

Communication from the Petitioner 22 February 2011

Friends of the Earth Scotland acknowledge that the Scottish Government has implemented those aspects of the Aarhus Convention which have been the subject of binding European legislation. Our concern remains that Scots law does not comply with Article 9 (3) of the Convention for which there is currently no European Directive.

We would therefore continue to take issue with the statement included in the Scottish Government's response stating that the Scottish Government complies with the Convention. Indeed, we would suggest that the indication that the Scottish Government intend to replace the current tests of title and interest "which would broaden access to justice generally" strongly implies that the current state of affairs is inadequate.

The Scottish Government response does not mention anything about the cost of litigating - the response is only on title and interest. We would suggest the Committee consider including in their legacy report a recommendation to press the Scottish Government to respond on this.

We would also express concern that the Scottish Government's response seems to focus only on the Court of Session. The Sheriff Court has jurisdiction over a number of environmental type issues including nuisance, some water issues and access to land. We would be interested to know what progress the Scottish Government are making on ensuring access to justice in the Sheriff Court as well as the Court of Session.

We are also concerned that deferring to the Rules Council may not take full account of the requirement that the test for ensuring inexpensive access to the courts must not be reliant on judicial discretion.

We also continue to be disappointed that the Scottish Government cannot explicitly state how they comply with Article 9 (3) of the Convention and give examples to support this.

Regarding the UK Implementation Report, we find it worrying that the Scottish Government consider the report to provide an accurate assessment of compliance in Scotland.

For instance, under Article 3 paragraph 3, the Defra report refers repeatedly to the standards of environmental education and awareness provided by the National Curriculum and the Environment Agency. As neither of these institutions provide advice to Scotland, we find the absence of parallel information about Scottish provision worrying.

Equally, under Article 3 paragraph 4, the Defra report mentions the Greener Living Fund as providing direct financial support to environmental associations or groups. No mention is made of Scottish Government initiatives such as the Climate Challenge Fund.

The Scottish Government's response indicates that the (limited) changes they seem to admit as being necessary will require primary legislation but that there is no timetable yet set for such legislation. We would suggest the Committee ask the

Government if they are concerned that whilst awaiting this legislation they are in breach of the Convention.

In relation to the Scottish Legal Aid Board's response, we would suggest the questions for the Committee to consider on the Board's response include:
Have the legal aid applications raising regulation 15 that have been granted been environmental cases?

The Board haven't identified how many applications have been refused under Regulation 15 which is probably more significant than how many have been approved – and we would be interested in the numbers both of environmental issues and other issues

Are the two applications that have been granted despite raising environmental issues both for environmental matters?

Have the Board given advice to the Scottish Government on the impact of Regulation 15 on environmental legal aid applications in view of the Scottish Government's obligations regarding access to environmental justice?

We would also be interested to ask of the Scottish Government concerning Regulation 15 and the availability of legal aid whether they are aware that there is considerable reliance put on the availability of legal aid by the UK (and ultimately by the Committee) in the Port of Tyne case and if so, why does that same reliance not need to be placed on legal aid in Scotland. This relates back to the failure of the Scottish Legal Aid Board to identify the number of environmental cases that have been refused legal aid.

We hope the issues identified persuade the Committee that there is still more to be investigated in relation to this Petition.

We would suggest that the Committee recommend in their legacy report that the next session's Public Petitions Committee consider looking at the new Government's legislative programme to see if it includes the potential to introduce such legislation. If there was such potential, the petition could be referred to the appropriate Committee and if not, then the Petitions Committee could examine how else Scotland might ensure that individuals and communities in Scotland have full and not excessively expensive access to justice in environmental matters as required under the Aarhus Convention.