EQUALITIES AND HUMAN RIGHTS COMMITTEE

AGENDA

14th Meeting, 2019 (Session 5)

Thursday 30 May 2019

The Committee will meet at 9.30 am in the James Clerk Maxwell Room (CR4).

1. **Decision on taking business in private**: The Committee will decide whether to take item 3 in private.

2. **Petitions PE1372**: The Committee will consider a petition by Duncan McLaren, on behalf of Friends of the Earth Scotland, calling on the Scottish Parliament to urge the Scottish Government to clearly demonstrate how access to the Scottish courts is compliant with the Aarhus convention.

3. **Correspondence**: The Committee will consider correspondence on the Scottish Government’s Draft Gypsy/Traveller Action Plan and Gypsy/Traveller definition - Planning (Scotland) Bill.

4. **Work programme (in private)**: The Committee will consider its work programme.

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The papers for this meeting are as follows—

**Agenda Item 2**

Paper from the Clerk  
EHRiC/S5/19/14/1

SPICe Paper  
EHRiC/S5/19/14/2

**Agenda Item 3**

PRIVATE PAPER  
EHRiC/S5/19/14/3
(\(P\))

PRIVATE PAPER  
EHRiC/S5/19/14/4
(\(P\))

PRIVATE PAPER  
EHRiC/S5/19/14/5
(\(P\))

**Agenda Item 4**

PRIVATE PAPER  
EHRiC/S5/19/14/6
(\(P\))
Introduction

1. This paper invites the Committee to consider the ongoing petition:

   - **PE01372**: Access to justice in environmental matters

2. This paper sets out the terms of the petition along with information on the most recent consideration by the Committee. It also provides updated information and links to other relevant documentation where appropriate.

3. SPICe paper 2 provides further information on updates and recent developments regarding the petition.

4. The petition originates from Session 3 of the Parliament and was referred to the previous Equal Opportunities Committee in Session 4. The Public Petitions webpage summarising the consideration of the petition in these Sessions can be found [here](#). Further information can also be found in the Session 4 Legacy Report.

5. Further general background information on the petitions process, provided by the Public Petitions Committee, can be accessed on its dedicated [webpage](#).

Options available to Committees considering petitions

6. Once a petition has been referred to a subject Committee it is for the Committee to decide how, or if, it wishes to take the petition forward. Among options open to the Committee are to:

   - Keep the petition open and write to the Scottish Government or other stakeholders seeking their views on what the petition is calling for, or views on further information to have emerged over the course of considering the petition;
   - Keep the petition open and take oral evidence from the petitioner, from relevant stakeholders or from the Scottish Government;
   - Keep the petition open and await the outcome of a specific piece of work, such as a consultation or piece of legislation before deciding what to do next;
   - Close the petition on the grounds that the Scottish Government has made its position clear, or that the Scottish Government has made some or all of the changes requested by the petition, or that the Committee, after due consideration, has decided it does not support the petition;
• Close the petition on the grounds that a current consultation, call for evidence or inquiry gives the petitioner the opportunity to contribute to the policy process.

7. When closing a petition, the Committee should write to the petitioner notifying the decision and setting out its grounds for closure. Closing a petition does not preclude the Committee taking forward matters relevant or partly relevant to the petition in another way.

**PE01372: Access to justice in environmental matters**

**Terms of the Petition**

8. **PE0 1372** was submitted to the Parliament in November 2010 and 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.”

**Committee Consideration**

9. The petition was considered by the Equal Opportunities Committee in session 4, and in their legacy report they recommended—

“Due to the Scottish Government’s commitment to publishing an options paper on an environmental court before the end of this session, we agreed to keep the petition open. We recommend that our successor Committee tracks any work taken forward by the Scottish Government on a consultation on an environmental court.”

10. This Committee noted the petition in April 2017 when it agreed to await an update on the issues raised in the Petition and the position with the Courts review and review of court costs.

11. In September 2017 the Scottish Government published [Developments in environmental justice in Scotland: analysis and response](#) which stated—

“The Scottish Government has considered the issue carefully and is fully mindful of the views of the respondents to the consultation. The variety of views on what sort of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape caused by Brexit lead Ministers to the view that it is not appropriate to set up a specialised environmental court or tribunal at present. The Government will,
however, remain committed to environmental justice and will keep the issue of whether there should be an environmental court or tribunal or even a review of environmental justice under review.”

