The Scottish Parliament
Pàrlamaid na h-Alba

EQUAL OPPORTUNITIES COMMITTEE

AGENDA

20th Meeting, 2014 (Session 4)

Thursday 4 December 2014

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

1. **Declaration of interests:** Sandra White will be invited to declare any relevant interests.

2. **Choice of Deputy Convener:** The Committee will choose a Deputy Convener.

3. **Subordinate legislation:** The Committee will consider the following negative instruments—

   Civil Partnership (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/303);

   Same Sex Marriage (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/305);

   Marriage and Civil Partnership (Prescribed Forms) (Scotland) Regulations 2014 (SSI 2014/306).

4. **Public petitions:PE1372** The Committee will consider petition PE1372 by Friends of the Earth Scotland, on Access to justice in environmental matters.

5. **Age and Social Isolation (in private):** The Committee will consider its approach to the inquiry.

6. **Draft Budget Scrutiny 2015-16 (in private):** The Committee will consider a draft report to the Finance Committee on the Scottish Government's Draft Budget 2015-16.

EO/S4/14/20/A

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The papers for this meeting are as follows—

Agenda item 3

Note by the Clerk	EO/S4/14/20/1
Note by the Clerk	EO/S4/14/20/2
Note by the Clerk	EO/S4/14/20/3

Agenda item 4

Note by the Clerk and SPICe on PE1372	EO/S4/14/20/4

Agenda item 5

PRIVATE PAPER	EO/S4/14/20/5 (P)

Agenda item 6

PRIVATE PAPER	EO/S4/14/20/6 (P)
PRIVATE PAPER (to follow)	EO/S4/14/20/7 (P)

EO/S4/14/20/1

Equal Opportunities Committee

Subordinate legislation

Note by the Clerk

Purpose of the paper

- To brief you on an SSI that you will consider at your meeting on 4 December 2014.

Title of instrument

Civil Partnership (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/303)

Type of instrument

Negative

Laid date

13 November 2014

Background

1. Section 94A(1)(a)(i) of the Civil Partnership Act 2004 enables the Scottish Ministers to prescribe the religious or belief bodies whose ministers, clergymen, pastors, priests or other celebrants are entitled to register civil partnerships without the need to be registered as approved celebrants or temporarily authorised under the Civil Partnership Act 2004.

Delegated Powers and Law Reform Comm consideration

2. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 25 November 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

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Procedure

3. Guidance on the consideration of subordinate legislation is available at—
http://www.scottish.parliament.uk/parliamentarybusiness/24417.aspx

4. Specific Guidance on **negative procedure** is reprinted below—

> 6.5. SSIs subject to negative procedure must be annulled if the Parliament so resolves within a 40-day period beginning with the day on which they are laid. Such instruments require to be laid at least 28 days before they are due to come into force under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. If this "28-day rule" is breached, the Scottish

Government must explain why in a letter to the Presiding Officer which is considered by the Delegated Powers and Law Reform Committee and the relevant subject committee.

6.6. SSIs subject to negative procedure come into force on the date specified in the instrument unless they are annulled by the Parliament.

6.7. Any MSP wishing to annul a negative SSI must lodge a motion proposing that the lead committee recommend annulment to the Parliament. Where such a motion is lodged, the SSI and the motion to annul are included on the agenda of the lead committee. Rules 10.4 and 10.5 provide for a debate on the motion in the lead committee not exceeding 90 minutes in which the member who has lodged the motion and the relevant minister or junior Minister are entitled to speak. However, only committee members are entitled to vote on the motion.

6.8. In any case where a motion to annul an instrument has been debated by a lead committee, the committee is required to report on the instrument, setting out its recommendations. If the lead committee agrees to recommend annulment, it reports in those terms and the Bureau is required to lodge a motion for annulment to be taken in the Parliament. Rules 10.4 and 10.5 provide for a short debate and, if the Parliament were to agree to the motion, the SSI would be annulled.

6.9. In practice it is unusual for a motion to annul to be lodged. However, all negative SSIs still appear on the agenda of the lead committee which may take evidence on them depending on the subject matter.

6.10. Where no motion to annul has been lodged, the lead committee may still report to the Parliament setting out any comments or highlighting any concerns that it has. Such a report does not require to be made within the 40-day period.

