



Friends of the Earth Scotland

Parliamentary Briefing on The Scottish Civil Justice Council Bill

September 2012

Introduction

Friends of the Earth Scotland welcomes the Bill introducing a new Scottish Civil Justice Council. Our interest in this legislation stems from our campaign for full implementation of the UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the 'Aarhus Convention'), to which the EU and the UK are signatories.

The Aarhus Convention recognizes every person's right to a healthy environment – as well as his or her duty to protect it. It places an active duty on citizens to 'protect and improve the environment for the benefit of the present and future generations'.¹ This illustrates the wider policy issues that drive environmental law and set it apart from other areas of public civil law. It also explains why the Government is obliged to improve access to justice in environmental matters, and why it must ensure that ongoing reform to the civil justice system complies with Aarhus in this respect.

It is our position that Scotland is in breach of obligations in relation to access to justice in environmental matters. This is supported by ongoing EU infraction proceedings against the UK. Ensuring that the new Council is established in accordance with the principles of accountability, openness, transparency and participation is a crucial step on the way to Aarhus compliance.

General comments

Broadly speaking, we support the creation of a Scottish Civil Justice Council with the functions outlined in the Bill. The work of the two existing Rules Councils is not widely enough understood, and they do not provide a strategic overview of the courts systems. The creation of a new Scottish Civil Justice Council, to replace the Court of Session and the Sheriff Court Rules Councils, offers the chance to remedy that.

A new Council was recommended by Lord Gill in his 2009 review of the Scottish Civil Courts, and a key function of the new Council will be to implement further reform of the civil justice system. As well as being responsible for drafting rules of court, the Council is to have a policy remit. This dual function means the Council 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.

However, as currently drafted the Bill raises a number of areas of concern:

Appointments

We have serious concerns about the lack of transparency and openness in the way appointments are made to the existing Rules Councils, and are keen to see that this is not replicated in the new system. At present, the Faculty of Advocates and the Law Society of Scotland each appoint 5 members to the Court of Session Rules Council (CSRC) with little accountability.² That the current Council of 13 members and 5 invited attendees includes only one woman is strongly indicative of the CSRC's lack of representation. As the Bill stands, this appointment practice continues within the new Council.

The civil justice system provides a public service and therefore should be subject to measures to ensure publicly acceptable standards are maintained. We consider that the best way to ensure this is through regulation by (or akin to that of) the Public Appointments Commissioner.³ Where the Council carries out work through sub-committees and ad-hoc groups, appointments to these should be similarly regulated.

¹ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

² For example, the last nominations by the Law Society of Scotland were determined by the Law Society's Civil Justice Committee without any external consultation or advertisement

³ Such regulation should apply to all appointments to the Council and sub-committees with the exception of those who are members by virtue of their office at SCS and SLAB and the civil service representative.

This is in keeping with Lord Gill's recommendation that the new Council should be an NDPB, thus automatically falling under Public Appointments regulation. 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. **The appointments procedure should be explicitly spelt out in the Bill and not left to the Lord President** to implement a suitable appointment practice.

Functions and Powers

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. 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.

We consider that the Council should be required to consult before adopting new rules, in all but the most exceptional of circumstances.⁴ 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. **As it stands the Council may chose – but is not obliged – to consult** in relation to its policy remit and on new rules of court. We recommend the Bill explicitly state that **the Council 'must' consult with a broad range of stakeholders and interested parties**.

Given that civil justice as a whole falls under the policy remit of the Scottish Government, **the Council should be able to provide advice and recommendations to the Scottish Government as well as to the Lord President**. Further, in the draft Bill the broad power to approve or reject Rules of Court is retained by the Lord President, as head of the Court of Session, with no guidance as to under what circumstances this should happen. **The Bill should outline under what conditions Rules of Court may be amended or rejected** by the Court of Session to avoid weakening the role of the new Council.⁵

The Government's consultation on the creation of a new Council proposed including administrative justice and tribunals in its purview if the UK Administrative Justice and Tribunals Council – and therefore its Scottish Committee – was abolished. We support this proposal and consider it would enable a fuller 'whole system' viewpoint and help to ensure that the importance of this area of justice is more formally recognised. In light of the fact that it is not yet clear when the UK Administrative Justice and Tribunals Council will be abolished, **the Bill should contain provisions to ensure there is no gap in oversight of administrative justice**.

Membership

Lord Gill proposed that the membership of a new Council would include a number of lay or non-legal members. The Spencer Review⁶ of the Civil Justice Council in England and Wales recommended a re-balancing of membership to achieve parity between legal and non-legal members. As it stands **the Bill leaves it open for as few as two non-legal members to be appointed to the new Scottish Civil Justice Council**.

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 Commission⁷ – 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**. The requirement for a balanced membership, with parity between legal and non-legal members, should be spelt out in the Bill. Definition of what constitutes being a legal and lay member should also be included in the Bill, to ensure clarity of the role of, for example, non-practicing lawyers.

Further, we consider that **the power invested in the Lord President to remove individuals from the Council is too broad**, and the Bill should be amended so that s/he must consult with Scottish Ministers before removing any member from the Council.

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⁴ 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

⁵ i.e. where Rules are incompatible or where other Rules have superseded them

⁶ Spencer. J., Review of the Civil Justice Council 2008

⁷ Christie Commission, Report on the Future Delivery of Public Services 2011