**Current Consideration**

12. The Committee previously agreed to do further work on the petition and seek an update on the developments relating to the petition. SPICE have provided this update in paper 2.

13. No further communications have been received from the petitioner for PE0 1372 prior to this meeting.

**Options for consideration**

14. Options available to committees are set out at paragraph 6 above.

15. The Committee is asked to consider and agree what action it wishes to take in relation to the above petition.

16. The Committee may wish to close the petition on the grounds that the Scottish Government has made its position clear.

17. If this is an issue that the Committee does wish to explore further, it may wish to consider taking one or more of the following actions:

- Write to the Cabinet Secretary for Justice and the Cabinet Secretary for Environment, Climate Change and Land Reform to request an update on:
  
  o The Scottish Government’s current position on its compliance with the Aarhus Convention.
  o What legal weight the Scottish Government attributes to the findings of the Convention’s Compliance Committee and what obligations it is under to respond to its findings?
  o What governance gap will there be in enforcing the requirements of the Aarhus Convention following EU Exit, and how is this governance gap being considered by Scottish Government as part of its current work?
  o Whether the Scottish Government has assessed the impacts of changes stemming from the courts reform process - in particular changes to the judicial review process and rules on Protective Expense Orders (PEOs)?
  o Whether the Scottish Government has considered recommendations made by the Human Rights Consortium Scotland and other groups on ‘Overcoming Barriers to Public Interest Litigation in Scotland’?
  o How the Scottish Government is reviewing the case for environmental courts or tribunals as part of its current consideration of post EU Exit governance?
• Write to the UK Government to request an update on:
  
  o The UK Government’s current position on compliance with the Aarhus Convention with relation to Scotland.
  o How the UK Government is reviewing the case for environmental courts or tribunals as part of its current consideration of post EU Exit governance.

• Invite the petitioner to submit written evidence or appear before the Committee to share their views on progress in this area.

• Hear from other stakeholders either in writing or as part of a formal evidence session - such as the UK Environmental Law Association, Scottish Legal Aid Board, Scottish Environment LINK, and Scottish Human Rights Commission.

Clerks/SPICe
Equalities and Human Rights Committee
30 May 2019
Background

This paper provides an update on developments relating to PE01372: Access to justice in environmental matters, which calls on the Scottish 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.” The initial (2010) SPICe briefing on this Petition can be found here.

The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention) was signed in 1998. The UK Government is a signatory, therefore it is binding in Scots law. The Convention is based on three pillars:

• the right of access to information about the environment;
• public participation in decision-making about the environment; and
• access to justice in relation to environmental matters.

The petition relates to the third pillar, access to justice in environmental matters. Article 9 of the Convention provides that members of the public must have access to court procedures to challenge decisions relating to the natural environment that are fair, equitable and timely and which are not prohibitively expensive. Key issues relating to Aarhus compliance in Scotland discussed below include:

• The cost of taking legal action – and whether rules in Scotland on legal aid and Protective Expenses Orders (PEOs) ensure that access to environmental justice is not ‘prohibitively expensive’
• The scope of judicial review and whether judicial review procedures provide an adequate forum and remedy in environmental cases

Courts Reform (Scotland) Act 2014

The Courts Reform (Scotland) Act 2014 introduced a number of reforms to court structure, organisation and procedure, as recommended by Lord Gill’s Scottish Civil Courts Review (also known as the Gill Review). The Gill Review made a raft of recommendations designed to improve the efficiency, effectiveness and
proportionality of Scotland’s civil courts. Further background can be found in the Courts Reform Bill SPICe briefing. More information on judicial review proceedings can be found in this SPICe briefing.

