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Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to the Scottish Government consultation on Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC

About Friends of the Earth Scotland

Friends of the Earth Scotland is an independent Scottish charity with a network of thousands of supporters, and active local groups across Scotland. We are part of Friends of the Earth International, the largest grassroots environmental network in the world, uniting over 2 million supporters, 76 national member groups, and some 5,000 local activist groups - covering every continent. We campaign for environmental justice: no less than a decent environment for all; no more than a fair share of the Earth's resources.

About the Environmental Law Centre Scotland

The Environmental Law Centre Scotland is a charitable law centre using law to protect people, the environment and nature, and increase access to environmental justice. We help protect the environment and support sustainable approaches and solutions by providing advice, advocacy, training, updates and research. We work with both local communities and other non-government organisations to use law to protect the environment. We seek to test the law, and work to ensure that Scotland complies with its European and international obligations.

Introduction

FoES and ELCS are working together for improved access to environmental justice in Scotland and it is with this in mind that our response is framed. Since 2010 FoES's Access to Environmental Justice campaign has sought to expose the barriers that individuals, communities and NGOs face in attempting to undertake legal action in environmental matters. We very much welcome the opportunity to respond to the consultation paper. We note that we endorse the response of the Coalition for Access to Justice for the Environment (CAJE).

Context

The UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention) recognizes every person's right to a healthy environment – as well as his or her duty to protect it. The EU and the UK are signatories to the Convention, and as justice and the environment are devolved, the Scottish Government is bound to comply with the Convention.

EU Directives on public access to environmental information (Directive 2003/4/EC) and providing for public participation in planning (the 'Public Participation Directive' 2003/35/EC)

are in place to facilitate member state implementation of the first two pillars of Aarhus.¹ In Scotland these are translated into freedom of information² and environmental assessment³ legislation.

The third pillar of Aarhus requires that members of the public have access to justice if *rights under the former pillars are denied* (i.e. those enshrined within the PPD and Directive 2003/4/E) and if *national environmental law has been broken*.⁴ Under Article 9 (4) these procedures must provide effective remedy and be “fair, equitable, timely, and not prohibitively expensive”.⁵

On ratification of Aarhus, the European Council (EC) made it very clear that the Public Participation Directive (PPD) and the Public Access to Environmental Information Directive did not fully implement the Convention – in particular its access to justice provisions – and that member states were responsible for complying with these remaining obligations.⁶

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.⁷

Further, decisions of the European Court of Justice 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.⁸

¹ 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.

² Environmental Information (Scotland) Regulations 2004

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

³ 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>

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

- Article 9(1) states: “any person who considers that his or her request for information under article 4 [Access to Environmental Information] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.”
- Article 9(2) requires that “members of the public concerned...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 [Public Participation].
- Article 9(3) states: 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.

⁵ Aarhus Convention Article 9 (4)

⁶ 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>

⁷ Aarhus Convention, Article 9(3)

⁸ In Case C-240/09, for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej 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

We consider that the Scottish Government is in fundamental breach of its access to justice obligations not only under the PPD, but also under the third Pillar of the Aarhus Convention as a whole, and that this has a knock on effect on the performance of other Aarhus obligations, since there is little credible threat of legal action from citizens wishing to challenge decisions adversely impacting on the environment. We do not think the proposals outlined in this Consultation, even in their best possible form, will ensure compliance with Aarhus, or the PPD, as they relate only to the potential liability for the other sides' costs, and do nothing to remedy prohibitive expense in relation to the petitioners' own costs.

Scope of this Consultation

The proposals set out in this Consultation are for the codification of the rules of court on Protective Expense Orders (PEOs), in judicial reviews and statutory reviews of decisions of public authorities falling within the scope of the Public Participation Directive 2003/35/EC (PPD). Lord Gill recommended codification of the rules of courts for issuing PEOs in his 2009 Review of the Civil Courts. However, the Consultation indicates that the intention of these proposals is to put compliance with the PPD 'beyond doubt' following infraction proceedings from the European Commission (EC) in relation to the cost of environmental cases.⁹

The Consultation paper highlights that the proposals only apply to cases falling under the PPD, unlike similar rules proposed in England, Wales and Northern Ireland that apply to all Aarhus cases. Therefore, the proposals exclude a range of possible Aarhus cases that would fall under other European and domestic environmental legislation.

