Friends of the Earth Scotland

Ms Gisela Carr
EU and International Co-ordination Division
Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London
SW1P 3JR

Edinburgh, 16th November 2010

**Re: Draft UK National Implementation Report – Aarhus Convention**

Dear Ms Carr

Friends of the Earth Scotland was established in 1978 and is Scotland's leading environmental campaigning organisation. We are part of the Friends of the Earth International Federation, as is our neighbour, Friends of the Earth England, Wales and Northern Ireland. We would like to take this opportunity to associate and align ourselves with the comments submitted by Friends of the Earth England, Wales and Northern Ireland, and also with the submission from the Coalition for Access to Justice for the Environment (CAJE).

**Introduction**
Scotland has long had a separate legal and education system, and with the advent of the Scottish Parliament in 1997, many other responsibilities were devolved to the Scottish administration, including justice and environment policy. Since devolution, Friends of the Earth Scotland has worked with Members of the Scottish Parliament and the Scottish Government on a variety of issues including the Freedom of Information (Scotland) Act 2002, the Planning (Scotland) Act 2006, pollution issues, Strategic Environmental Assessment, the Climate Change (Scotland) Act 2009, and a number of other issues and individual developments.

Our experience has led us to believe that to fully participate in a modern democracy, Scots should be able to challenge decisions that impact on their environment or potentially break environmental law, as provided for by the Aarhus Convention on Access to Justice in Environmental Matters.

As Scotland has a distinct legal system, separate from that in England and Wales, and as both justice and environment policy are devolved, securing full implementation of the Aarhus convention in Scotland falls to the Scottish Government and the Scottish Courts system.

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Scotland's champion for our environment.

We were therefore surprised, when alerted by colleagues at Friends of the Earth England, Wales and Northern Ireland to the UK Government draft implementation report, (originating from Defra, a department whose functions are almost all devolved to the Scottish administration), to find numerous references to the situation in Scotland.

Perhaps more alarmingly, we disagree with many of the conclusions drawn regarding the Scottish situation. We are also concerned at the seeming lack of up-to-date information, any consideration of the findings of the Aarhus Convention Compliance Committee regarding Communications C27 and C33, or any reference to recent court judgements in Scotland.

This is perhaps explained by the date at the top of the document (2008) and the document's similarity to the 2008 Aarhus Convention Implementation Report. Friends of the Earth Scotland find this failure to respond to new developments, and instead to simply re-use an old document extremely disappointing and indicative of a lack of respect for this important UN ECE Convention and the work of those of us seeking to ensure compliance on the part of the UK with the Convention.

As there are no Scottish stakeholders featured on the list of consultees we can only assume Defra has alerted the Scottish Government through other avenues and that subsequent consultation with Scottish stakeholders will be enabled. We would note the irony that a consultation on a Convention that provides for adequate consultation could have made such an omission.

Unfortunately, given the short time frame for responses we have not yet been able to raise the issue of this draft implementation report with the Scottish Government. We look forward to meeting with them in due course.

This lack of consideration for the implementation of the convention in a separate legal system perhaps explains the inconsistent approach to Scotland and Scottish policy in the draft report. In some areas where the devolved nature of justice and environment policy applies, details are given of Scottish implementation and examples from the devolved administration provided. At other times, clearly devolved areas are ignored. Specific examples of this will be mentioned in our detailed submission below.

To move to **detailed comments on the draft**:

I.2
As mentioned in the introduction, we are concerned that no stakeholders from Scotland were specifically invited to respond.

III
There is an inconsistent approach in this section to presenting devolved and reserved matters. For instance whilst paragraph 7 notes the Freedom of Information (Scotland) Act, subsequent paragraphs fail to acknowledge that their implications are also devolved (8-16 and 20 as an example).

XXIV

In general in relation to public participation we would remark that despite changes to the planning system in Scotland to try and front load the system there is still a lack of engagement from the general public. More generally, consultation is inconsistent which, coupled with lack of faith in the planning system, leads to general malaise and discouragement from the general public.

XXVIII
Generally in relation to this section we would suggest that the report fails to understand the principle of access to justice without prohibitive cost, that is to say, broad access without fear of excessive expense **from the outset**.

92. We would highlight that the Scottish Statutory Instruments mentioned are limited in their scope and in effect only implement pillars 1 and 2 of the Aarhus Convention. They do nothing to provide for NGOs to issue legal challenges should their rights under these Directives be questioned or in relation to environmental matters that do not fall under the SSIs in question.

