



**Friends of  
the Earth  
Scotland**

Anne Peat  
Clerk to the Public Petitions Committee  
TG 01  
The Scottish Parliament

7<sup>th</sup> October 2011

Dear Anne

Thank you for the opportunity to respond to the Scottish Government's letter of 26<sup>th</sup> August and the Scottish Legal Aid Board's letter of 12<sup>th</sup> August. There are a number of points we would like to pick up on in these responses, but we would also like to update the Committee on recent activity on this campaign, a number of relevant cases currently or recently in the courts, and lastly outline what we would like to see happen next.

### **1. Recent campaign activity**

Since we last corresponded with the Committee, we have published a report examining Scotland's Aarhus Convention obligations in relation to access to justice and the current status quo. The report is available at <http://foe-scotland.org.uk/tippingthescales> and is also sent as an attachment with this letter.

A number of written parliamentary questions have been lodged by interested MSPs, probing various issues, particularly in relation to costs. Please find as an appendix to this letter a list of relevant PQs.

### **2. Update on current relevant cases**

- **Infraction proceedings against the UK at the European Court of Justice**

Since our last submission to the Committee the European Commission has referred the UK to the ECJ for non-compliance with the access to justice provisions of Aarhus, particularly in relation to prohibitive expense.<sup>1</sup> If the Court finds against the UK, this could have serious implications for all UK jurisdictions. As the complaints that triggered this case are from the English jurisdiction, we are liaising with the Commission desk officer for the UK to clarify Scottish specific issues with compliance. Our position is that the ability to access the courts in Scotland is far worse than elsewhere in the UK (with the possible exception of Northern Ireland). We will keep you up to date with any developments, but a decision is likely to be some months off.

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<sup>1</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML&aged=1&language=EN&guiLanguage=en>



**Scotland's champion  
for our environment.**

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A Scottish Charity: SC003442

- **Marco McGinty v the Scottish Ministers**

As you may be aware, this week Marco McGinty lost his judicial review of the Scottish Ministers decision to include the coal fired power station at Hunterston in the National Planning Framework.<sup>2</sup> The case highlights a number of our concerns. Mr McGinty was awarded the first ever Protective Expense Order issued in Scotland in January 2010 to limit his liability for the other sides costs should he lose. However, the cap was set high enough (at £30,000) that, combined with his own sides' expenses, he is now faced with liability of about £80,000. This amount would have certainly been prohibitively expensive had Mr McGinty not had strong community and NGO support.

The Scottish Ministers challenged Mr McGinty on his title and interest to sue, and won on that point. While Lord Brailsford argued that McGinty may have 'title' to sue as an individual to 'prevent a breach by a public body', he found that his connection to the site – despite being an almost daily visitor to it – was too remote and vague to qualify him as having an 'interest' to sue. Interest has generally been interpreted by the courts as having a private property interest, and Mr McGinty as a regular user but not owner of the site did not have that. This is in direct contradiction of the Aarhus Convention's requirement that access to the courts should be granted to members of the 'public concerned' i.e. members of the public who are likely to be affected by the decision and members of the public who have an interest in the decision making.<sup>3</sup>

In addition, Mr McGinty's petition was dismissed on the grounds of delay, on the basis that the challenge should have been taken at the time of the NPF 2 consultation in autumn 2008. This is despite information before the court in sworn affidavits that the community in general were not aware of the autumn 2008 consultation until early summer 2009.

- **Axa General Insurance v the Lord Advocate**

In June this year, Friends of the Earth Scotland became the first Scottish NGO (and the first environmental NGO in the UK) to intervene in a case at the UK Supreme Court. The case relates to insurance claims by victims of asbestos exposure who suffer from pleural plaques – scarring of the lungs – an apparently asymptomatic condition. The insurers are challenging the validity of a 2009 Act of the Scottish Parliament that ensures individuals can sue for damages if they contract the condition.<sup>4</sup>

Our intervention<sup>5</sup> relates to title and interest, as Axa are challenging the title and interest of some of the respondents in this case – individuals who are suffering from pleural plaques. The result of this case could have significant implications for Scots law on title and interest. We are expecting the judgement to be issued on 12<sup>th</sup> October, and will update the Committee on relevant outcomes.

