Name of petitioner
Duncan McLaren on behalf of Friends of the Earth Scotland

Petition title
Access to justice in environmental matters

Petition summary
Calling on the Scottish Parliament to urge the Scottish Government to clearly demonstrate how access to the Scottish courts is compliant with the Aarhus convention on ‘Access to Justice in Environmental Matters’ especially in relation to costs, title and interest; publish the documents and evidence of such compliance; and state what action it will take in light of the recent ruling of the Aarhus Compliance Committee against the UK Government.

Action taken to resolve issues of concern before submitting the petition
We have written and met with the Scottish Government on the issue. We requested a meeting with the Cabinet Secretary for Justice to discuss the issues and a meeting with Chris Graham, who had formerly headed up the Access to Justice team in the Scottish Government Justice Department, was arranged. The overall outcome of the meeting was a repetition of the Scottish Government’s belief that Scotland is fully compliant with Aarhus. However recent developments, in particular the compliance committees ruling that the UK (England, Wales, Northern Ireland) is non-compliant, suggests this is not the case (see section 5). We emphasised the need for Scottish Government lawyers to review their interpretation in light of this ruling.

We helped draft amendments for Alison McInnes MSP that were tabled then withdrawn during the passage of the Climate (Change) Scotland Bill. We supported an amendment which would have enshrined the principles of Aarhus in the Act, ensuring that the Scottish courts would comply with them in cases where the Scottish Government was failing to meet its commitments under the Act.

There were two main reasons why the amendment was withdrawn. Firstly because Friends of the Earth Scotland and Alison McInnes both agreed implementation of Aarhus would be better done in a comprehensive manner rather than through the Climate Change Bill, it was largely seen as a ‘probing’ amendment. Secondly the Minister gave an assurance that the Lord President of the Court of Session was looking at the issue – in particular there was a commitment that the Lord President would look at protective cost orders following the Gill review.

Having said this there were several shortcomings in the Minister’s evidence and argument at Stage 2, in particular around transposition of an EU directive, rules on standing, prohibitive costs, scope, and independence of the courts.

Transposition: The Minister failed to recognise or note that the provisions of Aarhus on
access to justice in particular (as opposed to those on access to information and participation) have yet to be translated into an EU directive. The Minister overlooked the fact that there are infraction proceedings pending against the UK arising under the participation provisions of Aarhus, and wider complaints pending with the Aarhus Compliance Commission (this decision has since been published as referred to below). We understand that this is one reason why the Scottish courts are already considering protective costs orders (PCOs) (see below).

Standing: The Minister argued that clarity of rules on standing was unnecessary. Yet in similar circumstances with regard to the Land Reform (Scotland) Act 2003, the Scottish Parliament, the courts (and the then Scottish Executive) took the opposite view and chose to actively clarify rights of standing, with respect to NGOs, in line with Aarhus. There is a need for clarity in this case also.

Costs: On the matter of costs we welcome the fact that PCOs are already being considered. While the courts have recognised the principle, it is worth noting that the original case which recognised the possibility of such orders being granted was heard in December 2005 but no orders have yet been made. (Although in McGinty v Scottish Ministers a PCO was granted, it was set prohibitively high and is still not in line with the Convention). In this situation the risk of costs remains a significant deterrent to access to justice, and the situation must be clarified.

For Minister’s response at Stage 2 see Official Report, Col.1964
www.scottish.parliament.uk/s3/committees/ticc/or-09/tr09-1602.htm#top
For Minister’s response at Stage 3 see Official Report, 24 June, Col.18783:

We have collected over 1,000 signed postcards from people across Scotland in support of our petition.

Petition background information

The Aarhus Convention is an international treaty that recognizes every person’s right to a healthy environment as well as his or her duty to protect it. It seeks to ensure that every individual lives in an environment adequate for his or her health and well-being. This applies not only to those of us living today, but to future generations as well. The Convention upholds the following rights (the three ‘pillars’) for every person: The right—

1. to be informed and have access to information about the environment;
2. to participate in environmental decision making; and
3. of easy and effective access to justice if the former rights are denied or if national environmental law has been broken, in a way that is fair, equitable, timely, and free or inexpensive.