93. The report gives an analysis of legal standing in England and Wales but fails to report on the situation in Scotland. (Which we would argue is far more restrictive). Our experience would be that NGOS rarely, if ever, feel able to bring environmental cases in Scotland, making the lack of mention of Scotland in this paragraph implicitly misleading.

100. As mentioned in relation to paragraph 92, these SSIs only apply to pillars 1 and 2. To quote: “ensuring environmental NGOs and community or resident organisations’ assured interest in all cases engaging the Directives covering ***pollution prevention and control*****,** and ***strategic environmental assessments*****.**” (Our emphasis) This limited access to justice in specific instances does not fit with the ‘broad’ requirement in the Convention.

101. It is widely acknowledged that in Scotland an individual who has a private interest in a case cannot claim legal aid. This paragraph thus suggests that in order to have standing (or title and interest in Scotland), given an individual must have a direct personal interest, they will therefore not be eligible for legal aid. This does not meet the requirements of the Convention and furthermore is inconsistent with other claims made regarding legal aid availability in this report.

106. Additionally, analysis of the reward of legal aid in Scotland demonstrates that in actuality legal aid is extremely unlikely to be granted in either environmental or public interest cases. We would therefore challenge the legitimacy of the following statement as regards Scotland: “Public funding is available for environmental cases and Judicial Review.”

111. We do not recognise this characterisation of Scottish justice policy. We would cite the case of *McGinty v Scottish Ministers* as an example of someone in receipt of state benefits not being exempt from court fees or eligible for legal aid. This, despite the 2007 and 2009 reforms.

112. As made clear in the recent Compliance Committee decision, discretion as to whether costs may or may not be payable is not compliant with the Aarhus Convention.

116. This paragraph fails to remark on the recent court judgement in *McGinty v Scottish Ministers* which while granting a Protected Order for Expenses, set it at such a level that the individual concerned has still faced considerable struggle and stress, which is not what the Aarhus Convention provides for[1]. The principle behind Protected Orders for Expenses is to provide **early** certainty and a **reasonable limit** on the level of costs the applicant may be expected to pay (in line with Aarhus). Yet, both the extreme rarity and the very high costs cap set mean Protected Orders for Expenses in Scotland do not yet contribute to removing the financial barrier to accessing justice in environmental matters. We would also point out that frequently the Scottish judiciary refuse Protected Orders for Expenses where they deem others able to help raise the costs, which given the requirement of public interest sets up a vicious circle.

117. Furthermore, the recent Compliance Committee decision suggests that this kind of protected cost order is not sufficient to meet the requirements of Aarhus anyway. Again, we express our concern and disappointment that this decision has not been addressed in this report.

118. We consistently hear and read references to these new Rules of Court. We look forward to seeing them, but fear they will be insufficient given the delay in their publication and the recent Compliance Committee decision which should be considered.

**Conclusion**

The Aarhus Convention 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 recognises 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.[2]

As signatories to Aarhus, as a member of the EU and as the UK, the administrations at Westminster and Holyrood have a legal obligation to comply with the Convention. Given the recent findings that the UK is in breach – particularly over prohibitive costs, an area in which Scotland is far behind – Scotland must improve access to justice to make it **fair, equitable, timely, and free or inexpensive**, and so comply with the third pillar of Aarhus.

Aarhus compliant access to the courts in environmental matters "increases the relevance of environmental protection in day-to-day discussions and policy, ensures the acceptance of administrative decisions and gives individuals the feeling that their

[1] The court capped the applicant's liability for the defendant's costs at £30,000, which, added to the estimated costs of £80,000 he would face in bringing the case (having being denied legal aid), amount to a significant financial barrier to pursuing the case.

[2] Milieu, Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters (2007); pp21-22

commitment to environmental protection is being respected."[3] In addition, increased access to the courts tends to ensure that administrations better prepare their decisions and consider omissions to act with more care.

Both the Scottish and UK Governments need the help of their citizens to help meet climate change, energy and biodiversity targets. To demand such support whilst restricting citizens' recourse to scrutinise Government will do little to build public confidence in decision making. Complying with Aarhus will benefit the relationship between the government and the public. Respecting the Convention enough to produce a decent report on implementation that fully involved the devolved administrations would be beneficial also.

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[3] Ibid