

July 2012

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint written evidence to Justice Committee on Scottish Civil Justice Council Bill

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, 77 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.

About the Environmental Law Centre Scotland

The Environmental Law Centre Scotland is a charitable law centre using law to protect people, the environment and nature, and increase access to environmental justice. We help protect the environment and support sustainable approaches and solutions by providing advice, advocacy, training, updates and research. We work with both local communities and other non-government organisations to use law to protect the environment. We seek to test the law, and work to ensure that Scotland complies with its European and international obligations.

*This written evidence is supported in addition by the Legal Governance Group of **Scottish Environment LINK**. LINK is the forum for over 30 of Scotland's voluntary environment organisations. It represents a range of environmental interests with the common goals of contributing to a more environmentally sustainable society and pursuing environmental justice.*

Summary

1. FoES and ELCS welcome the Bill introducing a new Scottish Civil Justice Council, and broadly speaking support it's functioning as outlined in the draft Bill. However, as it stands the Bill's provisions in a number of key areas are not adequate to secure reform of the more problematic and outdated aspects of the how the existing Councils operate, and ensure the new Council is fit for purpose.

2. In particular we consider provisions should be amended and strengthened in relation to:

- **Appointments:** in the interests of openness and transparency it is vital that the Bill ensures an appointment practice akin to regulation by the Public Appointments Commissioner is put in place.
- **Consultation:** as it stands the Council may chose – but is not obliged – to consult in relation to its policy remit nor on new rules of court.
- **Membership:** provisions on membership could lead to a significantly legal professional-heavy Council, at the expense of lay members.

- **Remit:** the Council should have an explicit duty to consider how to make the civil justice system more accessible, fair and efficient.
- **Role of Lord President:** in relation to the Council should be reconsidered in terms of fairness, transparency and public perception.
- **Rules:** the Bill should outline under what conditions Rules of Court may be amended or rejected by the Court of Session.
- **Administrative justice:** the Bill should contain provision to ensure there is no gap in oversight of administrative justice.

Introduction

3. FoES and ELCS are working together for improved access to environmental justice in Scotland and full compliance with the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

4. 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 the Scottish Government is bound to comply with the Convention. EU Directives¹ are in place to facilitate member state implementation of the first two pillars of Aarhus – the right to be informed about and the right to participate in decisions that impact on the environment – and in Scotland these are translated into freedom of information² and environmental assessment³ legislation.

5. The third pillar of Aarhus requires that, members of the public have access to justice if rights under the former pillars are denied or if national environmental law has been broken. Under Article 9 (3) these procedures must provide effective remedy and be “fair, equitable, timely, and not prohibitively expensive”.⁴ It is our position that the Scottish Government has not yet adequately complied with these obligations, and that this has a knock on effect on the performance of aspects of the other obligations of Aarhus, since there is little credible threat of legal action from citizens wishing to challenge decisions adversely impacting on the environment.

6. 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.⁵ 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, the position in Scotland. Indeed our research⁶ shows that compliance in Scotland is demonstrably worse than in England and Wales.

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.hmsso.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>

⁴ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9(3) <http://www.unece.org/env/pp/documents/cep43e.pdf>

⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML&aged=1&language=EN&guiLanguage=en>

⁶ See our 'Tipping the Scales' report: <http://www.foe-scotland.org.uk/tippingthescales>

7. Aarhus also actively places a duty on citizens to “protect and improve the environment for the benefit of the present and future generations”.⁷ This illustrates the wider policy issues that drive environmental law and set it apart from other areas of public law. It also explains why the Government is obliged to introduce certain measures in relation to access to justice in environmental matters, and why it should keep reforms to the civil justice system under continuous review to ensure they meet Aarhus requirements.

8. The broad role of the proposed new Scottish Civil Justice Council means the body will have a significant influence over the way environmental law develops in Scotland and impact on the way that individuals, communities and NGOs engage in the justice system. It is vital therefore, that the new Council is established in keeping with the principles of accountability, openness, transparency and participation in decision making as upheld by the Aarhus Convention.

Evidence on Part One of the Scottish Civil Justice Council and Criminal Legal Assistance Bill

9. Broadly speaking, we support the creation of a Scottish Civil Justice Council as recommended by Lord Gill’s 2009 review of the Civil Courts, and with the functions outlined in the Bill. The work of the two current Rules Councils are not widely enough understood, and they do not provide a strategic overview of the courts systems. The creation of a new Civil Justice Council offers the chance to remedy that.

10. An overlying theme of Lord Gill’s review was that the legal system is a public service, and its structures and functions should be funded, modelled and operate with that function as a core principle. Gill recommended that a new Scottish Civil Justice Council would be a non-departmental public body⁸ and as such subject to the standards expected of public bodies.