EO/S4/14/20/2

Equal Opportunities Committee

Subordinate legislation

Note by the Clerk

Purpose of the paper

- To brief you on an SSI that you will consider at your meeting on 4 December 2014.

Title of instrument

Same Sex Marriage (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/305)

Type of instrument

Negative

Laid date

13 November 2014

Background

1. These Regulations prescribe the religious or belief bodies whose ministers, clergymen, pastors, priests or other celebrants are entitled to solemnise marriage between persons of different sexes without the need to be registered as approved celebrants. The Church of Scotland are not prescribed in these regulations as their ministers or deacons are entitled to solemnise marriage between persons of different sexes under section 8(1)(a)(i) of the 1977 Act.

Delegated Powers and Law Reform Comm consideration

2. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 25 November 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

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Procedure

3. Guidance on the consideration of subordinate legislation is available at—
http://www.scottish.parliament.uk/parliamentarybusiness/24417.aspx

4. Specific Guidance on **negative procedure** is reprinted below—

> 6.5. SSIs subject to negative procedure must be annulled if the Parliament so resolves within a 40-day period beginning with the day on which they are laid. Such instruments require to be laid at least 28 days before they are due to come into force under section 28(2) of the Interpretation and Legislative

Reform (Scotland) Act 2010. If this “28-day rule” is breached, the Scottish Government must explain why in a letter to the Presiding Officer which is considered by the Delegated Powers and Law Reform Committee and the relevant subject committee.

6.6. SSIs subject to negative procedure come into force on the date specified in the instrument unless they are annulled by the Parliament.

6.7. Any MSP wishing to annul a negative SSI must lodge a motion proposing that the lead committee recommend annulment to the Parliament. Where such a motion is lodged, the SSI and the motion to annul are included on the agenda of the lead committee. Rules 10.4 and 10.5 provide for a debate on the motion in the lead committee not exceeding 90 minutes in which the member who has lodged the motion and the relevant minister or junior Minister are entitled to speak. However, only committee members are entitled to vote on the motion.

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6.9. In practice it is unusual for a motion to annul to be lodged. However, all negative SSIs still appear on the agenda of the lead committee which may take evidence on them depending on the subject matter.

6.10. Where no motion to annul has been lodged, the lead committee may still report to the Parliament setting out any comments or highlighting any concerns that it has. Such a report does not require to be made within the 40-day period.

Equal Opportunities Committee

Subordinate legislation

Note by the Clerk

Purpose of the paper

- To brief you on an SSI that you will consider at your meeting on 4 December 2014.

Title of instrument

Marriage and Civil Partnership (Prescribed Forms) (Scotland) Regulations 2014 (SSI 2014/306)

Type of instrument

Negative

Laid date

13 November 2014

Background

1. These Regulations amend the Registration of Civil Partnerships (Prescription of Forms, Publicisation and Errors) (Scotland) Regulations 2005 ("the 2005 Regulations"), the Book of Scottish Connections Regulations 2008 ("the 2008 Regulations"), the Marriage (Prescription of Forms) (Scotland) Regulations 1997 ("the Marriage Regulations") and the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997 ("the 1997 Regulations") in consequence of the Marriage and Civil Partnership (Scotland) Act 2014.

2. The Regulations amend the 2005 Regulations by prescribing the forms of notices to be used by a district registrar to require delivery of a civil partnership schedule under section 95ZA of the 2004 Act where, following the registration of a religious or belief civil partnership, the schedule has not been delivered by either of the parties to that civil partnership within the time period specified in that section. The Regulations also substitute an amended version of Form CP10 (civil partnership notice).

3. The Regulations amend the 2008 Regulations by substituting an amended version of the form of the Entry of Marriage.

4. The Regulations amend the Marriage Regulations by substituting amended versions of the following forms: Form M10 (marriage notice); Form DSR (declaration where marriage proposed between parties related in a specified degree); Marriage Schedule; and Form M1 (certificate of no impediment).

