Friends of the Earth Scotland (FoES) response to the Scottish Government consultation on the Courts Reform (Scotland) Bill

May 2013

About Friends of the Earth Scotland
Friends of the Earth Scotland is an independent Scottish charity with a network of thousands of supporters, and active local groups across Scotland. We are part of Friends of the Earth International, the largest grassroots environmental network in the world, uniting over 2 million supporters, 76 national member groups, and some 5,000 local activist groups - covering every continent. We campaign for environmental justice: no less than a decent environment for all; no more than a fair share of the Earth's resources.

Introduction

FoES are working for improved access to environmental justice in Scotland and it is with this in mind that our response is framed. Since 2010 FoES's Access to Environmental Justice campaign has sought to expose the barriers that individuals, communities and NGOs face in attempting to undertake legal action in environmental matters. The Courts Reform (Scotland) Bill presents an important opportunity to tackle some of these barriers and as such we welcome the opportunity to respond to this consultation.

Context

The UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention) recognizes every person's right to a healthy environment – as well as his or her duty to protect it. The EU and the UK are signatories to the Convention, and as justice and the environment are devolved, the Scottish Government is bound to comply with the Convention.

EU Directives on public access to environmental information (Directive 2003/4/EC) and providing for public participation in planning (the 'Public Participation Directive' 2003/35/EC) are in place to facilitate member state implementation of the first two pillars of Aarhus.[1] In Scotland these are translated into freedom of information[2] and environmental assessment[3] legislation.

The third pillar of Aarhus requires that members of the public have access to justice if *rights under the former pillars are denied* (i.e. those enshrined within the PPD and Directive 2003/4/E) and if

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[1] For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.
[2] Environmental Information (Scotland) Regulations 2004 http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm
[3] Environmental Assessment (Scotland) Act 2005 http://www.legislation.gov.uk/asp/2005/15/contents and Environmental Impact Assessment (Scotland) Regulations 2011 http://www.legislation.gov.uk/ssi/2011/139/signature/made

national environmental law has been broken.[4] Under Article 9 (and the PPD) these procedures must include review of both the "substantive and procedural legality of decisions, acts or omissions", provide effective remedy and be "fair, equitable, timely, and not prohibitively expensive".[5]

On ratification of Aarhus, the European Council (EC) made it very clear that the Public Participation Directive (PPD) and the Public Access to Environmental Information Directive did not fully implement the Convention – in particular its access to justice provisions – and that member states were responsible for complying with these remaining obligations.[6]

The PPD only amends Directive 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control). Aarhus cases can fall under other, un-amended Directives such as the Strategic Environmental Assessment Directive, and Article 9(3) makes it clear that the Convention applies to national environmental legislation.[7]

Further, decisions of the European Court of Justice have indicated that Aarhus principles apply to all questions of European environmental law even although not all relevant Directives were amended in light of the Convention.[8] We consider that the Scottish Government is in fundamental breach of its access to justice obligations not only under the PPD, but also under the third Pillar of the Aarhus Convention as a whole, and that this has a knock on effect on the performance of other Aarhus obligations, since there is little credible threat of legal action from citizens wishing to challenge decisions adversely impacting on the environment.

This is supported by the ongoing infraction proceedings against the UK for non- compliance with the Public Participation Directive (which contains some Aarhus access to justice provisions), particularly in relation to costs.[9] Whilst the referral was prompted by reports of English cases, we understand the written case for the Commission includes an analysis of, and complaints in respect of, aspects of the position in Scotland, and that the Commission intends to pursue other compliance issues separartely. Indeed our research[10] shows that compliance in Scotland is demonstrably worse than in England and Wales.

Making Justice Work and the scope of this Consultation

The present Government's response to Lord Gill's 2009 Review of the Scottish Civil Courts in establishing the 'Making Justice Work' programme provides the perfect opportunity to build on progressive Freedom of Information and Strategic Environmental Assessment legislation, by finally implementing the last Pillar of Aarhus, and securing access to environmental justice in Scotland.

