Ruth Maguire MSP
Convener
Equalities and Human Rights Committee
Scottish Parliament
Edinburgh EH99 1SP

25 September 2019

Friends of the Earth Scotland

Dear Ms Maguire MSP, Convener

Friends of the Earth Scotland are grateful for the Equalities and Human Rights Committee's continued interest in our Petition (PE1372) on Aarhus Compliance, and the action taken before summer recess to seek updates from the Scottish and UK Governments on matters arising from the petition. We wish to take this opportunity to update the Committee on a number of relevant points before its next consideration of our Petition.

We would start by noting that 9 years after tabling our petition the Scottish Government remains in non-compliance with the Aarhus Convention, as is evident from the most recent (February 2019) assessment of the Convention's Compliance Committee (ACCC).[1]

The Committee will be aware that the most recent assessment is the latest of 7 consecutive decisions of the ACCC and the Aarhus Convention's Meeting of the Parties to have found that the Scottish civil justice system does not comply with Article 9 of the Convention, with the first such finding being made by the ACCC in 2014.[2] Our petition therefore concerns a long-running, systemic problem.

Sadly the latest finding is unsurprising, since the Scottish Government has to date failed to undertake a comprehensive review of the Scottish legal system in relation to Article 9 provisions and has instead taken a reluctant, piecemeal approach to compliance.

Compliance of Scottish Civil Justice System with the Aarhus Convention

The Scottish Government's response to the EHR Committee letter of 3 June 2019 shows that Ministers are in denial of their continued non-compliance with the Aarhus Convention despite repeated assesments of the ACCC. As the Cabinet Secretary is well aware, the now closed infraction proceedings that he uses to support the Government's position relate only to implementation of Aarhus Convention Article 9 insofar as it is applied through the Public

[1] ACCC, 'First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2019).
[2] ACCC, 'Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2014/23), Meeting of the Parties, 'Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2014/2/Add.1), ACCC, 'First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2015) ACCC, 'Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2017), ACCC, 'Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2017/46), Meeting of the Parties, 'Decision VI/8k, Compliance by United with its obligations under the Convention' (ECE/MP.PP/2017/2/Add.1), ACCC, 'First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2019).

Participation Directive (PPD). The scope of Article 9 of the Convention is broader than the PPD, encompassing the ability of members of the public and NGOs to challenge acts and omissions by private persons and public authorities which contravene provisions of national laws relating to the environment.

The difference in scope between Article 9 of the Convention and the PPD is recognised by the EU. The European Council (EC) has been very clear that the PPD (together with the Public Access to Environmental Information Directive) do not fully implement the Convention – in particular its access to justice provisions – and that member states are responsible for complying with these remaining obligations.[3]

Further, decisions of the CJEU have made it clear that Article 9 provisions for access to justice are of indirect effect (meaning that individuals cannot invoke Article 9 in national courts, instead national courts are only required to ensure that domestic law is interpreted consistently with Article 9). However, this result is obtainable insofar as the national law is not wholly inconsistent with EU law.[4] At a time when the Scottish Government is eager to assure civil society that it will not only maintain, but exceed, EU standards of environmental protections, we would note it is vital to first implement, before it can maintain or exceed.

It is also important to note that the closure of infraction proceedings by the European Commission is not determinative of compliance, as the Scottish Government's response would appear to suggest. Decisions regarding infraction proceedings are the subject of many factors, including political choices, and the decision to end infraction proceedings should therefore not be given significant weight. Additionally, the Convention is an instrument of the United Nations Economic Commission for Europe (UNECE), not the EU. The EU institutions are not tasked with directly reviewing compliance with the Convention. As discussed below, this is the ACCC's role.

