

Fergus D. Cochrane
Clerk to the Public Petitions Committee
Tower 4
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The Scottish Parliament
Holyrood
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Dear Fergus

You recently wrote to the Scottish Government setting out a number of questions in relation to petition 1372, which concerns access to justice in environmental matters. I have attached our response to these questions below.

- **Do you consider that 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 and can you demonstrate this?**

The requirements of the Aarhus Convention are set out in binding European legislation (Directive 2003/35/EC), which has been transposed into Scots law by a range of SSIs.

- **What is the case law, rules of court, or legislation to demonstrate you are compliant?**
- **Will you publish the documents and evidence of such compliance and, if not, why not?**

Scotland complies with the Convention requirements. No legal challenge made on these grounds to date has succeeded. A range of SSIs, such as SSI 2006/614, transpose into law the principal obligations of the Directive, including the requirement to provide non-governmental organisations in environmental cases in which the Directives are engaged with the required standing and interest in judicial review proceedings.

Similar wording has been enacted in all necessary respects in different instruments along the lines of the following in SSI 2006/614:

“Any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of the Directive and rights capable of being impaired for the purposes of Article 10a(b) of the Directive.”

Furthermore, the Court of Session Rules Council has considered and recommended draft rules in relation to protective expenses orders (draft minutes from the relevant meeting of the Council are available at:

http://www.scotcourts.gov.uk/session/rules_council/Meeting%20of%2011%20Oct%202010.pdf). The Scottish Government has made these draft rules available to the European Commission for comment.

Finally, if implemented in due course, the planned introduction of a simpler test of sufficient interest, as recommended in the Report of the Scottish Civil Courts Review, would broaden access to justice generally.

- **What action will you take in light of the recent ruling of the Aarhus Compliance Committee against the UK Government?**

The recent ruling in question relates to the Port of Tyne and so only applies to England and Wales. While certain aspects of the Scottish legal system and administration of justice are similar, there are significant differences and so direct read across is not appropriate. Nevertheless, such matters, both from England and Wales and further afield, are routinely considered when developing Scottish solutions, even when not directly applicable to Scotland.

- **What was your response to the recent DEFRA consultation on this issue and will you publish it?**

The Scottish Government did not respond to the consultation in question.

- **What is your response to the questions posed by the petitioner at the end of the petition ('What we need in Scotland')?**

The Scottish Government response to the petitioner's specific questions is set out below.

1) 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?

This question concerns matters crucial to the effective and efficient functioning of the Government, in particular in relation to the formulation of policy, and to maintaining effective relations within the UK and EU. That being the case, the Scottish Government does not consider it appropriate to answer this question.

2) 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?

This is a matter for the Court of Session. Its Rules Council has considered and recommended draft rules in relation to protective expenses orders. The Scottish Government has made these draft rules available to the European Commission for comment.

3) 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?

As stated in the Scottish Government's response to the Report of the Scottish Civil Courts Review (which is available at: <http://www.scotland.gov.uk/Resource/Doc/330272/0107186.pdf>), it agrees with the Review's proposal to replace the current tests of title and interest with a single and simpler test of whether the petitioner has determined a sufficient interest in the subject matter of the proceedings. The introduction of this simpler test of sufficient interest would broaden access to justice generally. Implementation by primary legislation would be subject to Ministerial decisions at the appropriate time and to approval by the Parliament.

4) What studies have the Scottish Government undertaken to analyse the provision of legal aid in cases involving the environment.

No such studies have been undertaken.

5) What studies have the Scottish Government undertaken to analyse the 'freezing' effect of current expenses rules?

No such studies have been undertaken.

6) 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?

The Scottish Government considers that the justice system in Scotland, including protective expenses orders, meets the requirements of the Aarhus Convention.

7) Can the Scottish Government share the progress of discussions with the Lord President of the Court of Session in relation to the Gill Review?

Following the publication of the Scottish Government's response to the Report of the Scottish Civil Courts Review, it is now considering plans for the implementation of the recommendations. Initial contact has been made with relevant stakeholders, including the Lord President, and further consultation will be undertaken as appropriate.

8) 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?

The Scottish Government will take such findings into consideration when considering plans for the implementation of the Review's recommendations.

Finally, the Cabinet Secretary for Justice responded to a number of Parliamentary Questions on this subject in late 2010, which may be of interest to the petitioner. These are available at: <http://www.scottish.parliament.uk/Apps2/Business/PQA/Default.aspx> (PQ numbers 37741, 37742, 37743, 37744, 37745, 37746, 37747 and 37748).

I hope this has been helpful.

ANDREW MACKENZIE

Head of Courts and Legal Services Reform