### **3. Response to the Scottish Government and Scottish Legal Aid Board's submissions**

- **The costs of litigation in judicial review of environmental decisions**

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<sup>2</sup> Full judgement available at <http://www.scotcourts.gov.uk/opinions/2011CSOH163.html>.

For a fuller analysis of the case see <http://www.planningdemocracy.org.uk/archives/640>

<sup>3</sup> The Aarhus Convention: An Implementation Guide, p40 [www.unece.org/env/pp/acig.pdf](http://www.unece.org/env/pp/acig.pdf)

<sup>4</sup> Case details available at [http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case\\_2011\\_0108.html](http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case_2011_0108.html)

<sup>5</sup> The full text of our intervention is available online as an Appendix in our report 'Tipping the Scales', as an attachment to this email, and at <http://foe-scotland.org.uk/tippingthescales>.

Friends of the Earth Scotland acknowledge that the Scottish Government intend to consult on the rules of court on Protective Expense Orders, and that the Taylor Review will look at 'Expenses and Funding of Civil Litigation'.

We are concerned however, that Sheriff Taylor has appointed his Review Team in a closed process, with no advertisement of roles and no public scrutiny.<sup>6</sup> Further, it is evident that there is no environmental expertise on the Review Team: in light of the fact that the EC has brought infraction proceedings against the UK in relation to prohibitive expense, this seems particularly short sighted. It is not clear if the Scottish Government will be relying on the Taylor Review to bring forward a more general compliance with the Aarhus Convention in relation to costs; if they are, it appears to be a missed opportunity, in terms of environmental expertise.

*Q. We suggest that the Committee asks the Government for an explanation of how the particular urgency of issues in relation to the costs of environmental litigation, because of infraction proceedings, will be addressed within the timescales of the Taylor Review and available expertise on the Review Team. We suggest that the Taylor Review be asked to consider the setting up of a working group to advise the Taylor Review on the detail of this area.*

Consultation on the codification of rules of court on Protective Expense Orders has been promised for some time now, and specifically in response to PQ S4W-00947 (answered July 2011) the consultation was promised for 'during the course of summer 2011'. However, the most recently available minutes of the meetings of the Court of Session Rules Council, which date from February and May 2011, indicate that there has been correspondence with the EC over the draft rules, and that the Commission has expressed unhappiness with them. Further there is reference to a UK wide consultation on 'the policy in relation to environmental cases'.<sup>7</sup>

*Q. We would like the Committee to press the Scottish Government for an explanation of the delay to the consultation on the rules of court, and clarification over whether we are to expect a UK or Scottish Government led consultation, or both.*

The Scottish Legal Aid Board's response confirms that of three cases refused legal aid using Regulation 15 of the 2002 Regulations since 2009, all were concerned with environmental issues. They also confirmed that two environmental cases have been granted legal aid, but it is not clear within what timescale these two cases fall. If the two cases that were granted legal aid are the only environmental cases to have done so in a longer timeframe than since 2009, then this is not a direct comparison with the three cases that SLAB confirmed have been refused under regulation 15 since 2009.

*Q. We suggest the Committee ask for clarification on the timescale within which the two cases that were granted legal aid fell, i.e. is this two cases since the regulations were introduced in 2002? If so, how many applications under regulation 15 have been refused since 2002, and how many of these were environmental cases?*

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<sup>6</sup> See PQs S4W-01007 and S4W-01008 in appendix

<sup>7</sup> Minutes of meetings held on 14<sup>th</sup> February and 9<sup>th</sup> May 2011 available at [http://www.scotcourts.gov.uk/session/rules\\_council.asp](http://www.scotcourts.gov.uk/session/rules_council.asp). Minutes of the recent September meeting are not yet available.

