

July 2012

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to the Scottish Government Consultation on a Review of Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian

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.

Introduction

1. 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.
2. 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.
3. 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

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>

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 – particularly in relation to the cost of legal action – 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.

4. 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.

5. 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.

Q1 Are any of the fee proposals likely to have a disproportionate effect on a particular group? If so, please specify the group and the impact. (Note that an initial impact assessment has been undertaken at Annex D and this will be updated based on responses to this consultation)

6. Fee proposals for the Court of Session will have a serious and disproportionate impact on parties seeking access to justice under the Aarhus Convention. As noted above, Aarhus not only places a duty on citizens to protect and enhance the environment, but also requires that nation states ensure that access to justice is broad and affordable in instances where rights under the Convention are breached and where national environmental laws are broken.

7. Raising challenges to environmental decisions will generally be by way of judicial review. There is no doubt that judicial review is relatively expensive. In *Uprichard v Fife Council*, the petitioner faces a total bill of £173,000. In *McGinty v Scottish Ministers*, where Mr McGinty was awarded the first ever PEO in Scotland, the PEO was granted at a cap of £30,000. The estimation of his costs was around £80,000 if he was to lose.

8. Even with the introduction of protective expense orders, to be represented by Counsel and pay the various outlays and court fees involved will still cost thousands of pounds. Only two PEOs have been granted by the courts to date in Scotland, and

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

in each, the cap set high: *McGinty* at £30,000,⁸ and *RoadSense* at £40,000.⁹ The Government recently consulted on proposals for new rules of court for issuing PEOs, however the rules are limited to only certain Aarhus cases, and even where they apply, they relate only to the potential liability for the other sides' costs, and do nothing to remedy prohibitive expense in relation to the petitioners' own costs.¹⁰

9. A legal aid certificate means that the court costs are not paid. However, it is extremely rare for legal aid to be awarded in environmental cases in Scotland. When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002,¹¹ 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. Further, the test states that the applicant must be 'seriously prejudiced in his or her own right' without legal aid, in order to qualify.¹²

10. 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. 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. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. It therefore follows that Aarhus cases are highly unlikely to secure an exemption from court fees on the basis of legal aid.

11. Far from enabling citizens to protect the environment in court when necessary, the current system actively hinders such action, with expense a major factor in this. It is fundamentally undemocratic that going to court in the public interest is out of bounds to all but the very wealthy.

12. The Aarhus Implementation Guide¹³ indicates that reducing court fees are one way that costs can be made more affordable. We therefore consider a special case can be made for cases to which the Aarhus Convention applies. We ask the Scottish Government to give specific consideration to reducing court fees in Aarhus cases, rather than increasing court fees, and reconsider the impact assessment with such cases in mind.

13. It is essential to look at how the whole picture of costs impacts on access to justice when considering increases in court fees. However, even taken alone, 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 due to the complexity of many such cases. For example in *McGinty* the Outer House hearing took 18 hours at a cost 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 to £5,580. Under the proposals outlined in this consultation, *McGinty's* costs for time spent in court alone would double to £3,240 in 2014; and

⁸ *Marco McGinty v Scottish Ministers* [2010] CSOH 5

<http://www.scotcourts.gov.uk/opinions/2010csoh5.html>

⁹ *RoadSense and William Walton v Scottish Ministers* [2011] CSOH 10

<http://www.scotcourts.gov.uk/opinions/2011CSOH10.html>

¹⁰ Scottish Government Consultation on Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC. Our response is available at <http://foe-scotland.org.uk/PEOconsultationresponse>

¹¹ <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made>

¹² For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010

¹³ The Aarhus Convention: an Implementation Guide, 2000 www.unece.org/env/pp/acig.pdf

Walton's more than double to £12,060. It should be remembered that court costs are not the only outlay in bringing a court action; there are also costs in travel, copying, expert reports and witnesses, and solicitors and Counsels fees. The proposed increase in court fees will simply serve to exacerbate barriers to what is already a highly inaccessible system.

Q2 In what circumstances should some or all of the cost of the courts in civil litigation be borne by the taxpayer, rather than the parties?

14. FoES and ELCS do not agree with the principle of full cost recovery. The Civil Courts exist to provide a vital public service to uphold the rule of law, and should be funded with that function as a core principal. Pursuit of full cost recovery will impact adversely on access to justice and the perception that the law and the courts exist to serve society. While we recognize that this consultation is part of an ongoing implementation of gradually increased court fees to finally arrive at full cost recovery, we note that this policy has attracted strong opposition from a diverse group of organizations including the Faculty of Advocates, the Law Society of Scotland, Consumer Focus Scotland and the Scottish Trade Union Congress.

15. Before progressing any policy of full cost recovery, the Scottish Government should undertake 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, given the rights granted by the Aarhus Convention.

Q3 Do you have any other comments?

16. We consider that instead of increasing court fees, changes could be made to procedure across all types of judicial review to make it a speedier and more cost-effective procedure. In particular, the First Hearing could be used as a case management direction, with the Respondent authority asked to lodge detailed answers in advance. Preliminary issues such as title and interest (now referred to as sufficient interest¹⁴) and whether a PEO (or One Way Cost Shifting) is to be granted, should be raised and ruled on if possible at the initial hearing. The same judge should be assigned to the case throughout, with case management directions.

17. Much of the delay – and associated costs – in judicial review cases relate to the time taken to issue decisions, or time between different court days to hear the case. Insufficient attention has been paid to these matters, and the potential for changing to judicial review procedure to deal with the cost of taking this type of action.

¹⁴ See *Axa v Lord Advocate and others* [2011] UKSC 46, and in particular the judgements of Lord Hope and Lord Reed as to the proper test for standing in judicial review cases

Review of Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian - Consultation Paper



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Friends of the Earth Scotland and the Environmental Law Centre Scotland (joint response)

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Church

Forename

Mary

2. Postal Address

Friends of the Earth Scotland

5 Rose Street

Edinburgh

Postcode EH7 4AA

Phone 0131 243 2716

Email mchurch@foe-scotland.org.uk

3. Permissions - I am responding as...

Individual

/ Please tick as appropriate

Group/Organisation

<p>(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?</p> <p>Please tick as appropriate <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).</p> <p>Are you content for your response to be made available?</p> <p>Please tick as appropriate <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis</p> <p>Please tick ONE of the following boxes</p> <p>Yes, make my response, name and address all available <input type="checkbox"/></p> <p style="text-align: center;"><i>or</i></p> <p>Yes, make my response available, but not my name and address <input type="checkbox"/></p> <p style="text-align: center;"><i>or</i></p> <p>Yes, make my response and name available, but not my address <input type="checkbox"/></p>	
<p>(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?</p> <p>Please tick as appropriate <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	