

PE1372/F

Fergus D. Cochrane
Clerk to the Public Petitions Committee
Tower 4
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The Scottish Parliament
Holyrood
EH99 1SP

11 February 2011

Dear Fergus,

Petition 1372 (access to justice in environmental areas)

You recently wrote to the Scottish Government seeking a written response to the petitioner's written submission PE1372/E.

General remarks

Before turning to the specific questions in bold in the petitioner's submission, I must stress that the Scottish Government does take compliance with all its European and other international obligations seriously. Indeed, and to clarify a point made in the previous response to the Committee, the requirements of the Aarhus Convention so far as set out in binding European legislation have been transposed into Scots Law by a range of SSIs, including the rules on standing.

I can also add that draft rules relating to protective expenses orders (referred to in the Scottish Government's previous response) have been developed further and will be considered by the Court of Session Rules Council when it meets on 14 February 2011.

Responses to specific questions in PE1372/E

The Scottish Government should be asked to confirm whether or not they consider whether Scotland complies with its international obligations in respect of Article 9(3) of the Convention.

The Scottish Government complies with the Convention.

We would suggest the Committee press the Scottish Government on this point, and particularly ask why there is no information in their response on the wider requirements of Article 9(3) (breaches of domestic law re environmental matters in general).

Again, the Scottish Government complies with the Convention. However, as set out in our previous response and in the Government response to the Gill Review, the Scottish Government agrees with the Review's proposal to replace the current tests of title and interest with a single and simpler test - which would broaden access to justice generally in all areas. This would require primary legislation and the approval of the Scottish Parliament in due course.

The Committee could ask the Scottish Government to clarify the status of the Court of Session Rules Council with regard to the Scottish Government's obligations under the Aarhus Convention particularly in the light of the reference in Edwards.

Ultimately, the responsibility for implementing devolved international and European Community obligations rests with the Scottish Government. However, where implementation requires changes to the Court of Session's rules of court, the Scottish Government is careful to respect the role of the Court of Session Rules Council, since the Lord President is responsible for drafting and approving rule changes.

The Edwards case has of course yet to be decided; the Scottish Government will consider its implications in due course.

The Committee could also ask the Scottish Government to advise on what steps it is taking to comply with the Aarhus Convention in environmental actions outwith what is currently being considered by the Court of Session Rules Council.

Again, the Scottish Government complies with the Convention requirements.

We also suggest the Committee question whether both SLAB and the Scottish Government recognise that there is a problem and whether they have a view on the repeal of Regulation 15.

The purpose of this rule (regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002) is to ensure that taxpayers' money is only used where it is appropriate to do so and where there is no other means of funding a court case. In cases where there are many individuals interested in the outcome of an action, it is not always reasonable to expect public funds to meet case costs if there are others involved in a case who could meet those expenses.

This reflects the wider aims behind legal aid availability in Scotland:

- The legal aid system in Scotland provides free or subsidised legal assistance for those who could not otherwise afford it to pay for it themselves. Civil legal aid, which provides for representation before a court, may be available provided that the three tests contained in the Legal Aid (Scotland) Act 1986 are met: applicants must qualify financially, must have a legal basis for their case and it must be reasonable in the particular circumstances of the case that legal aid is provided.
- In Scotland, legal aid is, generally, only available to individuals. The Scottish Legal Aid Board (the Board) can only grant legal aid to someone who is jointly concerned with, or has the same interest in a matter, as other people if it is satisfied on two counts. Firstly, that the applicant would be seriously prejudiced in their own right if legal aid were not granted or, secondly, that it would not be reasonable and proper for the other people concerned to pay the expenses that would be paid under legal aid if it was granted. The individual would have to show what serious prejudice there would be to them in their own right, and not anyone else, if legal aid were not granted. They would also have to show that it would not be reasonable for others affected to meet the costs of the case.

A change would be required to primary legislation in order for civil legal aid to be made available to community groups in Scotland. If such a change were envisaged, it should be noted that during discussions as part of the Gill Review, protective expenses orders were seen to be advantageous for such actions, given the degree of certainty they provided, were an environmental group to be unsuccessful. In addition, there is also a need to consider other factors such as whether or not it would be reasonable to expect that parties within a group who could afford to meet their own share of the legal costs, do so.

We would suggest the Committee ask the Scottish Government what timescale they are working to for the introduction of the simpler test.

As set out above, the Scottish Government agrees with the Review's proposal to replace the current tests of title and interest with a single and simpler test - which would broaden access to justice generally in all areas. As this would require primary legislation, it is not possible to say at the moment when a Bill to implement such proposals would be likely to be introduced.

We would ask that the Committee seek confirmation from the Scottish Government of their contribution to the UK Implementation Report and whether the Scottish Government is content with the conclusions in the Implementation report.

The Scottish Government did contribute to the Implementation Report, and is satisfied that the report provides an accurate assessment of compliance in Scotland.

I hope these responses assist.

ROBERT SANDEMAN

Head of Courts and Legal Services Reform