However, we do acknowledge, as the ACCC does, that the Scottish Government has made some moves towards compliance with the introduction of, and subsequent improvement of, rules of court on Protective Expense Orders. Following the most recent amendments to the rules we consider that the scope and eligibility reflect better reflect the requirements of the Aarhus Convention, the application process has been improved (by motion and with a £500 liability cap if refused – though it still remains time consuming and therefore costly to apply), and the criteria to determine what is prohibitively expensive is an improvement, though it remains to be seen how these will be applied in practice.

That said, certain changes made to the 2018 PEO rules have moved Scotland further away from compliance. We are concerned that recent changes means default PEO caps can be moved in either direction 'on cause shown' – a low test – which leads to increased uncertainty for litigants, exacerbating the 'chilling effect'; and that PEOs are not carried over if litigants appeal, only if respondents appeal and then the cap set is inflexible despite the logical incurrence of greater costs. Further, the rules do not cover proceedings in private law claims (though 'toxic torts' are now covered by qualified one-way cost shifting in the Personal Injury court). No mandatory publication of PEO decisions makes it hard to monitor

[3] 2005/370/EC: Council Decision of 17 February 2005: "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations." http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML

[4] Reference for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* in Case C-240/09.

compliance. Clearly then, by the ACCC's criteria the rules need further improvement to bring Scotland into compliance with the Convention.

Part of the problem with the PEO system is that their terms have been set without an assessment of the overall costs of litigation to an applicant.[5] The ACCC's jurisprudence is clear that it takes a holistic view of the costs of litigation which includes any relevant costs on appeal and associated costs such as court fees.[6] Of course PEOs only tackle one part of the costs faced by litigants in Aarhus cases, and the ACCC identifies Court Fees and Legal Aid as areas for attention.

In the Scottish Courts certain court fees have doubled in recent years for example hearing fees for the Court's time now range from £209 in the Outer House to £629 in the Inner House per half an hour per party. We are aware of examples of environmental judicial reviews where court fees alone would run into 5 figures under this regime, while further 'uplifts' of 2% or more are planned for each of the next three years. The Faculty of Advocates has warned the Scottish Government that its policy of full cost recovery in the courts may be illegal as per *Unison v Lord Chancellor*. The Aarhus Convention implementation guidance specifies court fees as a way to tackle prohibitive costs. The Aarhus Compliance Committee in its most recent Progress Report *"notes with concern the submission by observers that some fees, e.g. hearing fees, have doubled in recent time. In this regard, the Committee encourages the Party concerned to following the approach of England and Wales to expressly include any court fees in the assessment of what would be "prohibitively expensive"*.[7]

On legal aid we note that Regulation 15 Civil Legal Aid Regs appears to exclude environmental public interest cases, and note that very few environmental cases get legal aid – our understanding is that most that do are private law cases. Further, we note that the system of caps of £7,000 on legal aid are unrealistic for a complex judicial review, and it takes further time and money to review the cap, further adding to the 'chilling effect' that puts citizens off taking legal action to protect the environment. In the most recent Progress Report the Committee *"notes that it has not received any further information from the Party concerned with regard to legal aid in Scotland and notes observers' submission that the availability of legal aid is limited in Scotland in practice."*[8] With regard to an overview of the problems caused by the Legal Aid rules vis-à-vis Aarhus Compliance, we would refer the Committee to a recent submission to the Scottish Government's Legal Aid review.[9]

We would also like to draw to the EHR Committee's attention to Communication ACCC/C/2017/156 presently before the ACCC concerning a general failure by the UK (including Scotland and Northern Ireland) to provide an adequate review of the 'substantive legality' of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention. The essence of this Communication is that judicial review provides an examination of procedural legality only, whereas the Convention requires access to a review procedure which considers substantive legality of the claim.

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[5] See letter from Paul Wheelhouse, Minister for Community Safety and Legal Affairs to the Convener of the Equal Opportunities Committee at the Scottish Parliament, June 2015. The Minister acknowledges that Aarhus cases are different, and that it hasn't been possible to assess the overall costs in Aarhus litigation http://www.parliament.scot/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_from_Mr_Wheelhouse_Petition_1372_(2).pdf

[6] ACCC, 'Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain' (ECE/MP.PP/C.1/2009/8/Add.1), para 108.

