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

26 June 2019

Dear Convenor,

PETITION PE01372: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Thank you for your letter of 9 June to Roseanna Cunningham and myself regarding the above. I am responding upon behalf of both Roseanna and myself.

You have asked a number of questions regarding Scotland's compliance with the Aarhus Convention which I will deal with in turn.

- *The Scottish Government's current position on its compliance with the Aarhus Convention, including its response to the most recent assessment by the Convention's Compliance Committee, which suggests there are outstanding issues in spite of progress made as part of the courts reform process.*

The Scottish Government is confident that it is compliant with the requirement of the Aarhus Convention in respect of maintaining access to justice in environmental cases. It is supported in this view that the infraction case initiated by the European Commission in relation to the UK's transposition of Articles 3(&) and 4(4) of the EU's Public participation Directive (PPD) has now been closed. In saying that I acknowledge that although the UN's Aarhus Convention Compliance Committee (the Compliance Committee) has recognised 'significant progress to date' it is still of the opinion that there are further issues to be addressed. We will continue to engage with the committee to reassure them of Scotland's continued compliance.

- *Given the Scottish Government has previously highlighted the Convention's Compliance Committee's status as a 'non-judicial body', what legal weight does the Scottish Government*

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attribute to the findings of the Committee and what obligations is it under to respond to its findings?

In noting that the Compliance Committee is a non-judicial body the Scottish Government is highlighting a self-evident fact. It is not to diminish the Committee in any way. Clearly if, for example, the Court of Session or the UK Supreme Court, were to rule that the Scottish Government were failing to comply and highlight specific steps to be taken then we would comply with that judgement. The Compliance Committee does not issue judgments, it adopts findings, if a non-compliance is found, it may make recommendations either to the Meeting of the Parties (signatories to the convention), or directly to the Party concerned. The Compliance Committee asks for progress reports regarding compliance. To that end, the Scottish Government, alongside the UK Government, responds to the requests for progress reports and seeks to engage with the Compliance Committee's concerns. This is an on-going process and we are currently working with the UK Government on providing a further progress report to the Compliance Committee.

Your committee may wish to be aware that the First Minister's Advisory Group on Human Rights Leadership recommended that the Aarhus Convention should be justiciable in Scots law. <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

Work is now underway to set up a new national taskforce of Human Rights Leadership as recommended by the First Minister's Advisory Group in December 2018. The Taskforce will take forward the Advisory Group's key recommendation for legislation to create a new human rights framework. The Taskforce is to be Co-Chaired by Shirley Anne Somerville, the Cabinet Secretary for Social Security and Older People and Professor Alan Miller, the Special Envoy for the Global Alliance of National Human Rights Institutions. Further details of the remit and membership of the taskforce will be announced in due course.

- *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 and consultation on environmental governance and principles?*

The UK and EU are both parties to the Aarhus Convention and the EU has partly incorporated the Convention into EU law through Public Participation Directive 2003/35/EC (the PPD) and Directive 2003/4/EC on public access to environmental information. The EU institutions have a role in ensuring compliance with EU Law. For example, a Member State may be subject of infraction proceedings by the European Commission if the EU Directives were not adequately transposed into domestic law. The Scottish Government is committed to maintaining or exceeding the standards set out in EU environmental law, following an exit from the EU. Also relevant to the Aarhus Convention is the current route of redress to the European institutions, which would be lost on exit from the EU. We have consulted on the governance gaps that would follow an exit from the EU, and are taking forward the development of proposals for measures and institutional arrangements to address these gaps.

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- *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 subsequent changes to rules on Protective Expense Orders (PEOs) on access to environmental justice for individuals and groups?*

Responsibility for the PEO system lies with the Scottish Civil Justice Council (SCJC). Following a public consultation, the SCJC made recent changes to court rules (effected December 2018) that drew upon experience of the system to date. No further assessment has been made since then.

- *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' including that there should be a presumption in favour of awarding a PEO in public interest cases, and that PEO decision should be routinely published?*

The Scottish Government is aware of the report and my colleague Christina McKelvie recently met with the report's authors. The Lord Advocate spoke at the report's launch. The Scottish Government is still considering how the recommendations, which are complex, wide-ranging and also for other bodies such as SCJC to consider, can be taken forward. It is possible that the work following the First Minister's Advisory Group that I referenced above may form part of the way forward.

- *How the Scottish Government is reviewing the case for environmental courts or tribunals as part of its current consideration of post EU Exit governance?*

The question was considered by a consultation on developments in environmental justice which concluded in 2017 that the Scottish Government does not consider it appropriate to set up an specialised environmental court or tribunal at present. Clearly the situation has moved on since then due to the on-going uncertainty caused by UK exit from the European Union.

We have had responses to our consultation on future environmental governance in Scotland that argue that a change to domestic governance arrangements following an exit from the EU would increase the case for an environmental court. There are also responses suggesting a full investigation of the potential for meditative approaches to rectifying incomplete or wrong application of environmental law. We shall consider all the responses as we develop our proposals for future governance arrangements.



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