

Fifth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Written Submission on behalf of Friends of the Earth Scotland

**5. Procedures and mechanisms facilitating the implementation of the Convention:
(b) Compliance mechanism**

Friends of the Earth Scotland (FoES) requests the opportunity to make a brief intervention at the Fifth Meeting of the Parties to the Aarhus Convention under Agenda Item 5(a) - Procedures and mechanisms facilitating the implementation of the Convention (Reports on the status of implementation of the Convention) on Monday 30th June 2014 (3.30-4.30pm). If permissible, the oral intervention will comprise a summary of the first two pages below - the Annex being background information to support the statement.

In general terms, FoES adopt the statement made by Friends of the Earth, the Royal Society for the Protection of Birds (RSPB) and WWF-UK (referred to as 'the joint NGO statement') and only highlight differences which arise in Scotland.

- **UK National Implementation Report (NIR)¹** - FoES is concerned that the UK NIR does not accurately reflect the situation in the Scotland within the UK with regards to the implementation of the Convention. In particular, it fails to identify a substantial number of distinct positions in Scotland as compared the to the rest of the UK in respect of public participation and access to justice. Whilst Scotland does not fact the same scale and pace of legislative and policy change as seen elsewhere in the UK and as referred to in the Joint Statement statement, there are also reforms to the court system planned in Scotland which, at best, are unlikely to assist with respect of improvement implementation of the Convention in Scotland.
- **Decision IV/9i and Costs** - FoES adopts the joint NGO statement in respect of its general comments on Decision IV/9i². However there are significant differences between the different parts of the UK, as indicated in the joint NGO statement. These measures introduced in Scotland do not go far enough in that particularly they do not cover all cases which are covered by the Aarhus Convention, but rather the narrower category of just those cases arising under either the Public Participation Directive or the Integrated Pollution and Prevention Control Directive. Additionally, there are systematic problems with obtaining legal aid in Scotland. FoES would strongly argue that further action is necessary to bring Scotland into compliance with Article 9(4) of the Convention.
- **Further reforms to Judicial Review** - the Scottish Government has embarked on a process of court reform in Scotland, which includes reform of judicial

¹ Available at: http://www.unece.org/env/pp/reports_trc_implementation_2014.html

² Communication C33 available here: <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>

review in Scotland. This means increased court fees (which are not limited to the initial fee for lodging a petition, and will run into thousands of pounds if a case runs to a multi-day hearing), the introduction of a three month time limit for challenging decisions and the introduction of a leave stage in Scotland for judicial review.

- **Legal aid** FoES is particularly concerned about the ongoing restrictions in legal aid (public funding) in Scotland for environmental cases.
- **Article 9(2) and the scope of review** - FoES adopt the joint NGO statement as to its submissions as to the scope of Article 9(2) of the Convention.³

³ Although FoES cannot add anything further in terms of case law in Scotland this may be because there are, however, a relatively small number of judicial reviews or court actions within the scope of Article 9 each year in Scotland. This in turn might be because the standing rules in Scotland for judicial review applications were not relaxed until October 2011 and until that point it was difficult to bring an action on the basis of a wider public interest basis, or it may also be because there are still ongoing difficulties with funding environmental cases. However, generally Scottish courts are thought to be unlikely to be take a wider substantive merits based approach in judicial review cases

Annex I – Background information

1.UK National Implementation Report (NIR)

Again, FoES adopt the submissions of the joint NGO statement.

The UK report was prepared by the Department for Environment, Food and Rural Affairs (Defra) in conjunction with other government departments and the Devolved Administrations in Scotland, Wales and Northern Ireland.

FoES were not specifically consulted on the draft NIR. As noted in their response to the draft NIR, from the list of consultees on the draft NIR, no organisations in Scotland were consulted by DEFRA, and FoES sought out the consultation to respond. It was also noted that the information was presented about each of the three jurisdictions in a confusing way, where it was difficult to see which information related to which of the three separate legal systems. It was suggested that the information was separated out into each legal system, but this was generally not adopted for the final report.

Article 9, paragraph 1

In relation to the number of requests for information under the Environmental Information (Scotland) Regulations 2004, we asked it to be noted that the Scottish Information Commissioner has commented on the low level of appeals in relation to disputes as to providing environmental information.⁴

Article 9, paragraph 4

In Article 9 (4), we noted in the consultation response that the issue of costs associated with taking legal action was not limited to the initial costs for lodging a petition. Whilst the NIR might report the initial fee for lodging a petition in the Court of Session, it does not report the court fees for the case proceeding to a full hearing. In our consultation response on the NIR we set out that we had calculated that the fee in one environmental case would have been £1620 based on the associated hearings taking 18 hours and the hourly rate chargeable; in another the fee would have been £5,580. These fees are understood to be likely to double, meaning that the second of these cases, if it was to take up the same amount of court time, would have had court fees of over £10,000.

