to the European Commission on the excessive costs of challenging environmental decisions in Scottish Courts <http://foe-scotland.org.uk/node/1624> for more info.

⁸ Scottish Government consultation on Legal Challenges, 25-29 'The [Taylor] review...will look among other things at the cost and funding of public interest litigation, including environmental actions' <http://www.scotland.gov.uk/Publications/2012/01/09123750/2>

⁹ Confirmed in email correspondence with Kay McCorquodale, Secretary Taylor Review, 15 March 2013

due process was followed) and can be openly reluctant to do so.¹⁰ **Beyond enabling greater specialisation in the courts, the Bill does nothing to tackle the issue of substantive review.** While we recognise the need to ensure that the courts do not become a 'vehicle to articulate what are essentially political arguments',¹¹ **we consider that there is scope to revise judicial review to incorporate a substantive element including the merits of a case.**

Environmental decision making takes place in a highly complex framework of legislation – not all specifically environment-related – and is initiated and regulated by numerous public authorities and bodies. **A specialist environmental court or tribunal offers the chance to rationalise and simplify the way this legislation is dealt with, and could also give the judiciary greater authority and confidence examining issues of substantive review,** as well as providing speedier and better decisions.

What FoES and ELCS are calling for

While the Court Reform Bill presents an important opportunity to deal with aspects of certain barriers, it cannot in itself resolve the issue of Aarhus compliance, and we welcome the Justice Committee's recognition of this.

The Government's 'Making Justice Work' programme (MJW) 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 access to environmental justice in Scotland.

However, we do not think the proposals outlined to date under MJW, including those within this Bill, even in their best possible form, will ensure compliance with Aarhus and avoid further legal action from the European Commission in relation to the Public Participation Directive.

Therefore we ask MSPs to call on Government to:

- **Fulfil its manifesto commitment to consult on options for an environmental court or tribunal in Scotland and establish an Expert Working Group to look into the matter**
- **Reform the judicial review procedure to enable judges to review the merits of a case where appropriate**
- **Introduce a presumptive time limit of a year rather than the proposed three months for such cases**
- **Reform Civil Legal Aid Regulations to enable individuals and communities apply for legal aid in public interest cases**
- **Extend rules of court on Protective Expense Orders to include all public interest environmental cases, and review the rules for Aarhus compliance in light of the recent ruling from Europe**
- **Review the policy of full cost recovery in relation to environmental cases in the context of the requirement for proceedings to be 'not prohibitively expensive'**

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¹⁰ For example Lord Brailsford in *McGinty v Scottish Ministers* <http://www.scotcourts.gov.uk/opinions/2011CSOH163.html>

¹¹ 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