[7] UNECE Aarhus Convention Report of the Compliance Committee on Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, August 2017, Para 73.

[8] Ibid para 74.

[9] See Scottish Environment Link, Legal Governance Subgroup Response to the Legal Aid Review (2017), available at http://www.scotlink.org/wp/files/documents/Scottish-Environment-Link-Legal-Aid-Review-response-May-2017.pdf.

This communication is initiated by Friends of the Earth Scotland, Friends of the Earth England, Wales and Northern Ireland, RSPB and Leigh Day. Details of the communication and responses so far from the UK Government are available at http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2017156-united-kingdom.html. A hearing before the Compliance Committee has been scheduled for 5 November 2019.

Obligation to respond to Compliance Committee's findings

It is factually correct to note that the Compliance Committee is a non-judicial body. However, this does not mean that its findings have no weight or can be ignored, and it is critical to understand the role of the ACCC in terms of the architecture of accountability which is built into the Aarhus Convention.

Article 15 of the Convention required the Convention's Meeting of the Parties to establish arrangements for reviewing Parties' compliance with the Convention. As a result, Decision I/7 of the Meeting of the Parties established the ACCC 'for the review of compliance by the Parties with their obligations under the Convention'.

Members of the public, NGOs and Parties to the Convention can send the ACCC 'communications' when they are concerned that a Party is not meeting its obligations. The ACCC takes evidence from both sides, deliberates and then produces written findings on whether there has been non-compliance. Its nine members are expert environmental lawyers from across the United Nations Economic Commission for Europe. They include senior legal practitioners, academics and three professors. Its decisions have produced a considerable body of legal reasoning on access to information, public participation and access to justice in environmental matters.

The ACCC is the body with both the legal mandate and the requisite expertise to make decisions on whether Parties are meeting their obligations under the Convention. For these reasons, its findings should not be lightly dismissed.

At the very least, if the Scottish Government continues to adopt a position in contradiction to the findings of the ACCC, it should publish a legal analysis which explains its alternative position. We are unaware of any such analysis having been carried out.

Further, the fact that the Compliance Committee cannot enforce compliance does not make it any less of an imperative for the Scottish Government to take action to fully comply with international law under the Aarhus Convention. The Committee will be aware that as a general principle of international law, every treaty in force is binding upon the parties to it and must be performed by them in good faith.[10] In this context, performance in good faith would include respecting and seeking to comply with findings of the ACCC.

A brief comparison to another area of international human rights protection is useful to illustrate the Scottish Government's inconsistent approach to international law in its refusal to accept the findings of the ACCC. The UN Convention on the Rights of Persons with Disabilities 1995 has an equivalent Committee – the Committee on the Rights of Persons with Disabilities – also tasked with monitoring implementation of its parent convention. In 2016, following an inquiry into UK welfare reforms since 2010, it rebuked the UK Government for adopting policies which led to *"grave or systematic violations of the rights of*

[10] Vienna Convention on the Law of Treaties, Article 26.

persons with disabilities".[11] The Scottish Government recognised these findings, added its own criticisms of the UK Government's welfare reforms and has developed remedial policies including an ongoing process to design a new human rights based social security system.[12]

It is difficult to reconcile the Scottish Government's support for the findings of the UN-CRPD, with its neglect of those of the ACCC. Neither are judicial bodies the findings of which equate to those of courts. The reasons for dismissing one, while approving the comments of the other should be examined by the Committee.

Regular progress reports and seeking to engage do not amount to action to comply. We are disappointed by the suggestion that the Scottish Government requires to be compelled by the Courts before taking its obligation to comply with international law under the Aarhus Convention seriously.