However, we do not think the proposals outlined to date under MJW, including those within this consultation, even in their best possible form, will ensure compliance with Aarhus or the PPD, as

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[4] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 http://www.unece.org/env/pp/documents/cep43e.pdf.
[5] Aarhus Convention Article 9 (4)
[6] 2005/370/EC: Council Decision of 17 February 2005: "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations." http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML
[7] Aarhus Convention, Article 9(3)
[8] In Case C-240/09, for a preliminary ruling under Article 234 EC from the Najvyssí súd Slovenskej republiky (Slovakia), in the proceedings Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky, judgement of Grand Chamber ECJ of 15th March 2011 "It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law". See Official Journal of the European Union C130/4
[9] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML&aged=1&language=EN&guiLanguage=en
[10] See our 'Tipping the Scales' report: http://www.foe-scotland.org.uk/tippingthescales

they do not directly or fully tackle issues of excessive cost in taking action in environmental cases, nor do they tackle the issue of substantive review.

In Scotland, as throughout the UK, raising challenges to environmental decisions will generally be by way of judicial review or statutory review. There is no doubt that judicial review is very expensive, and prohibitively so for the ordinary person. In *Uprichard v Fife Council*[11], the petitioner faces a total bill of around £180,000. In *McGinty v Scottish Ministers*[12], despite being awarded the first ever Protective Expense Order (PEO) in Scotland, the estimation of Mr McGinty's costs was around £80,000 if he was to lose.

In response to legal action from the European Commission, the Government's moves to tackle the excessive cost of environmental litigation are limited to codification of rules of court for PEOs.[13] However, the new rules in Scotland apply only to cases under the Public Participation Directive, and fall far short of providing for the kind of assurance against prohibitive expense required by the Aarhus Convention.[14] In the context of difficulties in accessing legal aid and increases in court fees,[15] these rules do little to substantially improve access to justice, and are ultimately unlikely to satisfy the Commission.

The proposals laid out in the Consultation do nothing to tackle the issue of substantive review (in other words, the examination by the courts of the merits of a case, rather than just whether due process was followed). In fact, the Scottish Government has stated that in principle it objects to substantive review as a function of the courts.[16]

In a letter to the Scottish Parliament Equal Opportunities Committee in March 2012 the Scottish Government confirmed that the introduction of Protective Expense Orders would not fully cover the wider implications of Aarhus compliance, but indicated that the Court Reform Bill consultation would address these issues.

It is our view that the proposals outlined in this consultation are insufficient to bring about compliance with the Aarhus Convention, and that efforts date under MJW are not adequate to avoid further legal action from the European Commission in relation to the PPD.

Response to Chapter 5: Improving judicial review procedure in the Court of Session

Standing

The Government accepted the recommendation of the Civil Court Review to replace 'title and interest' with 'sufficient interest', and in this consultation considers that the changes made in *Axa v Lord Advocate and others*,[17] have effectively broadened the law on standing to the degree required by the Review . We agree, however we wish to make a number of points.

We note that, as outlined in the Civil Court Review, sufficient interest is the test used in judicial

[11] http://www.scotcourts.gov.uk/opinions/2011CSIH59.html
[12] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html
[13] The Government has previously indicated that the Taylor Review will see to the broader requirements of Aarhus compliance on costs. However, we met with the Secretary to the Taylor Review in February 2012, and we note 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 Aarhus Convention.
[14] The rules ultimately assume that a sum of £35,000 – the presumptive amount an unsuccessful petitioner would be expected to pay – is not prohibitively expensive. Yet average annual earning in Scotland fall well below this sum, and evidence suggests that deprived communities suffer from the brunt of poor environmental decision making, with people living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality, this limit therefore disproportionately impacting on these communities. SNIFFER, Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation, 2005 http://www.sniffer.org.uk/Webcontrol/Secure/ClientSpecific/ResourceManagement/UploadedFiles/UE4%2803%2901.pdf
[15] See our briefing to the European Commission on the excessive costs of challenging environmental decisions in Scottish Courts http://foe-scotland.org.uk/excessivecostsDec2012
[16] In Ministerial correspondence dated December 2011 (hard copies availables)
[17] http://www.supremecourt.gov.uk/decided-cases/index.html

review in England, Wales and Northern Ireland, where it is seen to be a relatively low hurdle in cases of genuine public interest.