5. The Regulations amend the 1997 Regulations by substituting an amended version of the Marriage Register Page.

Delegated Powers and Law Reform Committee consideration

6. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 25 November 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

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Procedure

7. Guidance on the consideration of subordinate legislation is available at—
http://www.scottish.parliament.uk/parliamentarybusiness/24417.aspx

8.. Specific Guidance on **negative procedure** is reprinted below—

> 6.5. SSIs subject to negative procedure must be annulled if the Parliament so resolves within a 40-day period beginning with the day on which they are laid. Such instruments require to be laid at least 28 days before they are due to come into force under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. If this "28-day rule" is breached, the Scottish Government must explain why in a letter to the Presiding Officer which is considered by the Delegated Powers and Law Reform Committee and the relevant subject committee.
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> 6.9. In practice it is unusual for a motion to annul to be lodged. However, all negative SSIs still appear on the agenda of the lead committee which may take evidence on them depending on the subject matter.

6.10. Where no motion to annul has been lodged, the lead committee may still report to the Parliament setting out any comments or highlighting any concerns that it has. Such a report does not require to be made within the 40-day period.

Equal Opportunities Committee

Note by the Clerk on Petition PE1372

PE1372 – **Lodged 12 November 2010**

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 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

1. The Public Petitions Committee wrote to and received responses from the Scottish Government, on the issues raised by the petition. It referred the petition to the Equal Opportunities Committee (EOC) on 1 November 2011. The referral was made under the EOC remit of "social origin" i.e. in light of potential financial constraints to accessing justice on environmental matters. The relevant element of the Aarhus Convention, as highlighted by the petition, is the "Access to Justice" principle.

The "Access to Justice" pillar aims to provide access to justice in three contexts (from SPICe briefing of 19 November 2010):

- 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.

2. The EOC has corresponded with the Scottish Government and the Law Society of Scotland and has received updates from the petitioners since it was first referred.

3. Friends of the Earth Scotland wrote to the Committee on 15 May 2014 with further background (see **Annexe A**). Their update briefing includes the following—

- A call for an environmental tribunal to be established.
- Detail of the Courts Reform (Scotland) Bill where the petitioners state that "its impact on key areas of Aarhus compliance, particularly costs and sufficient interest is very limited".
- Concerns in relation to the application of the "sufficient interest" test in the Scottish courts.
- Concerns in relation to the Taylor Review.

- Scottish Legal Aid Board's "introduction last year of a system whereby all the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors fees and outlays) will be capped at £7000." Friends of the Earth Scotland considers that "£7000 is an unrealistic figure to run a complex environmental judicial review".
- Friends of the Earth Scotland considers that "the Scottish Government has continued to delay compliance with the Aarhus Convention in respect of key issues".

4. The EOC considered the petition on 19 June 2014 and wrote to the Cabinet Secretary for Justice, Kenny MacAskill MSP on 28 July 2014 requesting an up-to-date statement. A response was received on 24 September 2014 (see **Annexe B)**.

5. The Cabinet Secretary stated that—

> "The Scottish Government complies with the Aarhus Convention. The Scottish Government is committed to a comprehensive programme of civil courts reform. The implementation of Lord Gill's Scottish Civil Courts Review (SCCR) through the Courts Reform (Scotland) Bill (the Bill) currently before Parliament, will pave the way for swifter handling and disposal of cases, including public interest cases such as environmental cases."

6. In response to the Committee's specific question on *Evidence to support the view that the Scottish Government complies with the Aarhus Convention in the area of Access to Justice in Environmental Matters,* the Cabinet Secretary set out the following—

> "The access to justice obligations under the Aarhus Convention are met by the availability of judicial review proceedings, which may be brought in the Court of Session. Since 25 March 2013, the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 has been in force. Individuals or environmental pressure groups bringing an environmental case against a public body have been able to apply for a protective expenses order, limiting their liability for the other side's costs to £5,000. The order will also cap the public body's liability for the applicant's expenses to £30,000. The court "must" grant the order if it is satisfied that it would be "prohibitively expensive" for the applicant to bring the case without one. It will only be able to refuse to grant the order if the applicant does not have "sufficient interest" in the case, or there is "no real prospect of success".
>
> "Civil legal aid is available in relation to environmental issues, provided that statutory eligibility criteria are met."

7. In respect of the issue of "title and interest" raised by the petitioner, the Cabinet Secretary responded that—

> "The petition raises the issue of "title and interest". When the petition was lodged in 2010, a petitioner for judicial review was required to demonstrate both title and interest to sue. The SCCR considered that the law on standing was too restrictive and that the separate tests of title and interest should be replaced by a single test—whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings. Since the Supreme Court ruling in *Axa*

General Insurance Limited and others v Lord Advocate and others in 2011, this sufficient interest test has applied to petitions for judicial review.