Assessment of impacts of Court Reform process

Responsibility for compliance with the Aarhus Convention insofar as it relates to the Scottish jurisdiction is effectively delegated to the Scottish Government, as the UK Government's response to the Committee dated 26 June 2019 makes clear. As noted above, the Scottish Government has failed to undertake a comprehensive review of the Scottish legal system in relation to Article 9, and the PEO system specifically has been established without an assessment of the overall costs of litigation to – and other barriers faced by – an applicant.

The Scottish Parliament has the power to legislate in the areas of the environment and the justice system. The Scottish Government may have allocated responsibility to the Scottish Civil Justice Council for the design of the PEO system, however this is not a reason for the Scottish Government to avoid scrutiny in this area. The Scottish Government remains responsible for the state of the current law in this area, and the fact that the Scottish civil justice system is non-compliant. In this regard, the Committee will be aware of the principle of international law that a party to a treaty cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.[13] As such, the Scottish Government cannot escape accountability by pointing to the remit of the Scottish Civil Justice Council.

Overcoming Barriers to Strategic Litigation

We welcome that the Scottish Government is considering how the recommendations of the Overcoming Barriers to Strategic Litigation Report can be taken forward.

We would note that, in adition to the two recommendations the EHR Committee highlighted in correspondence with the Scottish Government, the report also recommended:

- *'Exploring extending the system of qualified one-way cost shifting, introduced by the Civil Litigation Funding & Group Proceedings Act for personal injury cases.'*

We have long argued that QOCS is a far more appropriate system of costs protection than the PEO regime, to tackle the issue of prohibitive expense in Aarhus cases, as we have raised in response to various consultations under the Civil Courts Reform programme.

[11] UN Committee on the Rights of Persons with Disabilities, 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention' (CRPD/C/15/R.2/Rev.1) 6 October 2016, paragraph 113.
[12] Scottish Government, 'A Fairer Scotland for Disabled People' (Scottish Government, 2016), Minister for Social Security Jeane Freeman's foreword at 1-2.
[13] Vienna Convention on the Law of Treaties 1969, UNTS 1155 331, Article 27.

We note that the argumentation for the introduction of QOCS as outlined in the Policy Memorandum to the Bill could equally apply to public interest cases under the Aarhus Convention, in particular Sheriff Principal Taylor's concerns about 'asymmetrical relationships' in court, and levelling the playing field. The point that *"if a pursuer's costs would exceed the likely benefit from the litigation, then a rational pursuer would not choose to bring a case at all"* applies all the more so in relation to public interest environmental cases, where there may be no 'benefit' at all for a litigant on an individual level.

In terms of the concerns about levelling the playing field, this argument is equally applicable in Aarhus-type environmental litigation as it is in personal injury cases. Environmental litigation often involves poorly-resourced individuals, community groups or NGOs litigating against local public bodies or central government (which are sometimes joined by intervening third parties - often well-funded private entities). There is a clear inequality of resources between parties in environmental litigation.

It is difficult to see how the Scottish Government can accept the case for QOCS in relation to personal injury, but reject it in relation to Aarhus cases.

- *'Exploring ways to ensure that time-limits are not an undue barrier to public interest litigation…[including]... extending the time limit for judicial review in public interest cases.'*

The introduction of the three-month time limit for judicial reviews in the Courts Reform (Scotland) Act 2014 creates an additional barrier for communities to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision. We urge the Scottish Government to introduce a 12 month time limit for public interest cases instead.

EU Exit Governance Gap in enforcing the Aarhus Convention

In relation to those Aarhus requirements that are facilitated through Directives – the Access to Information and Public Participation pillars of the Convention – the loss of oversight to ensure proper implementation of these Directives, of inter-jurisdictional comparisons in e.g. Commission reports on implementation, and of the ability to prosecute are of great concern. Although actual prosecutions are rare, the power of the threat of infringements proceeding should not be underestimated in ensuring adequate implementation of and adherence to environmental protections, as is apparent in the Cabinet Secretary's response to the question of the legal weight of the ACCC findings. All these measures need to be replaced by new, or expanded complementary domestic mechanisms.