It goes on to state that the Taylor Review 'will look among other things at the cost and funding of public interest litigation, including environmental actions'.¹⁰ The paper strongly implies then, that the Taylor Review will see to the broader requirements of Aarhus compliance on costs. However, we met with the Secretary to the Taylor Review on 9th February, and we note that the Taylor Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the Aarhus Convention.

We consider therefore that the limited scope of this Consultation is not adequately accounted for, given that it does nothing to tackle the issue of prohibitive expense in relation to Aarhus cases falling outwith the PPD, nor to tackle barriers faced by individuals and communities in trying to raise their own costs to take a case.

In our view the consultation is out of step with the general public opinion on the issue of access to justice. We believe that there would be broad support for a wider scope of rules on obtaining PEOs in environmental cases, including cases such as Mr McGinty's and Ms Uprichard's which are not taken under the PPD.¹¹

In limiting reforms to proposals for PEOs for judicial reviews and statutory reviews under the PPD, we consider that the Scottish Government ultimately leaves the door open to further legal action from the European Commission.

objective of effective judicial protection of the rights conferred by European Union law". See Official Journal of the European Union C130/4

⁹ Scottish Government consultation on Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC, 19-21

¹⁰ Scottish Government consultation on Legal Challenges, 25-29

¹¹ We would refer the Scottish Government to the strong local campaign against the proposed coal power station at Hunterston, and to recent media coverage regarding the granting of a Protective Cost Order in the case of *Uprichard v Scottish Ministers* by the UK Supreme Court, in particular the Scotsman leader article published on 2nd April.

Aarhus Compliance

The cost of access to justice in environmental matters

Aarhus demands that access to justice is not ‘prohibitively expensive’,¹² but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not), with the costs of taking a judicial review – under which most Aarhus cases would be taken – together with liability for expenses running into tens of thousands of pounds. For example, in *Uprichard v Fife Council*, the petitioner faces a total bill of £173,000. In *McGinty v Scottish Ministers*, where Mr McGinty was awarded the first ever PEO in Scotland, the PEO was granted at a cap of £30,000. The estimation of his costs was around £80,000 if he was to lose. In *Forbes v Aberdeenshire Council & Trump* the petitioner was faced with the prospect of paying thousands of pounds of the other side’s costs. The risk of incurring such enormous costs can deter even those extremely sure of their ground, and this is particularly off-putting to those taking a public interest case.

Our position that the Scottish Government has not yet adequately complied with its access to justice obligations under Aarhus is supported by the ongoing infraction proceedings against the UK for non-compliance with the Public Participation Directive (which contains some access to justice provisions of Aarhus), particularly in relation to costs. The Commission pursued infraction proceedings to the European Court of Justice (ECJ) in April 2011.¹³ While the referral relates to complaints regarding English cases, our research¹⁴ shows that the Scottish compliance is demonstrably worse than in England and Wales, and the examples noted above illustrate how prohibitively expensive access to justice in environmental matters can be in Scotland.

The Scottish Government position (as stated in correspondence with the Scottish Parliament Public Petitions Committee¹⁵) that the availability of legal aid and Protective Expense Orders (PEOs) ensure Aarhus compliance in terms of costs is not credible. In September 2010 the Aarhus Compliance Committee found that even taken together, the provisions England and Wales on costs (legal aid, Conditional Fee Agreements, ATE insurance and Protective Costs Orders) “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 any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty.”¹⁶

Only two protective expense orders have been granted by the courts to date in Scotland, and in each, the cap set high: *McGinty*¹⁷ at £30,000, and *RoadSense*¹⁸ at £40,000. While this Consultation purports to set out to remedy this, as outlined above, the proposals are limited to only certain cases falling under the PPD. Therefore, Mr McGinty’s case which saw

¹² Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9

¹³ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML&aged=1&language=EN&guiLanguage=en>

¹⁴ See our ‘Tipping the Scales’ report: <http://www.foe-scotland.org.uk/tippingthescales>

¹⁵ See Petition PE1372 <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>

¹⁶ 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, see 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

¹⁷ *Marco McGinty v Scottish Ministers* [2010] CSOH 5 <http://www.scotcourts.gov.uk/opinions/2010csoh5.html>

¹⁸ *RoadSense and William Walton v Scottish Ministers* [2011] CSOH 10 <http://www.scotcourts.gov.uk/opinions/2011CSOH10.html>

the first PEO issued by the Scottish Courts, but fell under the Strategic Environmental Assessment Directive, would not be covered by the rules outlined in the Consultation.