Widening of legal standing (i.e. who can bring a case to court)

The Courts Reform Act replaced the concept of ‘title and interest’ in judicial review, requiring litigants to have a private interest in their litigation, with a less restrictive test of standing. The rights of representative organisations to litigate in the public interest are of clear relevance to environmental cases where cases may be brought by an NGO or community group for example, rather than an individual bringing a case relating to their private interest. Rights to bring cases in the public interest were clarified in the Supreme Court case of AXA General Insurance v HM Advocate, then affirmed in Walton v Scottish Ministers in 2012. In Walton, Lord Hope stated that environmental law proceeds on the basis that “the quality of the natural environment is of legitimate concern to everyone”, although this was not to be seen as an “invitation to the busybody”. The Courts Reform Act codified these developments, requiring someone wishing to challenge a decision of a public authority to demonstrate “sufficient interest” in that decision. This new test should help those seeking to represent a public interest, such as the protection of the environment.

Time limit and permission to proceed stage

The Courts Reform Act introduced a three-month time limit within which an application for judicial review must be made. However, the Court has discretion to allow a longer period where it considers it equitable so to do. This limit applies to all judicial review actions, including those relating to rights protected by the European Convention on Human Rights. Under the law before the 2014 Act came into force, there was no general time limit in Scotland within which an application had to be brought (although a petitioner who delayed in raising an action could be met with a challenge of ‘mora, taciturnity and acquiescence’). Judicial review actions relating to rights protected by the European Convention on Human Rights were formerly subject to a one-year time limit.

The Act also introduced a permission to proceed stage, intended to filter out cases with no real prospect of success or where the applicant has insufficient interest. Prior to the 2014 Act there was no requirement to obtain ‘leave’ from the court to bring a judicial review action.

Protective Expenses Orders (including 2018 developments)

In litigation, the general principle is that “expenses follow success”, i.e. the losing party pays the winning party’s legal expenses, which is recognised as having a potential chilling effect on parties bringing public interest cases in court.

The issue of costs in environmental litigation in the UK has been raised by the European Commission and the Aarhus Compliance Committee for a number of years. The Commission adopted an opinion on 18 March 2010 which set out its view that rules on costs for environmental challenges did not ensure compliance with the Public Participations Directive. The Aarhus Compliance Committee also concluded
that the UK is not in compliance with its obligation to ensure access to justice in environmental matters and recommended that the UK review its system.

Friends of the Earth Scotland highlight in relation to costs in environmental cases, that “the legal aid system in Scotland grants very few awards of legal aid for environmental cases and effectively excludes aid for public interest cases, which most environmental challenges are. Moreover, while environmental cases tend to affect more than one person, community groups cannot apply for legal aid in Scotland.”

In Scotland, the Gill Review contained a recommendation that a working group should be established to look at the cost and funding of litigation. The Scottish Government appointed Sheriff Principal Taylor to undertake the review in 2011, the ‘Taylor Review’. One of the review’s recommendations was that Protective Expenses Orders (PEOs) - limiting a person or group’s liability for the other party’s legal expenses to a specific figure - should be available in public interest cases.

PEOs are available at common law in both judicial review cases and statutory appeals, and the first PEO in Scotland was granted in 2010 in the case of McGinty v Scottish Ministers. This was a judicial review in an environmental case which, it was agreed by both parties, raised issues of genuine public interest, and the petitioner’s liability for the respondent’s expenses was capped at £30,000.

Following the Taylor review, PEO rules were codified in Chapter 58A of the Rules of the Court of Session in 2013, extended in 2016, and again in 2018. The new 2018 rules simplify the PEO application process and limit the applicant’s liability to £500 in the context of the PEO application process if the PEO is refused. They also define the term ‘prohibitively expensive’ and provide guidance for the courts on which factors to take into account in determining this level.

Stakeholder responses to the above developments

Whilst changes to widen the standing test were generally welcomed as a positive development for access to environmental justice, concerns were raised by some stakeholders as part of the consultation on the Courts Reform Bill, that the proposals on judicial review would not make Scotland fully compliant under Aarhus.

Stakeholders also raised as part of the courts reform consultation that it did not seek to tackle the issue of substantive review. The Aarhus Convention requires access to a body “to challenge the substantive and procedural legality of any decision”, and there are significant limits to the ability of courts to review the substance of decision-making (as opposed to issues of procedural justice) under judicial review. This is one of the principal arguments of stakeholders for the establishment of a specialised environmental court or tribunal that can consider the substance of complaints.