We also note that when the Supreme Court replaced the archaic test of 'title and interest' to sue with the broader 'sufficient interest', it indicated that the development of public law in Scotland had been severely hindered by decades of judge made law. While the new test of sufficient interest should serve to improve access to justice in environmental – and other public interest – cases, we wish to point out that the Scottish courts have not been quick to apply it. In a recent subsequent ruling, the Supreme Court felt the need to make it clear that legal challenges to important decisions and acts by public authorities are a vital means of up upholding the rule of law, following the Inner House's opinion regarding standing in *Walton v Scottish Ministers*.[18] In its comments on standing in *Walton* the Supreme Court also emphasised the importance of individuals and NGOs taking cases on behalf of the environment, since the environment can't go to court by itself.[19]

Time limits

Q19 Do you agree with the three month limit for judicial review claims to be brought?

No. While we agree that it is in everyones interest that cases for judicial review are brought timiously, we are concerned with how that is interpreted and that the proposal to introduce a three-month time limit will cause problems in complex cases and particularly where there is uncertainty in funding. We consider that there is a real issue with a finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, and the introduction of even a presumptive three month time limit will exacerbate this.

A three month time limit will 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.

Further, we note that there is often a considerable grey area as to when exactly the grounds giving rise to an application begin, and while a degree of flexibility is contained in the Bill, a presumptive three month limit is likely to put potential litigants off (known as a 'chilling effect').

Given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, it should instead consider a presumptive time limit of a year for such cases.

Leave to proceed

Q20 Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?

We support the introduction of an appropriately designed leave to proceed stage, and consider that it could help filter out unmeritorious cases. Importantly, a leave stage could also be used to award Protective Expense Order's and settle issues such as standing, thereby reducing the 'chilling effect' where uncertainty created by these matters hanging over the petitioner for the duration of the case put potential litigants off (and cause considerable uneccessary anxiety for those who go ahead).

We note that the Bill as drafted does not indicate at what point leave to proceed would be assessed. However, 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.

[18] http://www.scotcourts.gov.uk/opinions/2012CSIH19.html
[19] www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf

We welcome the inclsion of a right to an oral hearing where leave has been refused or granted subject to certain conditions. We consider this to be a very important safeguard for access to justice given that certain public interest cases in England, where a permission stage is already in place, have been initially refused but gone on to win following permission at oral renewal (e.g. the case taken by our sister organisation in England, Wales and Northern Ireland *Friends of the Earth and others v Secretary of State for Energy and Climate Change [2011]*).

Access to Justice
Q21 Do you agree that these proposals to amend the judicial review proceure will maintain access to justice.

No. While aspects of the reforms proposed could improve access to justice, such as a well designed and applied leave stage; the introduction of a three month time limit is likely to hinder access to justice.

Further, as above, we note that access to justice in environmental cases remains prohibitively expensive despite the introduction of new rules of court on Protective Expense Orders, and there is no recourse to substantive review, in breach of our obligations under international law.

Recommendations:

• **One way cost shifting**

'Qualified One Way Cost Shifting' (QuOWCS), is a system where unsuccessful litigants are not ordered to pay the costs of any other party unless they have acted unreasonably in taking the case. This is the cost regime recommended by senior English judges, who point to inherent shortcomings with cost capping orders, such as PEOs. Certainly, the new rules of court on PEO's in Scotland are highly problematic in terms of:

- Level of cap: the presumptive cap of £5,000 for petitioners is in our opinion much too high. Based on the experience of the Environmental Law Centre Scotland, the sum of £5,000 would be difficult if not impossible for many community groups to find, let alone individuals. Further, the level of the cap cannot be viewed in isolation from the petitioners own costs.