Further, unlike in England and Wales, it is extremely rare for legal aid to be awarded in environmental cases in Scotland. When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, SLAB looks at whether 'other persons' might have a joint interest with the applicant. 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. In addition, the test states that the applicant must be 'seriously prejudiced in his or her own right', 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 applicant.¹⁹ 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 without necessarily causing individual serious prejudice. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue.

Moreover, community groups cannot apply for legal aid in Scotland. By contrast, England and Wales have a system that 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. We understand that the recent reform of legal aid in England and Wales has not altered the availability for legal aid for environmental judicial reviews. 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. We consider that removal of Regulation 15 is essential for Aarhus – and Public Participation Directive – compliance.

Given the limitations of legal aid in environmental cases, 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. Judicial reviews being brought by community groups, NGOs or individuals are relatively rare in Scotland. There may be a number of reasons for that such as costs, knowledge and availability of legal advice. By and large Scottish environmental NGOs do not have in-house solicitors, and this hinders the expertise and development of environmental law in Scotland.

Why Aarhus cases are different

Most environmental or Aarhus cases are matters of public interest. Paying for justice in civil matters acts as an incentive to settle private disputes outside of court, and therefore with minimal or no expense to the public purse. Public law is very different, as the petitioner rarely has any personal financial interest in the matter.

In the recent Supreme Court ruling in *Axa v Lord Advocate and others*, two of Scotland's senior judges made it clear that the development of public law in Scotland had been severely hindered by decades of judge made law, and pointed out that certain private law principles had 'no place' in judicial review.

It is logical that if an individual or community exercises their democratic right to challenge poor decision-making by public authorities, or breaches of environmental law, the public purse should bear the cost of both sides of the litigation – where there is a case to be

¹⁹ For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' as above

answered. In cases against public authorities or developers, Aarhus requires the state to provide a more level playing field for individuals against experienced repeat litigants, often with commercial interests, and money to pay for legal representation.

There is of course a responsibility on the part of citizens not to pursue 'frivolous' cases at the expense of the public purse, but this can be checked at the outset by the courts at a 'permission' stage (First Orders could be reformed to cater for this) where unmeritorious cases are filtered out. But Aarhus also actively places a duty on citizens to "protect and improve the environment for the benefit of the present and future generations".²⁰ This illustrates the wider policy issues that drive environmental law and set it apart from other areas of public law. It also explains why the Government is obliged to introduce certain measures in relation to access to justice in environmental matters.

Equally however, it is the duty of public authorities to be open and consultative and to seek to make the best informed decisions, which in turn reduces the risk of challenge and therefore the cost to the public purse of both the challenge and defence of cases. We would add that when considering the impact of the cost of litigation on the public purse, it is appropriate also to highlight that public authorities should use taxpayers money judiciously in appointing counsel and outside solicitors.

It is important to note that Aarhus covers all environmental cases, therefore the Scottish Government must also make provision to tackle prohibitive expense in private environmental cases under the terms of the Convention.

We are aware that the Taylor Review is considering whether PEOs should be extended to all public interest cases. We are not opposed to PEOs – or other measures to tackle prohibitive expense – being available in other public interest cases, and can see benefits in other areas of social justice where decisions might have wide implications. However, we consider that Aarhus cases demand special treatment by virtue of the UK and the EU's ratification of the Convention.

Responses to Consultation questions

1. In your opinion should there be a scheme for the capping of costs in legal challenges to public authorities' decisions within the scope of the PPD?

Protective Expenses Orders are one way of tackling the issue of prohibitive expense, as they can provide some certainty and clarity in relation to costs from an early stage. However, we consider that the best way to ensure Aarhus (and PPD) compliance in this area is to introduce 'Qualified One Way Cost Shifting' (QuOWCS), where unsuccessful litigants should not be ordered to pay the costs of any other party unless they had acted unreasonably taking the case. The Scottish Government should introduce QuOWCS²¹ for all environmental cases where there is a public law point to be answered.

This is the cost regime recommended by senior English judges, who point to inherent shortcomings with cost capping orders.

The Jackson Review (2010) looked at the costs of civil litigation in England and Wales.

²⁰ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

²¹ We refer to Qualified One Way Cost Shifting (QuOWCS) to distinguish between the current proposals for Protective Expense Orders and the preferred regime as recommended by Lords Sullivan and Jackson. The Scottish Government could design rules of court for Protective Expense Orders that effectively introduce QuOWCS.

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 as compliance 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'.²²

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. 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' by ensuring all possible costs are up front from the start.

