



Friends of the Earth Scotland

Briefing ahead of Stage 3 Scottish Civil Justice Council Bill

January 2013

Introduction

Friends of the Earth Scotland supports the introduction of 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, including when necessary, through the courts. This Bill presents Scotland with an important opportunity to enable citizens to 'protect and improve the environment for the benefit of the present and future generations'.¹

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 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 new 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 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:

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 envisage this as being the primary remit of the Council (following the implementation of the Gill reforms), 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. 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.**

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

Consultation

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. 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. We consider that 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.

Membership

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 Commission² – 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 Spencer Review³ of the Civil Justice Council in England and Wales recommended a re-balancing of membership to achieve parity between legal and non-legal members. The requirement for a balanced membership, with parity between legal and non-legal members, should be spelt out in the Bill.

Proceedings

The civil justice system provides a public service and therefore should operate in an open and transparent fashion. **We have serious concerns about the lack of transparency and openness in the way the existing Rules Councils operate, and are keen to see that this is not replicated in the new system**, however there is little in the Bill as drafted to ensure this. The new Council should ensure that accessible, current information is promptly made available online, including agendas, minutes and reports. Meetings and proceedings should also be held in public where possible. Best practice in information sharing, and transparency will be even more important given the extended policy remit of the proposed new Council.

Recommendations

We consider that the following Stage 3 amendments will significantly improve the accountability and transparency of the new Scottish Civil Justice Council:

- **Amendments 9, 10 and 12** would ensure the Council has a duty to consider how to make the civil justice system more accessible, fair and efficient, and require it to report to Ministers as well as the Lord President.
- **Amendment 11** would require the Council to consult on Rules of Court.
- **Amendment 12** would ensure gender balance on the Council (the current Court of Session Rules Council of 13 members and 5 invited attendees includes only one woman).
- **Amendments 13 – 16 (and 18 – 21)** would ensure greater parity between lay and legal members on the new Council, from the outset.
- **Amendment 22** would require the Council to hold proceedings in public and make information available online.

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² Christie Commission, Report on the Future Delivery of Public Services 2011

³ Spencer. J., Review of the Civil Justice Council 2008