In our consultation response[14] to the Scottish Government's consultation on Environmental Principles and Governance earlier this year we highlighted the need for the Scottish Government to be prepared for interim measures from October this year in the event that a 'no deal' Brexit is the eventual outcome. We are concerned that barely one month ahead of the scheduled date for EU Exit we have seen nothing from the Scottish Government on this front.

[14] For more information on our concerns regarding the EU Exit governance gap, please see our response to the consultation on Environmental Principles and Governance https://foe.scot/resource/environmental-principles-and-governance-response/ and Scottish Environment LINK's response to the same consultation http://www.scotlink.org/public-documents/link-response-to-the-scottish-government-environmental-principles-and-governance-consultation/.

An Environmental Court or Tribunal for post EU Exit Governance

We welcome that the Scottish Government considers the case for a specialist Environmental Court or Tribunal (ECT) has changed since its consultation on Developments in Environmental Justice, in the context of EU exit. Clearly there is a need to replace the function of the CJEU in relation to environmental law in Scotland, and at present domestic mechanisms are not fit for that purpose, as noted above in relation to non-compliance with the Aarhus Convention in relation to the prohibitive costs of legal action and lack of substantive review.

We consider the establishment of a specialist environmental court or tribunal is the best way to address both environmental governance in relation to both EU exit and compliance with the Aarhus Convention. Such a court or tribunal should be designed to address the two main areas of non-compliance with the Aarhus Convention – affordability and review of the substance of an issue rather than just process – to ensure the best outcomes for the environment. It must also have powers of appropriate remedy, including the ability to order interim relief, quash unlawful decisions and order remedial actions.

Human Rights Advisory Group Recommendations

We warmly welcomed the recommendations of the First Minister's Advisory Group on Human Rights Leadership to include a right to a healthy environment in a new Human Rights Act last year. We note that it is increasingly accepted that such a right is critical in underpinning all other human rights, and in the current context of increasingly urgent environmental problems like climate change and biodiversity collapse it is more important than ever that these rights are understood, incorporated into our laws and robustly upheld.

It is essential therefore that the incorporation of environmental rights into Scots Law is carried out, and done so with reference to the UN Framework Principles on Human Rights and the Environment, which includes the rights enshrined under the Aarhus Convention.[15]

Delivering on this commitment to enshrine a right to a healthy a safe environment would therefore help bring Scotland up to best international standards, and should significantly improve the application of environmental rights in practice.

However, we note that the timescale for incorporation of the right to a healthy and safe environment, and other human rights, into Scots Law means the rights will not be justiciable until the end of the next Parliamentary session in 2026 at the soonest. It would be unacceptable if Scottish Ministers delayed action to comply with our legal obligations under the Aarhus Convention until then.

Recommended next steps for EHR Committee

Given the long history of correspondence between this Committee's predecesor and the Scottish Government, which has resulted in next to no progress in terms of improved Aarhus compliance, we respectfully suggest that the EHR Committee should respond robustly to the Scottish Government's latest response and act accordingly to ensure that the Scottish Government is held to account for complying with its international legal obligations.

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[15] Framework Principles on Human Rights and the Environment (2018) https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx

We recommend that the Committee should take the following steps:

- Undertake an inquiry into Aarhus Compliance. As part of this, the Committee should call the Cabinet Secretary, amongst others, to give oral evidence and produce a report with its findings and recommendations.

- Request the Scottish Government to publish a legal analysis within a short defined timescale (i.e. within three months) which justifies its position that it is compliant with the Convention.

We would be happy to discuss or further elaborate on any of the above at the Committee's request. We note this submission is supported by Scottish Environment LINK's Legal Strategy Subgroup.

Yours sincerely,

Mary Church
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Friends of the Earth Scotland