Sullivan's 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".²³

We are disappointed with the Scottish Government's reasoning that "a general requirement on the petitioner to bear some liability will help discourage frivolous or vexatious litigation".²⁴ Individuals and communities do not undertake judicial review proceedings lightly; the commitment required to undertake such action extends far beyond finances, and proceeding with a judicial review can be extremely time-consuming and stressful.

Further, First Orders could be reformed to cater for a 'permission requirement',²⁵ (where claimants must seek the court's permission to take a case) which could be applied to all public law environmental cases, effectively ensuring that unmeritorious or poorly argued cases fall at the first hurdle. This filter would deal 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, and dispense with the perceived need for a financial disincentive to undertake proceedings.

We note that the assertion that "removing a petitioner's liability to costs goes beyond the requirements of the PPD, which simply requires that remedies should not be 'prohibitively expensive'"²⁶ fails to take account of the fact that in losing a case the petitioner would continue to face prohibitive expense in relation to their own costs. For example, if a case comparable to Mr McGinty's judicial review were awarded a PEO under these proposals (noting of course that Mr McGinty's actual case would *not* be eligible under these proposals as it does not fall within the scope of the PDD), the petitioner's liability in losing would only be reduced from £80,000 to a still prohibitively expensive (and therefore not Aarhus compliant) £55,000.

We consider that in addition to removing Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, to open up legal aid to environmental cases, changes could be made to procedure across all types of judicial review to make it a speedier and more cost-effective

²² Jackson, Review of Civil Litigation Costs: Final Report (2010), part 5, chapter 30 para 4.1

²³ Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 30

²⁴ Scottish Government consultation on Legal Challenges, 34

²⁵ 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.

²⁶ Scottish Government consultation on Legal Challenges, 35

procedure. In particular, the First Orders could be used as a case management direction, with the Respondent authority asked to lodge detailed answers in advance. Preliminary issues such as title and interest (now referred to as sufficient interest²⁷) and whether a PEO (or Qualified One Way Cost Shifting) is to be granted, should be raised and ruled on as early as possible, with the same judge assigned to the case throughout. Much of the delay in judicial review cases relate to the time taken to issue decisions, or time between different court days to hear the case. We think that insufficient attention has been paid to these matters, and the potential for changing to judicial review procedure to deal with the cost of taking this type of action.

3. Should the limit be set at £5,000?

4. Should the figure be higher or lower than £5,000?

If however the Government and the Court of Session Rules Council proceed with codification of the rules of court for PEOs on the basis that the petitioner must bear some liability for the respondent's costs, we note that we consider the £5,000 presumed cap is too high, and litigation will remain prohibitively expensive for the 'ordinary person'. There is no rationale for the presumed level of cap being set at £5,000 other than that it is proposed in England and Wales for similar rules.²⁸

In a Scottish context, based on the experience of the Environmental Law Centre Scotland, the sum of £5,000 would be difficult if not impossible for many community groups to find, let alone individuals. As outlined above, we are concerned with the presumption that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative, or no-win no-fee, basis. In our experience this is not the case. In other words, even if the cap of £5,000 is appropriate for England & Wales (which we doubt it is) it is not appropriate in Scotland. In fact, in evidence to the Aarhus Compliance Committee, the UK noted that Protective Cost Orders could be awarded for as little as £1,000: we consider that this is the maximum a presumed limit on PEOs should be set at.

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,²⁹ therefore such a limit would disproportionately impact on these communities. Should an individual or community lose the case they would additionally be liable for their own sides' fees that could amount to tens of thousands of pounds (under this regime, the Government considers at least £30,000 in addition to the PEO).

The level of the PEO cannot be viewed in isolation in relation to the question of what is 'prohibitively expensive'. The proposed limit is particularly unfair considering that legal aid is effectively denied to those seeking to pursue a public interest environmental case, and given the Government's proposals do nothing to tackle difficulties in obtaining legal aid for environmental cases, presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which, as discussed above, has a particularly adverse effect in environmental cases.

²⁷ See *Axa v Lord Advocate and others* [2011] UKSC 46, and in particular the judgements of Lord Hope and Lord Reed as to the proper test for standing in judicial review cases

²⁸ Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, para 36. We note that in their response to the Ministry of Justice's proposals for Protective Cost Order rules, the Coalition for Access to Justice for the Environment (CAJE) consider £5,000 is too high to comply with Aarhus.

²⁹ 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>

- 12. Should there be an automatic cross-cap?**
13. If introduced, should the cross-cap be set at £30,000?
14. Should the figure be higher or lower than £30,000?