The last of these three ‘pillars’ enables the public to challenge general breaches of environmental law, even if they have not suffered personal harm. This is crucial in fighting decisions that lead to environmentally damaging developments where the harm is not geographically limited. In addition, the Convention states that access to justice under any of these headings must not be “prohibitively expensive”.

Scotland, as an Aarhus signatory at both UK and EU level, is legally obliged to implement all three pillars. EU directives have been put in place for the first two. For pillar one, the Integrated Pollution Prevention and Control Directive and for pillar two the Environmental Impact Assessment Directive which have been legislated for in Scotland under the Freedom of Information (Scotland) Act 2002 and the Environmental Assessment (Scotland) Act 2005. There is no EU directive, and no specific Scottish legislation, which implements the final pillar, access to justice.

The European Commission and Aarhus Compliance committees have recently found the UK (England and Wales) to be non-compliant with the Aarhus Convention, with respect to access to justice. The main area of non-compliance was around prohibitive costs, an area where the Scottish legal system is even further behind the rest of the UK.
How did England and Wales get to this stage?

In May 2008, a Working Group on Access to Justice published Access to Environmental Justice in England and Wales, examining UK compliance with the access to justice provisions of the Aarhus Convention. Known as the Sullivan report, this concluded that “For the ordinary citizen, neither wealthy nor impecunious, there can be no doubt that the Court’s procedures are prohibitively expensive. If the problems identified in this report are not addressed it will not be long before the UK is taken to task for failing to live up to its obligations under the Aarhus Convention.”

Also in 2008, a wide ranging review of legal costs in civil matters was commissioned by the UK Government and undertaken by Lord Justice Jackson. The Jackson Report deals with environmental judicial reviews at para 4.1. It concludes that: “As our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention to which the UK has voluntarily signed up.”

The UK Government argued that it was compliant on costs because of the combination of (1) the availability of legal aid; (2) the existence of judicial discretion as to whether to award costs (and at what level; and (3) recent legal developments in relation to PCOs.

Given that in Scotland legal aid is not available for community groups or NGOs, nor for public interest cases, and rarely awarded in environmental cases, argument (1) is even less relevant here. In relation to (2), because this decision can only be made at the conclusion of a case, it does not solve the issue of access to justice not being prohibitively expensive. And finally, as mentioned, Scotland has only issued one PCO, the argument presented in point (3), and that was set at arguably a prohibitively high level. Furthermore, the findings of the Compliance Committee (ACCC/C/2008/33) indicate that this argument from the UK Government is inadequate.

Additionally, as far as ‘title and interest’ is concerned, in England and Wales the requirement of demonstrating a 'sufficient interest' provides a much broader and more accessible mechanism for implementing Aarhus’ access to justice than the ‘title and interest’ approach under Scots law.

What might happen next?

Continued non-compliance could result in the UK being taken to the Court of Justice by the Commission, with the associated penalty. If the Court finds that an obligation has not been fulfilled, the Member State concerned must terminate the breach without delay. If, after new proceedings are initiated by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may, upon the request of the Commission, impose on the Member State a fixed or a periodic financial penalty. Since the “Scottish Courts follow essentially the same approach in making decisions about expenses as do the other legal jurisdictions of the UK”, Scotland too must change or face the repercussions.

In October 2010, the Department for Environment, Food and Rural Affairs published a report setting out the measures the Government has taken to implement the Aarhus convention and is seeking responses from the public until 17 November. Comments received from the public during this consultation period will be reflected in the final draft of the report to be submitted at the next meeting of the Aarhus Convention parties, which will take place in July next year. The consultation does cover Scotland, so MSPs should be aware of, and able to discuss, the findings.

The Gill Review

The Gill review of civil law recognised issues around costs and standing. It recommended capping the costs of certain legal cases; ensuring competency to issue PCOs in Scottish courts, with somewhat less restrictive criteria than in England; and easing the rules on who could bring a case to court, ensuring that anyone with a clear interest – including communities and campaigning organisations – could initiate legal challenges.