- **What progress is the Scottish Government making in ensuring access to justice in the Sheriff Courts?**

The Scottish Government's response shows a lack of understanding of the scope of the Aarhus Convention. The Aarhus Convention relates to access to justice in all environmental matters, including those which fall under the remit of the Sheriff Court. Judicial review is an important function but by no means the only way in which an environmental matter can be brought before the courts.

Cases such as common law or statutory nuisance (where an interdict might be sought) against an environmental hazard such as noise or dust are frequently raised in the Sheriff Court. There are a number of statutory appeals to the Sheriff Court. The following are examples of statutory appeals given in the Scottish Government "Strengthening and Streamlining: The Enforcement of Environmental Law In Scotland" 2006.<sup>8</sup>

- **"The Contaminated Land (Scotland) Regulations 2000** gave legislative effect to Part II of the Environmental Protection Act 1990 - remediation notices may be served by a local authority and there are two routes of appeal against such a notice: in a case of "significant harm" the appeal is to the Sheriff by way of summary application (In a case of a "Special Site" determined by SEPA the appeal is to the Scottish Ministers).
- **The Private Water Supplies (Scotland) Regulations 2006**, Regulation 4, provides that a local authority shall determine the relevant person/s who provide the supply, occupy the land on which the supply is obtained or located or exercise power of management or control in relation to the supply. Regulation 5 provides that a person aggrieved by such a determination may appeal to the Sheriff by way of summary application.
- **Various bodies have a statutory duty to clear litter (mainly local authorities) under the Environmental Protection Act 1990** anyone who is aggrieved by the defacement of various categories of land by litter or refuse may make a summary application to the sheriff court to have the duty body told to clear up the mess or be "liable on summary conviction to a fine not exceeding level 4 on the standard scale together with a further fine of an amount equal to one-twentieth of that level for each day on which the offence continues after conviction".
- **The Pollution Prevention and Control (Scotland) Regulations 2000** Regulation 22 governs appeals to the Scottish Ministers (e.g. by a person who has been refused the grant of a permit for an installation). Regulation 22 allows that appeals against the Scottish Ministers' decision may be taken to the Sheriff by SEPA or persons referred to in Regulation 22(1) or 22(2), by way of summary application."

*Q. We would like the Committee to press the Scottish Ministers on what steps are being taken to ensure that all Sheriff Court procedures are Aarhus compliant?*

- **Court of Session Rules Council**

We are concerned about the delay in the Rules Council considering this matter and meantime the inability of those wishing to seek access to environmental justice to obtain access to the courts. We are also concerned about the potential judicial discretion that may in turn lead to non-compliance with Aarhus.

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<sup>8</sup> See [www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf](http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf). Please note that we have not checked whether any of these Regulations have been repealed, but we are aware of a number of statutory regulations granting appeal routes to the Sheriff Court

*Q. We suggest the Committee ask the Scottish Government to set out the timetable for consultation on the rules as indicated above, and to advise whether there will be further consultation with the European Commission on the rules before being finalised.*

#### **4. What we would like to see happen next**

We recognise that the Government has a number of consultations out or in the pipeline on relevant issues, and that the Gill Review reforms are moving forward. However, we feel that compliance with the Aarhus Convention needs particular attention because we are currently in breach of our international obligations. We are keen for the Government to open up a focussed debate on achieving access to environmental justice in Scotland.

We would be keen to see the Equal Opportunities Committee take on our petition, and take forward investigation into the barriers and potential solutions to access to environmental justice, and help stimulate this debate.

We feel that the Equal Opportunities Committee would be well placed to take on this work because both a) the impacts of environmental injustice and b) the key barriers to accessing justice in environmental matters relate to the equal opportunities agenda.