We consider that the policy of full cost recovery will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means

⁴ Scottish Information Commissioner, 2012/13 Annual Report Upholding the Right to Know, p11 "We still receive relatively few appeals concerning requests for environmental information. It is unclear whether this is due to requesters not realising they can make such requests, or whether it is authorities failing to recognise requests that should be dealt with under the Environmental Information (Scotland) Regulations 2004 rather than FOI (or both)."

environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court. Fees for the Court of Session are already very expensive – prohibitively so for the ordinary person – particularly in relation to the time spent in court in judicial review cases. Although exemptions are given for cases where there is a legal aid certificate in place, there are systematic problems with obtaining legal aid for environmental cases in Scotland.

We also noted that the draft NIR did not consider the position in any detail relation to legal aid for environmental cases in Scotland. Because of the restrictions on legal aid in environmental cases (as outlined in response to 106), it follows that such cases are highly unlikely to secure an exemption from court fees on the basis of legal aid. The final NIR asserts that “it is not appropriate for the general public to bear the cost of resolving civil disputes” particularly in light of Advocate General Kokott’s recent opinion in *European Commission v United Kingdom* in relation to the importance of greater equity of arms in civil actions against public authorities.

The NIR advises that in Scotland “access to justice is assured through the continuing provision of legal aid ...”. While recent reforms in Scotland mean that more adults now qualify for civil legal aid purely in financial terms, applying for legal aid is an increasingly complex and time consuming process. In addition, the first type of legal aid – advice and assistance – has more restrictive financial criteria than civil legal aid. As a result, there is more limited access to a solicitor to obtain initial advice and help on environmental issues. The real problem with legal aid in relation to our obligations under the Aarhus Convention is that the system has granted very few awards of legal aid for environmental cases and effectively prohibits aid for public interest cases, which most Aarhus challenges are. 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.

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. 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. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. We consider that removal of Regulation 15 is essential for Aarhus – and Public Participation Directive – compliance.

This situation is exacerbated by the Scottish Legal Aid Board’s recent introduction of a system whereby all the expenses of the case to be covered by legal aid (including Counsel’s fees, solicitors fees and outlays) will be capped at £7,000. We think that £7,000 is an unrealistic figure to run a complex environmental judicial review given the level of fees generally charged by Counsel and the likely budget of the public

authority on the other side. While applications can be made to increase the cap, this system is likely to further lessen the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the level of the cap particularly in a fast moving litigation, when it can be difficult to anticipate all costs in advance.

Moreover, while environmental cases tend to affect more than one person, community groups cannot apply for legal aid in Scotland. By contrast, we understand that England and Wales has 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. By their very nature environmental cases tend to affect a large number of people, therefore it makes sense to provide for joint applications. It is also a more sensible use of public money than potentially funding multiple individual cases and, in cases against public authorities, defending those actions.

Lastly we are aware of difficulties that arise due to the restrictions on protection from liability for expenses under the Legal Aid (Scotland) Act 1986. Generally in Scotland someone with a full legal aid certificate will have any liability for expenses modified unless they have acted in a manner which has prolonged or increased the costs of the litigation. However, these provisions do not apply to someone who has not been granted full legal aid certificate and thus is not designed as an 'assisted person' for the purposes of the legislation. This again has a 'chilling effect'; given the uncertainties over obtaining legal aid in environmental cases, many persons would be reluctant to raise proceedings until full legal aid is granted. However, this can mean that there are months of delay before a case is raised, which in turn only adds more uncertainty for the public authority and developer.

Whilst the Scottish Courts have discretion regarding the award of costs in individual cases, such decisions generally come at the end of proceedings and therefore cannot mitigate for the chilling effect of the prospect of having to pay high costs.

Further the Lord President, Lord Gill, has indicated his reluctance to limit expenses after the event. In ruling on the respondent's motion for expenses in *Uprichard v Fife Council*, Lord Gill (then Lord Justice Clerk), noted:

"Those who challenge decisions of this nature enter into litigation with their eyes open. They have to expect that if they should fail, the normal consequence will be that they will be liable in expenses. It would be reckless for a litigant to embark on a case of this kind in the hope that if he should fail, the court would relieve him of his liability for the expenses that he caused thereby. It is significant that the applicant was not deterred from raising this application by the possible extent of her liability should she fail."