11. We consider that whether or not the new Council is to be nominally an NDPB, recognition that the civil justice system provides a public services and acts on behalf of the public should be more explicit in the Bill and relevant best practice in public standards explicitly provided for in the Bill.

Functions & Powers

12. We support the new Council in having a policy remit, and think it vital that a key function of the Council is to keep the civil justice system under constant review. We would envisage this as being the primary remit of the Council, following the implementation of the Gill reforms, through a process of continuous review, both ensuring that the system provides a fit public service and avoiding the need for a future costly overhaul. Given this, and the importance of rules of court in how cases are heard, and the impact this has on litigants, we feel strongly that the whole process of making rules, and how the Council operates, must be as transparent and inclusive as possible.

13. The existing Rules Councils are not obliged to consult on changes to rules or the introduction of new rules, and such consultations are very rare. The Court of Session

⁷ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

⁸ Lord Gill, Review of the Scottish Civil Courts 2009 Vol 2 chapter 15, p54

passes rules as an Act of Sederunt (a form of SSI), and while all Acts of Sederunt must be laid before Parliament, this check is largely to examine technical drafting and competency to make rules, and does not provide for scrutiny beyond this.

14. Our view is that as a rule the Council should be required to consult before adopting new rules, in all but the most exceptional of circumstances. The Council should also be required to consult broadly and work with interested groups and bodies in areas where it has the policy lead, to ensure all parties have the opportunity to contribute and that broad specialist knowledge is accessed. The Spencer Review, which looked at the performance of the Civil Justice Council in England and Wales, emphasised the importance of such consultation, and noted that this did not always happen where it ought. The Review specifically pointed to increased consultation as a means to improve stakeholder perceptions in regard to openness and transparency in the workings of the Council.⁹

15. Power to approve or reject Rules of Court is retained by the Court of Session in the draft Bill, with no guidance as to under what conditions a Rule recommended by the Council may be amended or rejected. This significantly weakens the role of the new Council.

16. Including administrative justice and tribunals under the purview of the new Council (if the UK Administrative Justice and Tribunals Council – and therefore its Scottish Committee – is abolished) would enable a fuller ‘whole system’ viewpoint and help to ensure that the importance of this area of justice is more formally recognised. However, it is not yet clear whether and when the UK Administrative Justice and Tribunals Council would be abolished, and the Bill makes no provision for taking on the functions of the Scottish Committee. This could result in period when administrative justice has no oversight.

17. Recommendations:

- The Bill should include a provision to explicitly give the new Council a duty to consider how to make the civil justice system more accessible, fair and efficient, in relation to its functions. This would strengthen existing provisions that simply require the Council to have regard to certain principles in carrying out its functions.
- Given that civil justice as a whole falls under the policy remit of the Scottish Government it seems reasonable that in section 2 (1) (c) and (d) the function of the Council should be to provide advice and recommendations to the Scottish Government as well as the Lord President
- As it stands the Council may choose – but is not obliged – to consult in relation to its policy remit nor on new rules of court (at section 3(2)(d)). We would recommend amending the provision to state that the Council ‘must’ consult with ‘a broad range of stakeholders and interested parties’. Further, we consider that amending the provision at section 3(2) from ‘may’ to ‘must’ would strengthen the other provisions in this section.
- At section 4 the Bill should outline under what conditions Rules recommended by the Council may be amended or rejected by the Court of Session, i.e. where Rules are incompatible or where other Rules have superseded them. The Court of Session should give reasons for any amendments or rejection.

⁹ Spencer. J., Review of the Civil Justice Council 2008, 6.15

- The Bill should include provision for taking on the remit of administrative justice as soon as the Administrative Justice and Tribunals Council is abolished, to ensure there is no gap in oversight of this important area of justice.

Membership of the Council

18. Lord Gill proposed that the membership of a new single Council would include a number of lay or non-legal members. The Spencer Review recommended a re-balancing of membership to achieve parity between legal and non-legal members on the England and Wales Council. As it stands the Bill leaves it open for as few as two non-legal members to be appointed to the Council.

19. In keeping with the main thrust of the Gill Review – that the civil justice system is a public service – and the recommendations of the Christie Commission¹⁰ – that effective public services must be designed with and for people and communities – we consider that membership of the council should not be dominated by judicial and legal practitioners. There should be parity between legal and lay members on the Council itself, while effective use of the power to establish sub committees should ensure there is adequate flexibility in the system to access specialist skills on a more ad hoc basis as and when required.

20. We have serious concerns about the lack of transparency and openness in appointments to the existing Rules Councils. The Faculty of Advocates and the Law Society of Scotland each appoint five members to the Court of Session Rules Council (CSRC) with little or no accountability. For example, the Law Society's Civil Justice Committee nominates lawyer members to the CSRC without any external consultation or advertisement. That the current Council of 13 members and five invited attendees includes only one woman is strongly indicative of the Council's lack of representation. We consider that the current process for appointing members to the Rules Councils is not compatible with a modern democratic society, and must not be carried over to the new Council.

