Briefing for the Public Petitions Committee

Petition Number: PE1372

Main Petitioner: Duncan McLaren

Subject: Aarhus Convention on Access to Justice in Environmental Matters

Calls on the 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.

Background


The Convention contains three broad themes or ‘pillars’, these are:

Access to information: This pillar requires public authorities to respond to public requests for environmental information, and requires them to collect, update and disseminate appropriate environmental information relating to their activities.

Public participation: This pillar sets out minimum standards for public participation in decisions on whether to license or permit certain types of activity listed in Annex I to the Convention. This list is similar to the list of activities for which an Environmental Impact Assessment or Integrated Pollution Prevention and Control licence is required under the relevant EU legislation. It also covers public participation on decisions to release genetically modified organisms to the environment and in the development of plans, programmes, regulations and rules by public bodies.

Access to justice: This pillar aims to provide access to justice in three contexts:
- A person whose request for information has not been dealt with to their satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law.
- Persons with sufficient interest in a proposed project or activity covered by the Convention must have a right to seek a review in connection with decision-making on that project or activity. The review may address either the substantive or the procedural legality of a decision, or both.
- Challenges to breaches of environmental law in general.

The procedures in each of the three contexts referred to above are required to be ‘fair, equitable, timely and not prohibitively expensive’.

Article 15 of the Convention required the Meeting of the Parties to establish arrangements for reviewing compliance with the Convention. The result being the Compliance Committee. The petitioner mentions Compliance Committee Communication ACCC/C/2008/33, which relates to a communication which contained general allegations regarding costs and timescales for the judicial review system in England and Wales and specific allegations regarding licensing of dredging activities at the Port of Tyne. The Commission recommended that the UK Government:

(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified […] to ensure that such procedures:

(i) are fair and equitable and not prohibitively expensive; and
(ii) provide a clear and transparent framework.

(b) Review its rules regarding the timeframe for the bringing of applications for judicial review […] to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

It is worth noting that the UK Government does not agree with the Committee’s finding on costs, stating in response to the draft findings that “The UK continues to consider that the law relating to the award of costs in England and Wales is compliant with Articles 9(4) and (5) of the Convention…”

**Aarhus Convention and the European Union**

The European Commission adopted the Aarhus Convention on 17 February 2005 [Decision 2005/370/EC] and has been a party to the Convention since May 2005.

In 2003, two Directives concerning the first and second pillars of the Aarhus Convention were adopted, these are:

The provisions of these Directives have been transposed into Scottish legislation through the Freedom of Information (Scotland) Act 2002 and the Environmental Assessment (Scotland) Act 2005.

Scottish Government Action

The Report of the Scottish Civil Courts Review was launched by the Lord Justice Clerk, the Rt Hon Lord Gill, on Wednesday, 30 September 2009. The Report considers the issue of compliance with the Aarhus Convention in Chapter 12, looking specifically at the issue of the cost of court action to litigants. The Report makes recommendations to the Scottish Government on this issue. The Scottish Government published its response to the Report on 11 November 2010. This response states:

174. The report also discusses the issue of expenses in public interest litigation - particularly the question of whether the court should be able to protect a petitioner from the risk of meeting all the costs of the opponent should they lose. So called 'protective costs orders' have already been made by the Court of Session, and the European Commission has raised questions as to whether, in environmental cases, the current regime in the UK complies with the Aarhus convention, which requires that legal remedies should not be prohibitively expensive.

175. The Lord President has indicated to the Scottish Government that he intends to make rules to address this issue in environmental cases and the Court of Session Rules Council has now proposed new rules for such cases. The Scottish Government has indicated that it supports a wider codification of the rules on protective costs, to avoid the haphazard and inconsistent development of costs regimes in particular types of action.

Scottish Parliament Action

The Scottish Parliament has not considered the Aarhus Convention.

Alan Rehfisch
Senior Research Specialist
19 November 2010
SPIe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However if you have any comments on any petitions briefing you can email us at spice@scottish.parliament.uk

Every effort is made to ensure that the information contained in petitions briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.