- Eligibility: the rules apply only to individuals and 'non-governmental organisations promoting environmental protection'; and specifically preclude 'persons who are acting as a representative of an unincorporated body or in a special capacity such as trustee'.

- Judicial discretion: despite the fact that the rules only apply to cases falling under the Public Participation Directive – which requires challenges not to be prohibitively expensive – Petitioners taking a case under the PPD are not automatically considered to be eligible for a PEO.

- Appeals: the rules allow for PEOs to be awarded in appeals, but the cost limits are left to judicial discretion, taking into account decisions on costs in the lower court, meaning there is no certainty as to the cost of taking a case to appeal. There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed.

The Jackson Review (2010) looked at the costs of civil litigation in England and Wales. Lord Jackson found that while Protective Cost Orders (English equivalent of PEOs) can provide early certainty and control the level of a claimant's cost liability, the system currently does not provide for Aarhus as compliance PCOs are granted restrictively, and at the judges' discretion. Therefore Jackson recommended England and Wales should 'expand the [PCO] test and...introduce qualified one way cost shifting (QuOCS) for all judicial review claims, leaving the 'permission' requirement as

a sufficient mechanism to weed out weak claims'.[20]

The Sullivan report (2008) focused specifically on Access to Environmental Justice in England and Wales. Following the Jackson Review, Sullivan issued an update report in 2010 to take account of those findings.

Sullivan's 2010 update report agreed with Jackson's findings, and recommended one-way cost shifting, instead of tinkering with the PCO system, finding this to be the simplest and most effective way of complying with the Aarhus demands that access to justice must not be prohibitively expensive, and to avoid the 'chilling effect' by ensuring all possible costs are up front from the start.

Sullivan's proposal went further than Jackson in amending the qualification test, so that "an unsuccessful claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings".[21]

We consider that the best way to ensure Aarhus (and PPD) compliance in this area is to introduce one way cost shifting for all environmental cases where there is a public law point to be answered. This could be assessed at the leave stage.

• Legal Aid

The presumptive cap on PEOs is particularly unfair considering that legal aid is effectively denied to those seeking to pursue a public interest environmental case, and given the Government has no proposal to tackle difficulties in obtaining legal aid for environmental cases, presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002,[22] which has a particularly adverse effect in environmental cases.

When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, SLAB looks at whether 'other persons' might have a joint interest with the applicant. If this is found to be the case – as it would be in almost any Aarhus case imaginable – SLAB must not grant legal aid if it would be reasonable for those other persons to help fund the case. In addition, the test states that the applicant must be 'seriously prejudiced in his or her own right' without legal aid, in order to qualify.

These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant.[23] This has a particularly adverse effect in relation to Aarhus cases; environmental issues by their very nature tend to affect a large number of people. We are only aware of legal aid being awarded in cases restricted to subject matters that affect a small number of households, or where the Scottish Legal Aid Board has decided that Regulation 15 does not apply to the application.

Moreover, community groups cannot apply for legal aid in Scotland. By contrast, England and Wales have a system that allows the joint funding of a case, where the Legal Services Commission grants legal aid to an individual subject to a wider community contribution, based on what the community group can pay. Although Scotland has provision whereby if a third party contributes to the cost of a case it can be paid over to the legal aid fund, these provisions were not designed for environmental cases, and would require reform to allow a system such as that which operates in England.