We disagree with the Scottish Government’s reasoning that a cross cap is required to create a more level playing field, and “ensure the petitioner does not run up excessive costs”.³⁰ There is no requirement under Aarhus to consider expenses from the respondents’ perspective. Most Aarhus cases would be against a public authority or developer, who not only are considerably more likely to be experienced ‘repeat litigants’, but also to have commercial interests at stake, and money to pay for legal representation.

We recognise that “public resources are not unlimited”³¹, however the permission requirement deals with vexatious litigation, and ensures that only cases where a strong, arguable claim exists would go ahead. In this context it is appropriate that public authorities (and developers) are required to respond to such challenges. A key benefit of improved access to justice is that the credible threat of legal action leads to improved decision making by public authorities, who know that their decisions *can* be challenged. Ultimately this could lead to better use of public resources and decreased litigation.

Further, the inclusion of an explicit cross-cap at £30,000 is ultimately not compliant with Aarhus as it could leave individuals who take and win a public interest case considerably out of pocket for their trouble. For example, again assuming that Mr McGinty’s case was eligible under these proposals, had he won his case he would have remained liable for up to £20,000 of his own fees given the explicit £30,000 cross-cap. This possibility would act as a considerable financial disincentive to pursue public interest cases, where there is rarely any financial or private gain for the petitioner.

- 5. Should the amount be left to the Court’s discretion?**
6. Should challenges to the limit be allowed?
15. Should it be possible to challenge the cross-cap?

The Consultation indicates that the proposals will “provide a level of certainty required by the PPD”.³² However, if either cap is left to the Court’s discretion or open to challenge the system retains a level of uncertainty over liability for costs that would continue to see a ‘chilling effect’ – where uncertainty about potential liability puts people off commencing cases.

Much of the Aarhus Compliance Committee’s concern regarding the UK cost regime focussed on the uncertainty that potential litigants faced, noting that “the considerable discretion of the courts...without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty”,³³ and subsequently finding the UK non-compliant on costs.

We consider that a PEO system that leaves the level of cost cap up to judicial discretion or open to challenge would not be compliant with the Aarhus Convention or the PPD, and therefore oppose it in principle. Further, in practice, leaving caps open to challenge renders the system more costly and time-consuming, as petitioners (and respondents) will need to

³⁰ Scottish Government consultation on Legal Challenges, 37

³¹ Scottish Government consultation on Legal Challenges, 38

³² Scottish Government consultation on Legal Challenges, 32

³³ Aarhus Compliance Committee ruling on communication, ACCC/C/2008/33, 135, at

<http://www.unece.org/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf>

respond to such challenges, therefore increasing the risk of running up high costs before even the permission stage is passed.

20. Should the proposed rules apply to appeals?

21. If in the proposed rules are to apply to appeals, how should PEOs be treated?

22. In appeal proceedings, should a higher presumptive limit be set?

Given that the aim of the proposed rules is to ensure that environmental litigation is not prohibitively expensive in line with the requirements of the Aarhus Convention, it would be inconsistent to increase the level of a petitioner's PEO in the case of an appeal(s). Further, such a possibility would retain an element of uncertainty that is highly unlikely to be compliant with the Convention.

27. Are you aware of specific instances where a party has been deterred from bringing a case within the scope of the PPD due to concerns over potential liability for adverse costs? If so, please provide specific details including the matter you wished to challenge.

Research conducted by the Environmental Law Foundation indicates the extent to which costs serve to put off potential litigants in England and Wales. This research identified 210 potential judicial review cases between 2005 and 2009, of which 97 were judged to have a reasonable prospect of proceeding. Of these, over half (54 cases or 56%) did not proceed explicitly for reasons of cost.³⁴ While similar research has not been carried out in Scotland, the experience of the ELCS 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. We note that these figures should be considered bearing in mind the fact that court action is usually a last resort and not likely to be undertaken lightly, therefore we do not consider that all of these litigants would have wished to pursue action even if standing and cost barriers had been removed.

We also refer the Scottish Government to a paper presented at a CAJE (Coalition for Access to Justice for the Environment) event in 2011,³⁵ which discusses practitioners and NGOs awareness of cases that have not gone ahead because of concerns about costs or exposure to costs. While this research was primarily based on lawyers practising in England and Wales many of the issues raised are common throughout the UK, excepting key differences in Scotland (particularly in relation to restricted access to legal aid, as discussed above).