- a) The environmental justice movement arose out of the civil rights movement in America, as a result of increasing recognition that poor ethnic minority communities were bearing the brunt of environmental damage and pollution. While the concept has evolved from 'environmental racism', environmental damage – whether caused by climate change, pollution or over-development – continues to affect the poor and disadvantaged disproportionately. This is true in present day Scotland: the 2005 Scottish Government commissioned report 'Investigating environmental justice in Scotland' found that people living in deprived areas in Scotland suffered disproportionately from industrial pollution, poor water and air quality.
- b) In attempting to access the courts to seek remedy for environmental injustices poorer or deprived communities and individuals are again disadvantaged. Effectively the title and interest test bars individuals without a private property interest from taking cases while the extremely prohibitive costs involved bar non-wealthy individuals from taking cases.

We look forward to hearing the Committee's response. Please do not hesitate to get in touch if you require any additional information.

Yours sincerely,

**Mary Church**

Access to Environmental Justice Campaigner  
Friends of the Earth Scotland

## **Appendix - Written Parliamentary Questions on Access to Environmental Justice in 2011**

### **Question S4W-02937 - Malcolm Chisholm (Date Lodged 26/09/2011):**

To ask the Scottish Executive whether it plans to remove the right to take legal action for parties contesting planning and major infrastructure decisions.

### **Question S4W-02709 - Claudia Beamish (13/09/2011):**

To ask the Scottish Executive whether its implementation of the Aarhus Convention and directive 2003/35/EC depends on the availability of legal aid.

#### ***Answered by Stewart Stevenson (21/09/2011):***

The implementation of the Aarhus Convention and the related EU directive does not depend solely on the availability of legal aid. Legal aid is not available in Scotland to all potential applicants and cannot be awarded to non-governmental organisations.

In addition to legal aid in appropriate cases, a range of measures are in place to ensure access to justice in environmental cases. The ability of courts in Scotland to award protective expenses orders to limit an applicant's liability to pay the respondent's legal expenses where the applicant loses an application is an important protection which assists implementation. The Government intends to consult later this year on a codification of the rules regarding the granting of protective expenses orders.

### **Question S4W-02637 - Claudia Beamish (12/09/2011):**

To ask the Scottish Executive whether it considers that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 acts as a barrier to legal aid being awarded in most civil environmental cases.

#### ***Answered by Kenny MacAskill (21/09/2011):***

In cases where it appears that a legal aid applicant is jointly concerned with other persons, or has the same interest in the matter in connection with which the application is made, Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 does not allow legal aid to be granted, even when the usual statutory eligibility criteria are met, in two situations. Firstly, if the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted. Secondly, if it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Legal Aid Fund in respect of the proceedings if legal aid was granted. The Scottish Government believes this strikes the right balance by ensuring that legal aid is targeted at individuals needing assistance, not organisations, that publicly funded legal assistance is only made available where it is appropriate to do so, and where there is no other reasonable means of funding a court case.

### **Question S4W-02639 - Claudia Beamish (12/09/2011):**

To ask the Scottish Executive whether it plans to repeal regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

#### ***Answered by Kenny MacAskill (21/09/2011):***

The Scottish Government has no plans to repeal regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

### **Question S4W-02638 - Claudia Beamish (12/09/2011):**

To ask the Scottish Executive whether it considers that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 acts as a barrier to individuals applying for legal aid in civil environmental cases.

***Answered by Kenny MacAskill (21/09/2011):***

I refer the member to the answer to question S4W-02637 on 21 September 2011. All answers to written parliamentary questions are available on the parliament's website, the search facility for which can be found at:

<http://www.scottish.parliament.uk/Apps2/MAQASearch/QAndMSearch.aspx>.

**Question S4W-02636 - Claudia Beamish (12/09/2011):**

To ask the Scottish Executive, in relation to the implementation of the Aarhus Convention and directive 2003/35/EC, whether it considers that legal aid provides adequate access to justice in environmental cases.

***Answered by Kenny MacAskill (21/09/2011):***

The availability of legal aid is an important part of the Scottish Government's measures which implement the provisions of the Aarhus Convention and Directive 2003/35/EC in relation to access to justice in environmental cases. Since legal aid is not available to all potential applicants and cannot be awarded to non-governmental organisations, the availability of legal aid, by itself, is not intended to be the only mechanism by which adequate access to justice in all environmental cases is provided.