"Furthermore, no legal challenge against the Scottish Government made on the grounds of non-compliance with the Aarhus Convention has been successful."

Recent developments

8. There have been a number of policy developments since the petition was referred to the EOC. The Justice Committee has considered a number of issues relevant to this petition during its consideration of the Courts Reform (Scotland) Bill including cost, sufficient interest and the matter of an environmental tribunal. The Justice Committee has also taken evidence on the Taylor Review.

9. In its Stage 1 Report on the Courts Reform (Scotland) Bill, the Justice Committee stated that it was sympathetic to calls for the introduction of an environmental tribunal for Scotland (paragraph 322).

10. During stage 3 of the Courts Reform (Scotland) Bill, Roseanna Cunningham, the Minister for Community Safety and Legal affairs stated in her closing speech--

> "We have not yet consulted on the specific point that Malcolm Chisholm, John Finnie and Elaine Murray raised on the setting up of an environmental tribunal or court, because we think that it is appropriate that the significant programme of reforms to the civil justice system should come into effect before we consider with stakeholders the need for an environmental court or tribunal. Those reforms include protective expenses orders, the Regulatory Reform (Scotland) Act 2014 and, indeed, the Courts Reform (Scotland) Bill. We wanted to ensure that all that was in place before we went back to stakeholders to talk about what extra might be needed."

Action

11. You are invited to consider what action you wish to take in respect of this petition. Options include—

(1) The Committee has fully considered the issues raised by the petition since its referral in 2011 and received an up to date statement from the Scottish Government. The Justice Committee has taken forward a number of areas of work relevant to the petition's subject matter. Indications have been given by the Scottish Government that it is to take forward dialogue with stakeholders. As such, the Committee may wish to write to the petitioners, and in so doing, close the petition.

or

(2) To take any other action, including monitoring or correspondence, which the Committee considers appropriate.

Annexe A – Correspondence from Friends of the Earth Scotland

May 2014

Further to our correspondence of May 2013, I would like to take the opportunity to update you on matters in relation to our Petition (PE1372) on Aarhus Compliance.

Before we go into detail on key developments we wish to note that it is our position that despite the introduction of Protective Expense Orders and certain changes proposed under the Court Reform Bill, Scotland remains in breach of the Aarhus Convention and as a consequence faces, as part of the UK, action from the European Commission and the Aarhus Compliance Committee.

We consider that the Scottish Government could go some way towards Aarhus compliance by establishing an environmental tribunal. The Government pledged in its 2011 manifesto to consult on options for an environmental court or tribunal. We consider that this commitment would best be fulfilled by setting up an Expert Working Group to look into the issue.

We recommend that the Scottish Government is asked to appear before the Equal Opportunities Committee and explain how it will fulfil its legally binding international Aarhus obligations.

Court Reform Bill

In February 2014 the Scottish Government introduced the Civil Court Reform (Scotland) Bill. This is the legislation that the Government indicated in previous Petition correspondence would see to outstanding Aarhus compliance issues. While broadly we welcome the Bill, which implements many of the recommendations of Lord Gill's Review of the Scottish Civil Courts, its impact on key areas of Aarhus compliance, particularly costs and sufficient interest is very limited. This fact was acknowledged by the Justice Committee in its Stage 1 report on 9 May 2014 when it recommended:

322. The Committee notes the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law. The Committee is sympathetic to calls for the introduction of an environmental tribunal for Scotland.[1]

Further, we are concerned that aspects of the Bill could actually exacerbate certain barriers to access to justice in environmental cases.