21. While the Scottish Government have yet to publish its analysis of responses to the consultation on the creation of a Scottish Civil Justice Council, a brief examination of published responses¹¹ indicates that more than a quarter of respondents raised the issue of transparency in appointments, with a considerable number indicating that appointments to the new Council should be made by a selection panel in an open and fair process. Of the remaining three quarters there was little by way of substantive support for the appointments process for the existing Councils and that proposed in the consultation.

22. We consider that the best way to ensure this is through regulation by the Public Appointments Commissioner. Appointments to the Civil Justice Council in England and Wales – upon which this new Council is in part modelled – are regulated in this way, as are appointments to the Judicial Appointments Board for Scotland, the Scottish Law Commission and the Scottish Legal Aid Board. All appointments to the Council with the exception of those who are members by virtue of their office at SCS and SLAB and the civil service representative should be subject to public appointments standards. Where the Council carries out work through sub-committees and ad-hoc groups, appointments to these should also be regulated by the Public Appointments Commissioner.

¹⁰ Christie Commission, 2011 Report on the Future Delivery of Public Services

¹¹ <http://www.scotland.gov.uk/Topics/Justice/legal/Civil/Scottish-Civil-Justice-Council>

23. If it is not possible or desirable to assign the new Council as an NDPB thereby automatically falling under public appointments regulation, we consider it essential that the Bill is amended to include strong provision ensuring that appointments (to both the Council itself and sub-committees) are advertised in accordance with equal opportunities and made by a selection panel in an open and transparent way. Given the public service role of the Council it is not appropriate to leave it to the discretion of the incumbent Lord President to establish appointment criteria. It is difficult to see how regulation by the Public Appointments Commissioner, or statutory adherence to the same standards, would interfere with judicial independence.

24. We consider that the power invested in the Lord President to remove individuals from the Council is too broad, and he / she should consult with Scottish Ministers before removing any member, to improve accountability.

25. We support the provision in the Bill for members of the Council and sub-committees to receive expenses and remuneration. This is particularly important to ensure that both legal and lay membership of the Council is genuinely open to for example, individuals who work for small or impecunious firms and organisations, or are self / un employed, not simply individuals from larger organisations who may be better able to absorb the time and financial cost of involvement in the Council.

26. We are concerned however, with the suggestion in the Policy Memorandum that members generally would not be paid,¹² and hope this does not indicate a bias towards membership from larger organisations.

27. Recommendations:

- Section 6 should be amended to ensure parity of legal and lay members on the Council. Definition of what constitutes being a legal and lay member should also be included (perhaps at section 16) in the Bill, to ensure clarity of the role of, for example, non-practicing lawyers.
- In the interests of openness and transparency it is vital that section 7 of the Bill is revised. The Bill should provide for appointments to be regulated by the Public Appointments Commissioner for Scotland or through procedures akin to this. Such standards should apply to all members of the Council and sub-committees excepting those who are members by virtue of their office at SCS and SLAB and the civil service representative. This should be explicitly spelt out in the Bill and not left to the Lord President to implement a suitable appointment practice.
- Section 9 (3) should be amended so that the Lord President must consult with Scottish Ministers before removing any member from the Council.

Other

28. We note that Consumer Focus Scotland has raised concerns about the multiple roles of the Lord President in relation to the new Council.¹³ CFS note the complex situation that is proposed: the Council is accountable to the Lord President, s/he sits on and can chair the Council, appoints a significant majority of its members, informs the remit, is responsible for passing (or rejecting) new rules, and is responsible for implementing certain policy recommendations. In the interests of good governance

¹² Scottish Civil Justice Council and Criminal Legal Assistance Bill, 2012, Policy Memorandum p19

¹³ Consumer Focus Scotland, 2012, Written Evidence to Justice

and transparency in decision-making we support the call for the role of the Lord President in relation to the new Council to be reviewed.

29. We would also like to note that the current Scottish Courts website is not user friendly and it can be difficult to gather information about the work of the current Rules Councils. For example, the CSRC minutes are not usually posted until the following meeting leaving a four-month lag in publicly available information about the work of the Council.

30. The new Council should ensure that accessible, current information is available online. Given the likelihood of long gaps between the Council's meetings, draft minutes should be published promptly and accessibly to plug the information gap. When the Council are considering a specific piece of work, it would be good practice for background information to be made available to the public via the website. In addition to the annual report being laid before Parliament, the report should be made available on the Council and other relevant websites, promptly and accessibly. Best practice in information sharing will be even more important given the extended policy remit of the proposed new Council.

Contact

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