In addition, we note that the Scottish Legal Aid Board has recently introduced caps on legal aid certificates, which will mean that all the expenses of the case (including Counsel's fees, Edinburgh agents fees, solicitors fees and outlays) will be capped at £7,000. Freedom of Information requests

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[20] Jackson, Review of Civil Litigation Costs: Final Report (2010), part 5, chapter 30 para 4.1
[21] Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 30
[22] http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made

[23] For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' as above

have revealed that in some cases public authorities spend far larger sums defending judicial review cases, and consider the introduction of this cap will led to gross inequality of arms. Although there is provision for applications to be made to the Scottish Legal Aid Board for the cap to be increased, we consider that is likely that fewer solicitors will be willing to take on judicial review cases. The solicitor runs the risk of incurring liability for counsel's fees and outlays which are not covered the level of the cap. We think that £7,000 is an unrealistic figure to run a complex judicial review, and consider most if not all environmental judicial reviews are likely to be complex. The introduction of this cap is likely to lessen the number of solicitors willing to act in this area, and places another barrier on obtaining access to the courts on a legally aided basis.

We consider that removal of Regulation 15, and the introduction of a mechanism to enable community groups to access legal aid is essential for Aarhus – and Public Participation Directive – compliance.

• Court Fees

The Scottish Government is in the process of implementing a policy of full cost recovery in court fees.[24] Fee proposals for the Court of Session will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court.

Fees for the Court of Session are already very expensive – prohibitively so for the ordinary person – particularly in relation to the time spent in court in judicial review cases. For example in *McGinty* the Outer House hearing took 18 hours, which we estimate would incur costs of approximately £1,620 for the hearing alone; in *Walton* hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580. Under the new regime, McGinty's costs for time spent in court alone would double to £3,240 in 2014; and Walton's more than double to £12,060. Because of the restrictions on legal aid in environmental cases, it follows that such cases are highly unlikely to secure an exemption from court fees on the basis of legal aid.[25]

We consider that comprehensive research into the impact of increased court fees on access to justice as a whole, with special attention paid to the unique requirements for access to justice in environmental matters, under the rights granted by the Aarhus Convention should be undertaken.

• Substantive review

Aarhus requires that "members of the public concerned...have access to a review procedure...to challenge the substantive and procedural legality of any decision, act or omission...relevant [to] provisions of this Convention" and that these procedures "shall provide adequate and effective remedies". [26]

The Scottish Courts rarely stray into the substance of cases and are openly reluctant to do so.[27] While understandably there is some tension between the ability of governments to take decisions and be accountable for them, and the availability of judicial review, it could be argued that there is a contrast between the jurisprudence of public law cases north and south of the border. This may partly be due to a lack of specialism in the Scottish Courts. We note that the Court Reform Bill sets out to implement the Civil Courts Review recommendations in respect of judicial specialisation and welcome this.

However, while we recognise the need to ensure that the courts do not become a 'vehicle to

[24] http://www.scotland.gov.uk/Publications/2012/12/6391
[25] The granting of a legal aid certificate (together with some other exemptions in terms of receipt of certain benefits) give an exemption from the payment of a court fee
[26] Aarhus Convention Article 9 (1)
[27] For example Lord Brailsford in McGinty v Scottish Ministers http://www.scotcourts.gov.uk/opinions/2011CSOH163.html

articulate what are essentially political arguments',[28] we consider that there is scope to revise judicial review to incorporate a substantive element including the merits of a case.

Further, we note that environmental decision making takes place in a highly complex framework of legislation – not all specifically environment-related – and is initiated and regulated by numerous public authorities and bodies. A specialist environmental court or tribunal offers the chance to rationalise and simplify the way this legislation is dealt with, and could also give the judiciary greater authority and confidence examining issues of substantive review.

The Government's ongoing Tribunal reform and commitment to consult on options for an environmental court or tribunal present the ideal opportunity to explore the best solution for the Scottish context.

Contact

Mary Church, Campaigns Co-ordinator, Friends of the Earth Scotland
e: mchurch@foe-scotland.org.uk t: 0131 243 2716

[28] Scottish Government response to the Report and Recomendations of the Scottish Civil Courts Review, November 2010 http://www.scotland.gov.uk/publications/2010/11/09114610/1, 168