In particular, the introduction of a three-month time limit for Petitioners, where no time limit has previously been in place will cause problems for petitioners in complex cases and particularly where there is uncertainty in funding. There is a real issue in Scotland with a finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, and the introduction of a presumptive three-month time limit will exacerbate this. It will also create a particular barrier for community groups who will find it extremely difficult to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

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[1] http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/76275.aspx#v

We note that there is often a considerable grey area as to when exactly the time limit starts from in respect of the exact decision to be challenged. Although we note there is a degree of flexibility is contained in the Bill, with the possibility for granting of extensions, a presumptive three-month limit is likely to put potential litigants off (a further 'chilling effect').[2] While we are broadly supportive of the

introduction of a leave to proceed stage for judicial review under the Bill, we note that there is a risk that combined with a three month time limit, a leave stage could actually hinder access to justice as petitioners struggle to access funds and lawyers to martial the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

Standing

It is welcome that the Court Reform Bill confirms the new test of 'sufficient interest' for petitioners seeking judicial review. We note that the problematic test of 'title and interest' was replaced with 'sufficient interest' by the Supreme Court in the landmark 2011 *Axa v Lord Advocate and others*[3] ruling. Sufficient interest was the test recommended by Lord Gill, and in his Review of the Civil Courts he noted its broad interpretation in the English Courts. However we are concerned that the Scottish Courts are reluctant to apply the new test as fulsomely as is the practice in England and Wales.

In *Walton v Scottish Ministers,*[4] the Court of Session's Inner House questioned not only his standing as a person aggrieved under statutory provisions in the Roads (Scotland) Act 1984, but expressed the view that he would not have had sufficient interest to take a judicial review on the same matter. On appeal the UK Supreme Court robustly criticised these comments.[5]

In September 2013 the Inner House overturned a ruling from the Outer House in *McGinty vs Scottish Ministers*, which had found against the petitioner on standing.[6] While taking *AXA* into account, the Inner House indicated that it considered that petitioners ought to demonstrate sufficient interest on each individual argument in a case, rather than adopting the more expansive interpretation of the English and Welsh courts where legal standing is granted on grounds of public interest and is looked at more generally.

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[2] See for example *Bova and Christie v The Highland Council and others* [2013] CSIH 41 http://www.scotcourts.gov.uk/opinions/2013CSIH41.html and also *R (on the application of Maria Stella Nash) vBarne London Borough Council & (1) Capita Plc (2) EC Harris LLP (3) Capita Symonds (Interested Parties)*[2013] WHC 1067 (Admin)

[3] http://www.supremecourt.gov.uk/decided-cases/index.html

[4] http://www.scotcourts.gov.uk/opinions/2012CSIH19.html

[5] www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf

[6] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html and http://www.scotcourts.gov.uk/opinions/2013CSIH78.html

Taylor Review

We note that the Taylor Review reported in September 2013.[7] The Scottish Government has frequently indicated that this Review would mop up any outstanding issues regarding prohibitive expense in Aarhus cases.[8] However, we met with the Secretary to the Taylor Review in February 2012 as part of its consultation process, who confirmed that the Taylor Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the PPD or the Aarhus Convention.[9] The Review does recommend extending PEOs to all public interest cases, which of course could in theory cover many Aarhus cases not within the remit of the PPD and therefore not eligible under the new rules of court on PEOs. However, Taylor strongly implies that EU law consider Aarhus cases to be defined by the PPD, and also his recommendation makes it clear that granting of PEOs and the level of cap is to be left to judicial discretion where not governed by specific rules of court.[10]

CJEU ruling in EU vs UK

In February 2014 the European Court handed down its long awaited ruling in EU vs UK, and found cost regimes in the UK to be in breach of the access to justice provisions of the Public Participation. While the case focussed on examples from England and Wales, in certain key respects the Scottish cost regime is even worse.

As this Committee will be aware, in 2013 the Scottish (and rest of UK) Government(s) codified rules of court on Protective Expense Orders, capping the costs certain groups would be liable for in going to court to £5,000, as a result of these EU infraction proceedings. It is too soon perhaps to judge the success of this important mechanism, particularly in terms of its downward flexibility for applicants for whom the cap is too high, its application by the Courts with regard to NGOs and how appeals are dealt with under the new regime.

However, whatever the eventual success of this particular mechanism, the cost regime as a whole remains prohibitively expensive for most individuals, communities and NGOs. Litigants still have to raise their own legal costs which for a complex judicial review, accounting for lawyers and court fees can add up to tens of thousands. As evidenced in previous petition correspondence, Legal Aid is all but impossible to access for an environmental case with public interest implications.