The research concludes that over three quarters (76%) of leading environmental practitioners and NGOs are aware of good, arguable cases that have not proceeded because of concerns about costs. One solicitor said that he could point to at least 10 cases in his first year of practice where clients were “too scared of incurring huge costs – even with a Protective Costs Order”. A barrister reported that he had advised many smaller environmental NGOs who have not litigated for fear of adverse costs or the costs involved in seeking a PCO where it is opposed, including in cases concerning air quality and transport issues. Our sister organisation (Friends of the Earth England, Wales and Northern Ireland) reported that it always advises that costs can be managed but that it “loses count of the number of community groups who mention to us that they or others thought that they may have grounds for challenge, or were advised they did, but decided not to go ahead because they were put off by the costs risk”.³⁶

³⁴ Environmental Law Foundation and The Centre for Business Relationships, Accountability, Sustainability & Society (BRASS) (2009) *Costs Barriers to Environmental Justice*, section 6. Available from the ELF

³⁵ Aarhus and Access Rights: the New Landscape, http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

³⁶ CAJE conference paper, pages 17-18

Omissions

Interim interdicts

The paper omits key issues covered by the EC infraction proceedings and the findings of the Aarhus Convention Compliance Committee against the UK in relation to the need to ensure that are not prohibitively expensive.³⁷ If it is impossible to speed up proceedings so as to avoid the need for an interim interdict, in PPD/Aarhus cases there should be no possibility of obtaining damages if the case subsequently fails. Any potential liability for damages makes it prohibitively expensive to bring the case, and adds to uncertainty over total liability. Therefore we emphasise that the costs issues and the potential liability for damages must be viewed together when considering prohibitive expense and compliance with the PPD and the Aarhus Convention.

We note the current consultation paper issued by the Department of the Justice in Northern Ireland addresses the question of interim relief in the following terms:

“1.11 We also ask questions about cross-undertakings in damages when an interim injunction is sought and the enforcement of these cross-undertakings. The following summarises the main proposals on cross-undertakings:

- The rules are to apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the Public Participation Directive. The rules are to apply in relation to all applicants in the same way, regardless of whether the applicant is a natural or legal person;
- If the application meets the other criteria for granting an interim injunction, the court will grant an interim injunction without a cross-undertaking for damages where, if an injunction were not granted:
 - a final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded;
 - significant environmental damage would be caused; and
 - the applicant would be likely to discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required and would not be acting unreasonably in so doing.”³⁸

While we have some concerns about the proposals in respect of Northern Ireland, we commend the Department of Justice for recognising that interim relief is integral to the question of ‘prohibitive expense’ and for addressing the issue within its consultation paper. We urge the Scottish Government to consider the Department of Justice’s proposals and the recommendations in the Sullivan reports in respect of injunctive relief and to make appropriate recommendations.

Concluding remarks

Scottish Government is in breach of its obligations under the Aarhus Convention to provide fair and effective access to justice in environmental matters that is not prohibitively expensive. Protective Expense Orders can form part of an Aarhus compliant cost regime, however the proposals outlined in this Consultation will do very little to bring Scotland into compliance, leaving the UK open to continued legal action from the EC.

³⁷ Aarhus Compliance Committee ruling on communication, ACCC/C/2008/33

³⁸ See paragraphs 3.7 and 4.18-4.33 of the Consultation paper available at: <http://www.dojni.gov.uk/index/public-consultations/current-consultations/cost-protection-consultation-pdf-07.12.11.pdf>

We consider that in order to achieve compliance on costs the Scottish Government should:

- Introduce Qualified One-way Cost Shifting so that individuals, communities and NGOs taking a public interest Aarhus case can be confident that they will not be liable for the other side's costs
- Remove Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, so that those meeting financial eligibility criteria will be able to access public funding for public interest cases
- Reform legal aid legislation so that communities can access public funding
- Introduce a 'permission' stage (or improve First Orders procedure) 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 to any party in getting to that stage).

Should the Government go ahead in developing rules of court for Protective Expense Orders, we hope the rules will be consulted on, and we would welcome the opportunity to comment.

ANNEX C - LEGAL CHALLENGES TO DECISIONS BY PUBLIC AUTHORITIES UNDER THE PUBLIC PARTICIPATION DIRECTIVE



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Friends of the Earth Scotland and Environmental Law Centre Scotland

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Church

Forename

Mary

2. Postal Address

5 Rose Street

Edinburgh

Postcode EH2 2PR Phone 0131 243 2700 Email mchurch@foe-scotland.org.uk

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No