



Ministry of
JUSTICE

Cost Protection for Litigants in Environmental Judicial Review Claims

We would welcome responses to the following questions set out in this consultation paper.

Please email your completed form to: steve.uttley@justice.gsi.gov.uk

This is a joint response from Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS).

FoES and ELCS are campaigning for proper implementation of the Aarhus Convention in Scotland, and we welcome the opportunity to comment on the Ministry of Justice's consultation. However, as these proposals are targeted at England and Wales, our role in responding is limited, and as we wish only to add matters arising particularly in Scotland, we have responded outwith the set questions. Although we appreciate that the Scottish Government announced its own consultation *Legal Challenges to Decisions By Public Authorities Under the Public Participation Directive 2003/35/EC* on 10 January 2012, which relates to compliance with Article 9 in a limited number of cases, the UK Government retains responsibility for Scotland's compliance. Accordingly we will copy our response to the Scottish Government consultation to you in due course given the limitations the current Scottish consultation has.

We note that we have had sight of and endorse the Coalition for Access to Justice for the Environment (CAJE) response to this consultation.

We wish to highlight the following points in connection with the current thinking of the Ministry of Justice regarding Aarhus compliance in England and Wales, with our comments only in relation to how these might affect the Scottish position.

We note CAJE's suggestion that the usual presumption cap should be £3,000. In a Scottish context, the sum of £3,000 would be difficult if not impossible for many community groups to find. Based on the experience of the Environmental Law Centre, we would expect that community groups in Scotland who wish to raise a judicial review action would have access

to fewer funds, and probably a smaller potential membership than many in England & Wales. We think it important to raise this matter now, should the rules in England & Wales influence how the rules develop in Scotland.

Although we accept that PCOs are an important part of the overall system of compliance with the requirements of Aarhus, we are concerned that there is a presumption within the consultation paper that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative basis. Again we are concerned about this presumption applying in a Scottish context. Judicial reviews being brought by community groups, NGOs or individuals are relatively rare in Scotland; there is no specialism within the court system and no active case management. Often the judge only sees the papers on the first morning of the case. In other words, it is difficult to persuade Counsel and solicitors to act on a speculative basis – by and large Scottish environmental NGOs do not have in-house solicitors – and this hinders the expertise and development of environmental law in Scotland.

There are inherent difficulties with legal aid and environmental claims in Scotland (see McCartney 'Public Interest and Legal Aid' in Scots Law Times: Issue 32: 15.10.2010). This means it is unlikely that funding will be granted through a public route. Accordingly it seems to us that it would be difficult for Scotland to comply with Aarhus without considering this issue.

We note CAJE's submissions regarding the omission within the paper on undertakings for damages. The same issue applies in Scotland albeit in the context of damages for wrongful interdict, and the same issue has been omitted from the current limited consultation paper in Scotland.

About you

Please use this section to tell us about yourself

Full name	Mary Church
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If you would like us to acknowledge receipt of your response, please tick this box	<input checked="" type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Responding on behalf of Friends of the Earth Scotland and the Environmental

Law Centre Scotland.