In its report on the passing of the Passage of the Courts Reform (Scotland) Bill 2014, the Justice Committee noted “the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law” and said it was “sympathetic to calls for the introduction of an environmental tribunal for Scotland”.

3
A 2018 Discussion Paper by the Human Rights Consortium Scotland and others on ‘Overcoming Barriers to Public Interest Litigation in Scotland’ considered impacts of changes brought in under the Courts Reform Act 2014 in relation to judicial review. It says that the new 3-month time limit makes it difficult for organisations, communities or individuals who wish to challenge a public decision to obtain a legal opinion, organise action and raise funds or obtain legal aid in time. It does however note that the Court of Session has discretion to extend this period if satisfied that is equitable, and that some examples of this have been reported.

PEO developments have been welcomed by commentators as progress towards Aarhus compliance, but the system has also been criticised as still presenting uncertainties for applicants, and described as a ‘limited mechanism’ for achieving full Aarhus compliance. Measures that have been suggested to increase certainty for applicants include a presumption that PEOs will be awarded in public interest cases, and the routine publication of PEO decisions to increase transparency.

2016 Scottish Government consultation on environmental justice

In its 2011 manifesto, the SNP committed to seeking views on creating an environmental court, potentially building on Scotland’s Land Court. This consultation, ‘Developments in environmental justice in Scotland’, was published by the Scottish Government in 2016, and set out an overview of the environmental justice landscape, including changes via the courts reform process, and asked for views on whether further changes were needed. In particular, it sought views on whether there should be a specialist forum to hear environmental cases e.g. a court or tribunal.

The consultation stated regarding Aarhus compliance that:

“He codifying the changes to standing for judicial review and introducing PEOs for certain environmental cases, our civil courts reform programme has contributed to Scotland’s ongoing compliance with international obligations under the Aarhus Convention”.

A consultation analysis and outcome was published in 2017 and stated that:

“Though the justice reforms that have a bearing on environmental matters have been welcomed by respondents, most did not think that they have gone far enough. This is particularly the case in relation to civil environmental justice with perceived deficiencies in the judicial review and statutory appeals being highlighted by many of the respondents including criticism of Protective Expenses Orders (PEOs) and legal aid.”

The consultation also found that a “substantial majority of the respondents favoured the introduction of an environmental court or tribunal.” The Scottish Government concluded however that in light of the “variety of views on what sort of cases an environmental court or tribunal should hear” combined with the uncertainty caused by Brexit, it is “not appropriate to set up a specialised environmental court or tribunal at present”. However, the Government stated that it is “committed to environmental justice and will keep the issue of whether there should be an environmental court or tribunal or even a review of environmental justice under review”.

4
Scotland’s compliance with the Aarhus Convention

The Aarhus Convention required the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention". To meet this obligation, the Aarhus Convention Compliance Committee (ACCC) was established. The Scottish Government contributes to the UK’s annual reports to the ACCC and has informed the ACCC of updates to PEO rules and to judicial review.

The most recent assessment by the ACCC of the UK was published in 2017 and includes an overall assessment for Scotland:

“The Committee welcomes the 2016 amendments to the Scottish Court of Session Rules, in particular with respect to the type of claims covered by the costs protection system, who is eligible to apply for costs protection and the possibility to decrease the cost cap and increase the cross-cap. However, as described above, there remain several aspects of the system which do not as yet meet paragraphs 8 (a), (b) or (d) of decision V/9n, not least that private law claims are still excluded from costs protection and that claimants must re-apply for costs protection if they appeal the court’s decision at first instance.

With respect to proposed 2017 amendments, the Committee welcomes the proposals examined above and considers that if adopted, these would move the Party concerned closer towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.

In the light of the above, the Committee finds that the Party concerned has not yet fulfilled paragraphs 8 (a), (b) and (d) of decision V/9n with respect to Scotland, but welcomes the significant steps to date in that direction.”

[emphasis added]

Decision V/9n refers to the Committee’s report in 2014 which recommended that the Party concerned (the UK) take urgent action to “further review its system for allocating costs in all court procedures” and “undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive”.

The Scottish Government has not accepted it is non-compliant, referring to “ongoing compliance” with the Convention in its 2016 consultation on environmental justice, and stressing that the Compliance Committee is “not a judicial body”.

