Reforming legal aid to deliver environmental justice

Briefing, June 2025

Introduction

The Environmental Rights Centre for Scotland (ERCS) is an environmental law charity. We advocate for policy and law reform to improve environmental rights and compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[1]

This briefing discusses the importance of reforming Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to enable public interest environmental litigation and increase access to environmental justice.

Legal aid and access to environmental justice

Legal aid helps low-income individuals to pay for legal advice and representation and promotes access to justice.

Scotland has repeatedly been found in breach of the UNECE Aarhus Convention's access to justice requirements, due to the 'prohibitive expense' of environmental litigation.[2]

Article 9 of the Aarhus Convention concerns the rights of members of the public and NGOs to access justice in environmental matters.

Article 9(3) of the Convention requires that members of the public shall have access to:

> *...procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

Article 9(4) requires that such procedures shall not be 'prohibitively expensive'.

Article 9(5) creates the following positive obligation on Parties:

> *In order to further the effectiveness of the provisions of this article, each Party shall... consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*

The Convention's 'Meeting of the Parties' and the Aarhus Convention Compliance Committee have both repeatedly found that Scotland is non-compliant with Article 9(4) and 9(5).[3]

Scotland has a poor Aarhus compliance record because the cost of environmental litigation is unaffordable for many people.

One barrier is Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 which restricts access to civil legal aid for many environmental cases, preventing access to legal remedies for breaches of environmental law.

Regulation 15 - the joint interest test

A person considering environmental litigation is likely to have a joint interest with others because in almost all environmental litigation there will be several individuals interested in the issue(s) in dispute. Lord Hope explained in *Walton* that environmental law **"**proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone**"**.[4]

Regulation 15 makes it very difficult for a person to obtain civil legal aid when they have a 'joint interest' in their case with others.

It states as follows:

> *Applicant having joint interest, etc. with other persons*
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> *15. Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that –*
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> *(a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or*
>
> *(b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.*

This means that those persons can only be granted legal aid if the Scottish Legal Aid Board (SLAB) is satisfied that there is either 'serious prejudice' (Regulation 15(a)) - or that it would not be reasonable and proper for the other persons who are jointly interested to pay the expenses that would otherwise be paid by SLAB (Regulation 15(b)).

Regulation 15(a) - the serious prejudice test

Regulation 15(a) requires that SLAB is not to grant legal aid if satisfied that the applicant would not be 'seriously prejudiced' if legal aid were not to be granted. Or in other words, SLAB will only grant legal aid in joint interest cases where an applicant can show that they would suffer serious prejudice without legal aid.

There are three problems with the serious prejudice test.

- The requirement to show 'serious prejudice' in the absence of legal aid is a very high bar for applicants to meet. Environmental litigation often concerns diffuse public interests

involving environmental protection, the rule of law and enforcing environmental laws. In many environmental cases – such as those involving the protection of wildlife, marine life or challenging detrimental planning proposals - it would be very difficult for an individual to demonstrate that they will suffer serious prejudice without legal aid.

- The test is unclear. What is meant by 'seriously prejudiced' is not defined in the 2002 Regulations. SLAB's guidance on Regulation 15 provides little clarity.[5]

- SLAB's guidance on the test is contradictory. It states that, "Our criteria for a wider public interest will not be met … When we consider that the interest is, in fact, a private interest".

Frances McCartney (now Sheriff McCartney) has explained that this amounts to:

> *"…an impossible argument to win. If the individual does not have a substantial impact from the issue then reg 15 is not satisfied and legal aid is refused. On the other hand, if the interest and connection to the individual is real, then the first hurdle of serious prejudice can be satisfied, only then to be told that the interest is in fact a private interest and no wider public benefit can be taken into account."*[6]

Regulation 15(b) – others paying expenses

The effect of Regulation 15(b) is that SLAB will not grant legal aid where it would be "reasonable and proper" for other people who are interested in the case to pay the expenses that would be paid via legal aid, if legal aid was granted. The phrase 'reasonable and proper' is not defined and there is a lack of certainty as to how this test is applied in practice.

Case study: Save Slochy Woodlands

In the rare cases where legal aid has been obtained it has empowered individuals to challenge breaches of environmental laws.

Save Slochy Woodlands

In 2023, the Save Slochy Woodlands campaign group in Moray hailed a 'David vs Goliath' court victory, after Robert Bruce won a statutory appeal to prevent the construction of a luxury housing development on Slochy Woodlands, a locally valued greenspace widely used for recreation and access to nature. Lord Carloway ruled that the Moray Local Review Body's decision to grant planning permission constituted 'an error of law' and must be quashed, vindicating campaigners who had sought to protect the site for people and nature.[7]

Legal challenges often attract media attention and motivate others to scrutinise decisions, exercise their democratic rights and uphold the rule of law.

In the majority of breaches of environmental law (e.g. where public bodies are failing to discharge duties in relation to water regulations or the publication of public registers), a

judicial route to remedy is imperative to hold public bodies and polluters to account and reduce public costs from delayed action on the triple planetary crisis of climate change, biodiversity loss and pollution.

Recommendation

ERCS recommends that Regulation 15 is amended so that it does not apply to cases falling within the scope of the Aarhus Convention.

This could be done by adding the following provision to the 2002 Regulations:

> *Exclusion of Aarhus Convention cases*
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> *15B. Regulation 15 shall not apply to applications for legal aid involving –*
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> *a. an appeal to the Court of Session under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004,*
>
> *b. actions including a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention,*
>
> *c. actions which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.*

The above wording is adopted from Article 7 of The Court of Session etc. Fees Order 2024, which makes court fees not payable for certain litigation in the Court of Session which falls within the scope of the Aarhus Convention (this Order was introduced to improve Scotland's Aarhus compliance).[8]

For more information contact

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[1] United Nations Economic Commission for Europe (1998) Convention on access to information, public participation in decision-making and access to justice in environmental matters.
[2] ERCS (April 2025) The Aarhus Convention and access to environmental justice.
[3] ERCS (June 2024) Scotland's lack of progress on delivering access to justice.
[4] *Walton (Appellant) v The Scottish Ministers (Respondent) (Scotland)* [2012] UKSC 44, para 152.
[5] https://www.slab.org.uk/guidance/strategic-or-wider-interest-of-the-case/.
[6] Frances McCartney, 'Public interest and legal aid' (2010) 37 *Scots Law Times* 201-204, p202.
[7] *Robert Bruce v Moray Council* [2023] CSIH 11.
[8] ERCS (2022) ERCS welcomes exemption of court fees for some Aarhus cases, but much more is needed.