The NIR gives very little detail on the ability to obtain a Protective Expenses Orders (PEOs) in Scotland. PEOs are one way of tackling the issue of prohibitive expense in environmental cases, as they can provide some certainty and clarity in relation to costs from an early stage. We commented on the draft NIR that the presumptive cap

of £5,000 for petitioners is too high commented on evidence in Scotland on why this is so. That has not been reflected in the final NIR. We also noted that in Scotland there are very few solicitors working in this public law field for petitioners, and relatively few judicial reviews. It is unlikely that there would be many cases which would be taken on a no-win no-fee cases, as this is likely only to operate in a market where there are a high turn over of cases, with the opportunity for the solicitors and advocates (barristers) to have sufficient 'wins' to cancel out the lost cases.

While we object to the level of the £5,000 cap, and the principle of an automatic cross cap (which was also criticised by the Advocate General in *EU v UK*), we note that petitioners will be able to apply to lower the £5,000 cap and increase the cross cap. We assume the requirement for certainty as to potential adverse liability (as required by Case C-427/07 *Commission v Ireland*) can be assured in this situation as petitioners have certainty as to their maximum adverse costs liability. However, while the rules do not enable the respondents to challenge the level of either cap, nor do they expressly forbid it. Therefore, it is not clear whether respondents would be permitted to challenge a petitioner's application to alter the level of either cap. This possibility clearly detracts from the ability of the system to provide the certainty required by EU law.

While it is encouraging that respondents are not able to require petitioners to disclose their means, it is not clear whether the Court is able to require such disclosure, and whether it has any discretion in granting a PEO based on a petitioners means, for example in relation to lowering the cap or raising the cross cap. We are very concerned about the prospect of petitioners being required to disclose their means to the court under any circumstances, and point to *Walton*, where the petitioner disclosed his financial means in court and a national newspaper published his salary on its front page.

Further we are concerned that the rules apply only to individuals and 'non-governmental organisations promoting environmental protection'; and specifically preclude individuals representing an unincorporated body. This provision would exclude an appellant such as William Walton, who acted in his capacity as Chairman of Roadsense, an unincorporated body, in *Roadsense v Scottish Ministers*, from applying for a PEO under these rules. While a petitioner in this position could of course apply under the rules as an individual, we consider this provision puts a barrier in the way of community groups wishing to take legal action. Community groups understandably may wish to take action as a joint entity so that liability does not rest on a single individual, but also to ensure that decisions taken as to the litigation and its conduct of the litigation reflect the wishes to the community, through the democratic decision making process of the community group. We also observe it is more cost effective for the public purse for communities to pursue an action as one instead of potential multiple actions.

The rules allow for PEOs to be awarded in appeals, but the cost limits are left to judicial discretion, taking into account decisions on costs in the lower court. We note that in *Edwards* the CJEU found that "the requirement that judicial proceedings

should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal.”

There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed. We do not know the exact reasons for the relatively high appeal rates, but it might be because cases raised so far tend to raise important points of principle for third parties (such as availability of remedies and the standing requirements to bring cases) which have not yet been fully litigated in Scotland. Cases might also tend to be appealed due to the absence of any degree of specialism within the judiciary for dealing with environmental cases, and because they are challenges to the largest/most controversial developments in Scotland. We anticipate that cases raised in the immediate future are likely to continue the trend of being appealed, at least for the foreseeable future. We also think it likely that if the public authority or developer is unsuccessful at first instance, they are likely to appeal. Therefore we do not think the way that the rules deal with appeals is compliant with the PPD or Aarhus.

We note that the Taylor Review reported on 11 September 2013. The Scottish Government has frequently indicated that the Taylor Review would mop up any outstanding issues regarding prohibitive expense in Aarhus cases. However, we met with the Secretary to the Taylor Review in February 2012 as part of its consultation process, who confirmed 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 PPD or the Aarhus Convention. We note that the Review does recommend extending PEOs to all public interest cases, which of course could in theory cover many Aarhus cases not within the remit of the PPD and therefore not eligible under the new rules of court on PEOs. However, Taylor strongly implies that the EU law consider Aarhus cases to be defined by the PPD, and also his recommendation makes it clear that granting of PEOs and the level of cap is to be left to judicial discretion where not governed by specific rules of court.

Protracted legal proceedings are costly and stressful, particularly for first time litigants, are not in the interests of petitioners, respondents or the courts. However, the emphasis of the Aarhus requirement for access to justice to be timely is clearly weighted towards speedy decisions by the courts rather than any requirement for individuals to take cases promptly. Decisions from the Court of Session are notoriously a long time coming, with the petitioner in *McGinty v Scottish Ministers* waiting over a year for a decision to be handed down. We note that improvements to case management as part of the Scottish Government’s implementation of the Scottish Civil Courts Review should help speed the system up for all parties.