The long term difficulties in obtaining legal aid for environmental cases in Scotland[11] have been exacerbated by the Scottish Legal Aid Board's introduction last year of a system whereby all the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors fees and outlays) will be capped at £7,000.[12] We

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[7] http://scotland.gov.uk/About/Review/taylor-review/Report

[8] Scottish Government consultation on Legal Challenges, 25-29 'The [Taylor] review…will look among other things at the cost and funding of public interest litigation, including environmental actions' http://www.scotland.gov.uk/Publications/2012/01/09123750/2

[9] Confirmed in email correspondence with Kay McCorquodale, Secretary Taylor Review, 15 March 2013

[10] Taylor Review Chapter 5, paras 29 and 33

[11] As a result of Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which effectively prevents applications for public interest cases which most environmental Aarhus cases would be

[12] http://www.slab.org.uk/common/documents/profession/mailshots/2013/Cost_Limitations_Mailshot_-_27_February_2013.pdf

think that £7,000 is an unrealistic figure to run a complex environmental judicial review. While applications can be made to increase the cap, this system is likely to further lessen the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the level of the cap particularly in a fast moving litigation, when it can be difficult to anticipate all costs in advance.

Meeting of the Parties to the Aarhus Convention

The 5th Meeting of the Parties to the Aarhus Convention is due to take place in June in Maastricht. At this meeting Decision IV/9i, which found the UK to be in non-compliance with the Convention in 2008, will be reviewed, and Parties will consider whether compliance in the UK has improved sufficiently, and whether to issue a second decision against the UK. Friends of the Earth Scotland continue to liaise with the Convention secretariat regarding Scottish specific aspects of UK compliance.

Next steps for Petition

As noted above, we consider that the Scottish Government has continued to delay compliance with the Aarhus Convention in respect of key issues. Therefore we recommend that the Committee ask the Government to appear before it and describe how it plans to deal with these outstanding issues.

Please do not hesitate to get in touch if we can be of any further assistance in the Committee's deliberations on our Petition.

Annexe B – Correspondence from the Scottish Government

September 2014

General remarks

Before turning to the specific points raised by the Committee, I must stress that the Scottish Government takes seriously its compliance with European and other international obligations. The requirements of the Aarhus Convention so far as set out in binding European legislation have been transposed into Scots law by a range of SSIs.

Whether the Scottish Government considers that it complies with the Aarhus Convention in the area of Access to Justice in Environmental Matters

The Scottish Government complies with the Aarhus Convention. The Scottish Government is committed to a comprehensive programme of civil courts reform. The implementation of Lord Gill's Scottish Civil Courts Review (SCCR) through the Courts Reform (Scotland) Bill (the Bill) currently before Parliament, will pave the way for swifter handling and disposal of cases, including public interest cases such as environmental cases.

In particular, section 85 of the Bill makes provision that will speed up judicial review by introducing a time limit of 3 months which may be extended at the Court's discretion. This time limit will replace *mora*, taciturnity, and acquiescence which currently applies bringing more certainty to the process and lessening the scope for prolonged legal argument. In addition, this section introduces a permission stage which will filter out unarguable cases, thus saving the petitioner the expense of continuing a case that has no prospect of success.

Evidence to support the view that the Scottish Government complies with the Aarhus Convention in the area of Access to Justice in Environmental Matters

The access to justice obligations under the Aarhus Convention are met by the availability of judicial review proceedings, which may be brought in the Court of Session. Since 25 March 2013, the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 has been in force. Individuals or environmental pressure groups bringing an environmental case against a public body have been able to apply for a protective expenses order, limiting their liability for the other side's costs to £5,000. The order will also cap the public body's liability for the applicant's expenses to £30,000. The court "must" grant the order if it is satisfied that it would be "prohibitively expensive" for the applicant to bring the case without one. It will only be able to refuse to grant the order if the applicant does not have "sufficient interest" in the case, or there is "no real prospect of success".

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

The petition raises the issue of "title and interest". When the petition was lodged in 2010, a petitioner for judicial review was required to demonstrate both title and interest to sue. The SCCR considered that the law on standing was too restrictive and that the separate tests of title and interest should be replaced by a single

test—whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings. Since the Supreme Court ruling in *Axa General Insurance Limited and others v Lord Advocate and others* in 2011, this sufficient interest test has applied to petitions for judicial review.

Furthermore, no legal challenge against the Scottish Government made on the grounds of non-compliance with the Aarhus Convention has been successful.

I hope this is of assistance but I will of course be happy to provide the Committee with further details if so requested.

KENNY MACASKILL