

## **Scotland Remains Non-Compliant with the Aarhus Convention – 29/09/17**

We all have the right to live in a clean and healthy environment – the Aarhus Convention brings this to life. Signed-up States must ensure that NGOs and members of the public enjoy rights to access information, participate in decision-making, and access justice. This fosters participatory democracy – thought to lead to a cleaner environment as people become more involved in the decisions affecting them.

It is this last set of rights – on access to justice - where there are significant problems in Scotland. Rights are pointless if they can't be enforced, so the Convention requires that NGOs and members of the public must be able to challenge situations where their Convention rights are denied or national environmental laws are broken. Critically, Article 9 says that access to justice must be [‘not prohibitively expensive’](#).

However, environmental litigation in Scotland is carried out mainly through judicial review, which is very pricey. Expenses follow success – so a litigant pays their opponent's legal expenses if they lose their case. They may have to pay the expenses of another party too (such as where a developer ‘intervenes’ in a case). Litigants can apply for a ‘protective expenses order’ to cap their liability if they lose; but the statutory regime for PEOs is highly problematic and very few have been granted in practice.

Added to this, the Scottish legal aid rules effectively [make legal aid unavailable for environmental cases](#). So even if a litigant is lucky enough to get a PEO, they still have to figure out how to pay their own legal team (the costs of which are usually in the tens of thousands of pounds).

Expenses often run into six figures. The John Muir Trust's unsuccessful challenge to the Stronelairg windfarm development led to [a bill of £539,000 to the Scottish Government and developer SSE](#) (albeit eventually negotiated to £125,000). Access to environmental justice is an unaffordable luxury in

Scotland; rather than a basic human right as envisaged (and required) by the Convention.

Recognising this, official non-compliance action has been taken. The Convention's [2014 'Meeting of the Parties'](#) (the main governing body for the Convention) found that Scotland was not up to the 'not prohibitively expensive' requirement – and required that 'urgent' remedial action be taken. The Convention's 'Compliance Committee' then carried out two progress reviews in [2015](#) and early [2017](#) — finding that Scotland remained non-compliant. Finally, the [September 2017 Meeting of the Parties](#) reaffirmed its 2014 conclusion.

Scotland is manifestly non-compliant; but also *unashamedly* non-compliant. There has been no official response, no commitment to review and not even a basic recognition by the Scottish Government that this problem needs addressed. A [2016 consultation document](#) mysteriously proclaimed Scotland's 'ongoing compliance' with the Convention.

The rights set out in the Aarhus Convention are critical to the rule of law and the protection of the environment – access to justice gives them teeth. Scotland's justice system is pricing out those looking to realise their rights, protect the environment and hold decision-makers to account. The Scottish Government needs to face up to its Aarhus compliance problem.

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