However we are concerned about current proposals in the Court Reform (Scotland) Bill to introduce a three-month time limit for Petitioners. Introducing such a time limit may help provide certainty for developers, but it will cause problems for

petitioners in complex cases and particularly where there is uncertainty in funding. As outlined above there is a real issue 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.

A three-month time limit will create a particular barrier for community groups who will find it extremely difficult to 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 we note there is a degree of flexibility is contained in the Bill, a presumptive three-month limit is likely to put potential litigants off (a further 'chilling effect').

Further, we note that the Court Reform Bill will also introduce a leave to proceed stage for judicial review. We consider that an appropriately designed leave stage could be used to award Protective Expense Order's and settle issues such as standing, thereby reducing the 'chilling effect' where uncertainty created by these matters hanging over the petitioner for the duration of the case put potential litigants off (and cause considerable unnecessary anxiety for those who go ahead).

However, the Bill as drafted does not indicate at what point leave to proceed would be assessed, therefore 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 martial the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

Finally regarding this section, we note that the introduction of a statutory appeal process for Marine Licenses under the Regulatory Reform Bill will largely benefit developers, and where third parties wish and are able to appeal in this process they will be stymied by the extremely short time limit of 6 weeks. The proposed appeal and existing appeals under roads and planning legislation are broadly similar to judicial reviews therefore we consider it inappropriate to apply different time limits. As per above, we consider that a time limit of 3 months will prove difficult for individuals, communities and NGOs to raise the necessary finances, seek legal advice and prepare for any challenge, but a time limit of 6 weeks will prove near impossible, particularly in instances involving legal aid.

2.Decision IV/9i (Communication ACCC/C/2008/33)

Again, FoES would refer to the joint NGO statement in relation to Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention was adopted at the Fourth Meeting of the Parties to the Aarhus Convention in Moldova in 2010.

The devolved administrations of the UK subsequently implemented new costs regimes to address the finding that the UK was in non-compliance with Article 9(4) of the Convention and the requirement for legal review procedures to be “*not prohibitively expensive*”.

The amendments to the rules of court were introduced in Scotland in March 2013. Whilst the amendments are an improvement, they do not bring Scotland into compliance with Article 9(4) of the Convention. We adopt the joint NGO statement in that it states that firstly, the judgements of the CJEU in *Edwards*⁵ and *Commission v UK*⁶ confirm that the determination of what is “prohibitively expensive” for claimants requires the application of both an objective and subjective test. The figures of £5,000 and £10,000 remain patently beyond the means of most individuals and many groups (particularly small specialist environmental charities). Moreover, it must be recalled that the cap on what the applicant must pay if its claim is ultimately unsuccessful at first instance does not operate on its own – the unsuccessful applicant will also have to meet its own costs,. The figures given in the joint UK NGO statement (at around £30,000) would equally apply in Scotland. In Scotland, the court fees for the length of time that the case takes are also added to overall costs, and accordingly the total liability is likely to be in the region of £30,000 to £40,000.

The Scottish provisions cover JR and appeals under statute, but only regarding decisions, acts or omissions which are subject to the EU Directives 85/33/EEC and 2008/1/EC (i.e. procedures in respect of EIA and IPPC). This means there is general non-compliance with the Aarhus Convention in that not all environmental claims will be covered by the scope of the Convention. In addition, there are no rules in the Sheriff Court, where some environmental cases might arise, particularly in relation to nuisance claims.

FoES also, similar to the joint NGO statement, supports *draft Decision V/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention* and the Report by the Compliance Committee on *Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, both of which conclude that further action is necessary to bring the UK into compliance with Article 9(4) of the Convention.

3.Reforms to the process of Judicial Review in Scotland

As indicated above, there are various reforms proposed to judicial review in Scotland.

In short, the main points arising from the proposed reforms are around

⁵ Case C-260/11 - *R oao David Edwards, Lilian Pallikaropoulos v (i) Environment Agency, (ii) First Secretary of State, (iii) Secretary of State for Environment, Food and Rural Affairs*

⁶ Case C530/11

- (i) the introduction of a leave stage for judicial review proceedings. It remains to be seen, how, if introduced, this will operate in practice, and we note the joint NGO statement as to the problems of a leave stage in England & Wales;
- (ii) the introduction of a six week time limit for judicial review proceedings to be brought. We already note the difficulties this causes in certain statutory appeals which have a similar time limit, and consider given the issues over funding in Scotland, the relatively few solicitors available to take on this type of work and the associated problems with acting quickly on legal aid (arising out of the fact an individual on emergency legal aid is not an 'assisted person' in terms of the Legal Aid (Scotland) Act 1986) there are likely to be many people unwilling to take substantial financial risk to pursue a case in such a short space of time.

4. Article 9(2) - Substantive Review

FoES adopt the joint NGO statement in this respect.