Further related developments around environmental justice and rights

NGO calls for an Environmental Rights Centre

Scottish Environment LINK published a study last year outlining the case for an ‘Environmental Rights Centre Scotland (ERCS)’ in order to “respond to unmet needs in civil society” relating to access to legal remedies in environmental matters. It argues that an ERCS could address:

- gaps in access to affordable legal services in public interest environmental law;
• Scotland being “in breach of the Aarhus Convention” in relation to the right of the public and civil society to have access to environmental justice and;
• wider environmental governance issues including constitutional developments which require expertise in environmental law including EU Exit.

Recommendation for a ‘right to healthy environment’

The First Minister’s Advisory Group on Human Rights Leadership was set up by the Scottish Government to make recommendations on how Scotland can “continue to lead by example in the field of human rights” and was asked to look at economic, social, cultural and environmental rights. The Group reported in December 2018 and recommended the development of a contemporary human rights framework for Scotland, including the introduction of a “right to a healthy environment”, defined as:

“the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be outlined within a schedule in the Act with reference to international standards, such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention.”

EU Exit and environmental governance

Roundtable report on environmental governance (June 2018)

The Scottish Government commissioned a review of environmental governance in Scotland after Brexit by its Roundtable on Environment and Climate Change. Access to environmental justice was identified as an ‘at risk’ area, due to the loss of European Commission and European Parliament functions, as well as access to the Court of Justice, representing “a potentially significant narrowing of the scope to challenge Government on these issues over the longer term”. The report notes that:

“Unless some of these functions are replicated in a domestic context then the ability of individuals and civil society organisations to make their voices heard on environmental matters will be substantially reduced. This could be addressed through amending the procedures of existing institutions or pursuing a number of new institutions.”

The review does not consider alternative governance arrangements in detail but notes that following EU Exit:

“it would be necessary to review current rules regarding the procedures for judicial review, in particular the capacity of courts to consider the merits of an argument and not just matters of procedure, rationality or legal interpretation.”

Scottish Government consultation on environmental principles and governance

In February 2019, the Scottish Government published a Consultation on Environmental Principles and Governance in Scotland (closed 11th May) which
considers how Scotland maintains effective environmental governance following EU Exit. Options set out include addressing governance gaps through extending functions of existing bodies or by establishing a new body (or Commissioner). Whilst the consultation sets out proposals on environmental principles, on governance it states:

“We have not reached a conclusion about whether a new body is needed for this and other parts of environment governance in future, in part because of continuing uncertainty about the nature of the long term relationship between the UK and the EU.”

Specifically on the subject of enforcement of environmental law, the consultation recognises that in the absence of recourse to European institutions, “it is likely that judicial review will be sought as a route of redress in a wider range of circumstances” and notes the limitations of judicial review raised by the Roundtable report. The consultation does not propose new measures but does suggest one option, for a new legal process to “create a function for a Scottish body to have the responsibility to refer the Scottish Government or a public authority to a Scottish court for failure to properly implement environmental law”.

UK Government parallel work on environmental governance

The UK Government are also developing proposals on how to address environmental governance gaps following EU Exit. Michael Gove told the ECCLR Committee in evidence on the 15th May that:

“We are exploring whether there should be a new system of environmental law tribunals, not to mirror but to emulate some of the good work that immigration and employment tribunals do, by developing a body of expertise in the legal profession that ensures that we have rapid adherence to regulations and laws that guarantee environmental protection. Ultimately, it might be that the High Court could impose a requirement on the Government to change its ways, and if that Government—whether it is the UK Government or any other—refused to comply, the relevant minister or cabinet secretary would be in breach of the law, with all the consequences that follow.”

Environmental NGO campaign for an environmental court

The EU Exit context has reinvigorated NGO campaigns for an environmental court. Scottish Environment LINK is campaigning for a new Scottish Environment Act that, amongst other things, would create an independent watchdog to enforce environmental protections to replace current governance functions of the European Commission and Court of Justice. LINK also state that “it is critical that the Scottish Government confirms...its intention to review provisions around environmental justice in Scotland including the case for environmental courts or tribunals, in line with its 2016 commitments.”

Alexa Morrison
SPICe, May 2019