ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define 'prohibitively expensive'?

Whilst I thought that the definition of prohibitively expensive was logical, in light of the guidance and rulings from the ECJ and the Supreme Court, I do not see why a definition is required.

2. Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

Yes, it would not be in the spirit of the Aarhus Convention and European laws for applicants wanting to assert Aarhus Convention rights, such as myself, to have a dual hurdle to overcome. To the extent possible, access to justice should not be prevented by prospects of success obstacles – of course there is a balance to be had but there are three points I would make (1) the individual lacks power, resources and influence compared to the public sector, which often has a role to play in terms of making decisions, for example, the planning department of a local authority; (2) those involved in activities that affect the environment, from industry, to utilities to developers and housing associations, have a stronger voice and influence with the decision makers in our civic society, which includes local authorities – therefore, the individual lacks power, resources and influence compared to those whose commercial or operational interests affect the environment; and (3) in each part of the United Kingdom, access to justice is a theoretical concept for the vast majority of the people – there are two categories of people who have access to justice, (1) the corporates and the public sector and (2) those eligible for legal aid and it is this problem, which clashes head-on with the Aarhus Convention and its laudable aim to empower anyone who wants to question or protect decisions affecting the environment.

From my experience as an applicant who has used the Environmental Information (Scotland) Regulations 2004, and taking into account the costs of litigation in Scotland, the reality is that if you do not agree with the decision of the Scottish Information Commissioner, then I can state, and I am confident most people would agree, that you will not have the money and wherewithal to appeal to the Court of Session in Edinburgh within 42 days of receiving the Commissioner's decision. That is just not a realistic prospect. People will not put their homes on the line and local authorities and other decision makers know this. From my experience of the public sector, the way in which legal expenses are funded by local authorities also encourages a 'sue us if you dare' which is in contrast to the private sector, where funding litigation has a direct impact on the bottom line.

The challenge here is that the age old problem of access to justice in Scotland is in contravention with the requirements of the Aarhus Convention and European law. An applicant who wants to appeal the Commissioner's decision, will not have £50,000 to have counsel and a law firm instructed and will not have the ability to get the case ready within 42 days. This is where the English system is more compatible with the spirit of the Aarhus Convention and European law as the appeal of the Information Commissioner's decision is to a tribunal, and not the Court of Session equivalent in England. This is why the need to change the system in order to give individuals their rights under the Aarhus Convention is greater in Scotland than it is in England.

It is not the individual who has created the question of whether an activity will affect the environment or not, it is either the private sector (for example, industry) or the public sector, for example, a housing association. Therefore, the burden of justifying a decision that affects the environment should be on the private and public sectors, not the individual whose life will be affected by the activity having an impact on the environment.

3. Do you have any comments on draft rule 58A.6 for the determination of an application?

I think the Commission's suggestion of a simplified and accelerated procedure for the determination of PEO applications under which there would be a presumption against there being any hearing to consider the application is a step in the right direction and aligned to the requirements of the Aarhus Convention and European law.

4. Do you have any comments on draft rule 58A.9 for the expenses of the application?

I think the Commission's suggestion is good and in keeping with the requirements of the Aarhus Convention and European law.

5. Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

I think the Commission's suggestion is good and in keeping with the requirements of the Aarhus Convention and European law.

6. Do you have any comments on the draft amendment to rule 38.16?

7. Do you have any other comments on the proposals contained in this paper?

The Aarhus Convention and the European law implementing are progressive laws; the EIRS however, and the Scottish civil justice system, simply do meet the requirements of the Aarhus Convention and the European Directive. The right to get information is the basic step required in order to vindicate the rights granted by the Aarhus Convention and therefore, the inability of appealing the Commissioner's EIRS decision to the Court of Session due to solely the cost of it, is a continuing failure of Scots law being compliant with European law and the Aarhus Convention. As an individual, I did not have £50,000 it would cost to run an appeal in the Court of Session on a point of law and had to stop in my tracks even though the decision at issue, was at odds with rulings of the Information Commissioner's Office in England and the plethora of guidance on the Aarhus Convention available on the internet. What matters is money, and whether you have enough to go to the Court of Session.