The availability of legal aid is supported by the ability of courts in Scotland to award protective expenses orders to limit an applicant's liability to pay the respondent's legal expenses should the applicant lose the application. The Scottish Government supports a codification of the rules regarding the granting of protective expenses orders and is giving consideration to this matter with a view to a consultation exercise being conducted later this year to assist in the development of new rules.

**Neil Findlay submitted on 30 August 2011**

TATSE further to answer to question S4W-01008 on 8 July 2011, what criteria was used in the selection of the Reference Group for the Taylor Review.

TATSE further to answer to question S4W-01008 on 8 July 2011, whether there was a selection process for members of the Reference Group for the Taylor Review and if so what it involved.

TATSE further to answer to question S4W-01008 on 8 July 2011, whether there was any consultation on the appointment of members of the Reference Group for the Taylor Review.

***Answered (together) by Kenny MacAskill (08/09/2011):***

The Review of the Expenses and Funding of Civil Litigation in Scotland, which is being led by Sheriff Principal James Taylor, is independent of the Scottish Government. The choice of members of the reference group for the review was a matter for Sheriff Principal Taylor alone.

**Question S4W-01007 - Neil Findlay (20/06/2011):**

To ask the Scottish Executive how the review by Sheriff Principal James Taylor of the costs and funding of litigation is considering costs in relation to environmental matters and what opportunities there are for (a) non-governmental organisations and (b) the public to contribute

***Answered by Kenny MacAskill (07/07/2011):***

The review will consider the costs and funding of public interest actions as part of its remit. This will include environmental actions. In terms of how it will consider these matters, the review will be looking to draw on the experience and expertise of those involved in public interest actions.

The review will be carrying out a consultation exercise later in the year, where those with an interest will be able to contribute. The consultation paper will be made available on the review's website [www.taylorreview.org](http://www.taylorreview.org), together with details of how to respond.

**Question S4W-01008 - Neil Findlay (20/06/2011):**

To ask the Scottish Executive whether environmental expertise will be involved in the review by Sheriff Principal James Taylor of the costs and funding of litigation.

**Answered by Kenny MacAskill (08/07/2011):**

The review will consider as part of its remit the cost and funding of litigation in public interest actions (this will include environmental actions). In doing so, the review will be consulting widely with those with an interest in public interest litigation.

**Question S4W-01009 - Neil Findlay (20/06/2011):**

To ask the Scottish Executive whether it plans to amend the Civil Legal Aid (Scotland) Regulations 2002 in order to provide legal aid in relation to environmental issues.

**Answered by Kenny MacAskill (14/07/2011):**

Civil legal aid is already available in relation to environmental issues, provided that the statutory eligibility criteria 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.

**Question S4W-00947 - Patrick Harvie (16/06/2011):**

To ask the Scottish Executive whether it plans to consult on the proposed changes to the rules of court regarding protective expenses orders and, if so, when this consultation will take place.

**Answered by Kenny MacAskill (06/07/2011):**

The Scottish Government intends to consult on changes to the rules of court regarding protective expenses orders during the course of summer 2011.

**Question S4W-00949 - Patrick Harvie (16/06/2011):**

To ask the Scottish Executive, further to the Head of Courts and Legal Services Reform's letter to the Public Petitions Committee of 11 February 2011 regarding petition PE1372, when it plans to bring forward the primary legislation to replace the current tests of title and interest with a single and simpler test.

**Answered by Kenny MacAskill (06/07/2011):**

As stated in the response to PE1372, the Scottish Government agrees with Lord Gill's recommendations in the Scottish Civil Court Review to replace the current tests of title and interest with a single and simpler test.

The Scottish Government intends to take forward Lord Gill's recommendations as part of a planned programme of reform under its Making Justice Work programme. This will include legislation, beginning in the early years of the Parliament.