



Parliamentary Briefing

Civil litigation and access to environmental justice

For the Stage 1 Debate on the Civil Litigation (Expenses and Group Proceedings) Bill, Tuesday 16 January 2018

Summary

- Scotland is breaching international law by failing to comply with its Aarhus Convention commitments to ensure access to justice in environmental cases.
- Comprehensive action is required to ensure access to justice in environmental matters, but the Civil Litigation Bill is an immediate opportunity to begin to address some of those failings.
- Parliament should extend qualified one-way cost shifting to environmental cases, in order to ensure that bringing these cases is not prohibitively expensive.
- Parliament should introduce an opt-out system for group proceedings, to provide a route for effective remedy for environmental harms that affect large numbers of people.

The Aarhus Convention – Scotland’s commitment and non-compliance

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (“the Aarhus Convention”) is a United Nations treaty of which Scotland is part by virtue of its ratification by both the United Kingdom individually and the European Union collectively, in 2005.

Under the Convention, Scotland commits to ensuring access to justice in all environmental cases, both in terms of procedural and substantive review, providing for “adequate and effective remedies” in a manner which is “fair, equitable, timely and not prohibitively expensive”.

On three consecutive occasions (in 2011, 2014 and 2017), the United Nations body responsible for the Convention has found Scotland to be failing to fulfil its commitments on access to justice, particularly with regard to the cost of bringing environmental cases in Scottish courts. The issue of prohibitive expense in certain Aarhus cases has also been the subject of a ruling from the European Court of Justice against the UK.

The problem of ensuring access to environmental justice in Scotland urgently requires a comprehensive response. In the meantime, there is an opportunity to make a contribution to that broader effort by introducing two measures within the scope of the Civil Litigation Bill: qualified one-way cost shifting for all Aarhus cases, and opt-out group proceedings.

The need for qualified one-way cost shifting

The Aarhus Convention requires that bringing environmental cases must not be prohibitively expensive, and Scotland is, at present, failing to comply.

An effort has been made to address this, through the introduction of Protective Expenses Orders (PEOs) in 2014. However, the granting of PEOs is rare, and there are a number of issues with the PEO system that limit its ability to meet our Aarhus commitments, in particular the high costs and lack of certainty involved in applying for a PEO. Specifically relevant to the Civil Litigation Bill is that PEOs are not available in environmental cases in private law.

These issues are compounded by the difficulty of accessing Legal Aid in environmental cases. Environmental harms commonly affect a number of people, but Regulations require that the Scottish

Legal Aid Board assess whether persons other than the applicant might have a joint interest in the case, and refuse aid if it would be “reasonable” for those persons to contribute. Furthermore, community groups may not apply for Legal Aid.

The Policy Memorandum to the Bill notes that personal injury cases commonly involve a defender with far greater resources than the pursuer, and with the protection of liability insurance. It notes that the benefit to the pursuer may well be smaller than the costs, especially if the defender deploys a large and expensive defence. These issues risk obstructing access to justice in such cases.

Section 8 of the Bill provides an excellent remedy to these problems, in the form of qualified one-way cost shifting (QOCS). The very same problems are faced by would-be pursuers in environmental cases, with the added difficulty of limited recourse to Legal Aid and the likelihood that in many public interest Aarhus cases there may be no individual benefit to the pursuer. As the Bill progresses, it should be amended to extend the cost protections of Section 8 to all environmental cases as well as cases of personal injury.

The need for opt-out group proceedings

The Bill as introduced allows only for opt-in group proceedings, that is, only people who have actively signed up to an action may be represented and bound by the outcome. This is not sufficient to respond to environmental harms.

This is because breaches of the law in environmental cases commonly affect large numbers of people, so the cumulative harm may be great even while the likely individual award is low. With the likely benefit of taking part in a group action both small and uncertain, and the administrative burden of taking part significant, many will be disincentivised from joining the action.

With an opt-in system only, businesses whose environmental practices cause moderate harm to a very large population are likely to face only minor consequences, if a group of pursuers can be assembled at all (this will also be true with respect to many consumer cases). This removes the deterrent effect of enforcement through private law.

An opt-out system, in which the court may grant an appropriate person permission to bring a case on behalf of all those affected (except any such people who opt-out) will allow an effective means of redress against those who cause environmental harm, even when that harm is spread widely but thinly.

Beyond this Bill

Scotland is proud of its record on human rights, including economic, social and environmental rights, but repeated missed opportunities mean we are not making the grade on access to environmental justice. Neither the *Making Justice Work* programme nor the recent *Developments in Environmental Justice* consultation have generated any significant improvements.

As far back as 2014, the Stage 1 report on the Courts Reform Act highlighted “the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law,” but there has been no movement on remedying these differences. The lack of substantive (rather than procedural) review offered by Scottish judicial review proceedings is now the subject of a complaint to the United Nations under the Convention.

The Scottish Government rejected for now proposals for a specialist environmental court or tribunal in its response to the *Developments in Environmental Justice* consultation, though it stated its intention to keep the case for these under review. Given the approaching governance gap we face as we lose access to European Union environmental oversight, we should be revisiting this question now.

The Scottish Government should urgently undertake a comprehensive review of the legal system in relation to our Aarhus obligations, including the role that a specialist environmental court and/or tribunal could play in improving compliance. The establishment of an expert advisory group on human rights, announced in the Programme for Government, is a welcome development and an opportunity to kickstart this process.