Why access to environmental justice is important

There are a number of case studies that demonstrate the Aarhus-breaching barriers to environmental justice in Scotland. In 2003 William Smith v the Scottish Ministers demonstrated how costs can prove an insurmountable barrier. Being dyslexic, disabled
and deaf, and so unable to conduct his own appeal, Smith was twice denied legal aid and didn't have the financial means to secure representation. His challenge that a new bridge over the Clyde in Glasgow would impede dredging and elevate the risk of flooding, was unable to go ahead.

For the claimant in Mary Buchan Forbes v Aberdeenshire Council & Trump International Golf Links, the restrictive interpretations of title and interest to sue proved a barrier, as Forbes' standing was questioned by the judge on the basis that although neighbouring the site, her dwelling stands a kilometre from the current environmentally damaging preparatory works. Forbes also failed to demonstrate "sufficient interest" because she had not followed proper procedure by objecting to the planning application in the first place.

In a groundbreaking 2010 ruling, the local community group seeking to overturn the late inclusion (without adequate consultation) of a coal fired power station at Hunterston in the National Planning Framework were awarded the first ever PCO in Scotland. Yet, the court capped the applicant's liability for the defendant's costs at £30,000, which, when added to the estimated costs of up to £80,000 he would face in bringing the case (having been denied legal aid), amount to a significant financial barrier to pursuing the case. The principle behind PCOs 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 cost cap set, mean PCOs in Scotland do not yet contribute to removing the financial barrier to environmental justice.

The position of the UK Government that the issue of PCOs and other discretionary means of limiting costs, is a matter for the courts is clearly contradicted by the courts themselves in calling for Aarhus compliance to be secured through "changes to the Rules rather than further development of judge-made law." Likewise, the position of our government that it is the courts who must act, not the government, cannot be maintained given that too great a dependence on judicial discretion has been judged one of the obstacles to access to justice being 'fair, equitable, timely, and free or inexpensive', as Aarhus demands.

What we need in Scotland

We are asking the Public Petitions Committee to look behind the rhetoric and find clear evidence for the Scottish Government's position that the Scottish legal system is compliant with the Aarhus Convention. We would suggest examining the Compliance Committee's decision and recommendations to the UK Government and asking whether the same recommendations apply and should be put in place in Scotland. We believe examination of the facts will lead to a conclusion that Scotland is not in compliance with pillar 3 of the Aarhus Convention and therefore that the Scottish Government should introduce legislation to address this non-compliance.

The Scottish Government should:
• Discuss access to justice in environmental matters with DEFRA and seek to share the findings of the recent consultation and the UK Government's plans to ensure compliance with the recent decision of the Aarhus Compliance Committee.
• Acknowledge that the restrictive access to justice and prohibitive costs which exist in relation to access to justice on environmental matters in Scots law is in breach of the terms of the Aarhus Convention.
• Commission an independent inquiry into the best way to improve access to justice in environmental matters, including examining expenses: considering the usefulness of PCOs, the findings of Jackson and Sullivan in the English and Welsh context and the possibility of qualified one way cost shifting; and examining title and interest: looking at systems in other ECE states, how can Scotland apply the broad access to justice demanded by the Aarhus Convention.
• Introduce legislation enabling individuals, communities and interest groups to access justice in environmental matters without fear of prohibitive cost.

Specific questions:
• What discussions have the Scottish Government had with the UK Government in relation to the recent decision of the Aarhus Compliance Committee and the DEFRA
consultation?
• What steps does the Scottish Government intend to take to reflect on the decision of the Aarhus Compliance Committee that PCOs are not sufficient to provide full access to justice under the terms of the convention?
• What steps does the Scottish Government intend to take to ensure title and interest do not restrict access to justice in environmental matters as required by the Aarhus Convention?
• What studies have the Scottish Government undertaken to analyse the provision of legal aid in cases involving the environment?
• What studies have the Scottish Government undertaken to analyse the ‘freezing’ effect of current expenses rules?
• How many cases does the Scottish Government consider have been presented to the court in which full access to justice on environmental matters can be shown to have been met?
• Can the Scottish Government share the progress of discussions with the Lord President of the Court of Session in relation to the Gill Review?
• Does the Scottish Government consider that the findings of the Gill Review are still current and reflective of the legal situation following the findings of the Aarhus compliance committee?

Unique web address
http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01372

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NO

How many signatures have you collected so far?

1

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