

10th February 2011

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to the Scottish Committee of the Administrative Justice & Tribunals Council discussion paper on:

Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate

We very much welcome the opportunity to respond to the discussion paper, and we are grateful for the extended deadline for response. FoES and ELCS are working together to improve Scottish compliance with the Aarhus Convention and it is with this in mind that our response is framed.

The area of administrative law is a complex one. Many commentators use the term 'administrative decisions' in different ways, but we agree that at heart of the types of decisions that have been outlined discussion paper is a very real and important set of decisions that affect people's lives. We welcome the raising of the range of issues arising from the discussion paper, and agree with the underlying sentiment that administrative law has been given insufficient attention within thinking on law reform.

In summary:

We consider that judicial review provides a crucial function in scrutinising administrative decisions, and that legal aid is generally available for such challenges, with the exception of environmental cases. However, judicial review is expensive, and reforms to procedure could help reduce costs for litigants and the public purse.

Further consideration of the Scottish Public Service Ombudsman's powers in examining the substance of decisions and providing redress is needed.

Current internal review procedures for decisions of the Scottish Legal Aid Board are long and convoluted. However, we do not think there is sufficient evidence for establishing an independent tribunal to examine SLAB decisions. Decisions should continue to be examined in the Court of Session.

We consider that there is a strong case for establishing a specialist environmental tribunal or court: with climate change now widely recognised as one of the most serious threats to humankind it is clear that the nature of decisions affecting our environment are sufficiently important to society to merit greater investment in a sophisticated system of participation and review. The requirement for Scotland to comply with the Aarhus Convention offers the chance to rationalize and simplify recourse to justice in the complex framework of legislation relating to the environment.

We consider that it is crucial that legal aid is available to assist with representation even in the most accessible of tribunals to help reduce the problem of inequality of arms where a challenge is made by an individual against a public authority.

Detailed comments:

Judicial review

Firstly, the discussion paper appears to proceed on the understanding that judicial review is not always available to challenge administrative decisions. We disagree. We consider that judicial review is always *available* as a method of challenging administrative decision-making. There are however, separate and distinct issues as to whether judicial review is the most *appropriate* method of challenge, whether it is *accessible* (particularly in terms of cost), and whether it is sufficiently well understood by the legal profession.

We do not necessarily think that judicial review is an inappropriate method to challenge public body decision-making. For some of the types of decisions listed in the discussion paper, it may well be very appropriate for judicial review to remain as the main method to challenge decision makers, and we would be concerned if that assumption was altered without clear evidence to justify such a change. We agree that remedies should be accessible, but think that any alterations to the existing system should be based on clear principles as to why some matters should be challenged by recourse to a tribunal, and others by way of judicial review. The discussion paper does not outline what those principles might be Paragraph 3.3 also appears to assume that judicial review has a rather restricted role.

However, we think the scope and role of judicial review has been transformed in the last 10 years and is likely to continue to change. A large driver behind this is the influence of the Human Rights Act 1998 and of European law. We think it necessary that the SCAJTC should look at this aspect in some detail, as in our view it is impossible to understand the range and remit of administrative law remedies without examining this modern context.

In the same vein (and our particular though not exclusive area of interest), the influence and role of judicial review is also undergoing further change in the environmental law sphere. This is both under the direction of EU environmental law and in an international context by the UNECE Aarhus Convention. Again, we think it necessary that the SCAJTC considers what changes and influences these aspects bring.

We have not been convinced by the arguments in the discussion paper regarding the availability of legal aid for judicial review cases. The discussion paper appears to be based on the premise that a large majority of those who wish to challenge administrative decisions do not qualify for legal aid. This is based on 1996 research. The Scottish Legal Aid Board estimates that 75% of Scotland's population are eligible for legal aid, following the changes introduced under the Legal Profession and Legal Aid (Scotland) Act 2007. Whilst we consider that there are problems with provision of legal aid in both geographic and subject areas (and in particular, problems with accessing legal aid for environmental cases) we do not think the conclusion that judicial review is not an appropriate method for challenge insofar as legal aid is concerned is justified by virtue of what is cited in the discussion paper.

Legal aid issues aside, we think that an unspoken driver to the issues raised in the discussion paper is the cost of judicial review.¹ There is no doubt that judicial review is relatively expensive. Some administrative law decisions are challenged by Sheriff Court appeals (appeals regarding licensing and taxi licence decisions are one

¹ Lord Gill's 2009 Review of the Scottish Civil Courts examines the cost of judicial review

example, decisions regarding certain access rights under the Land Reform (Scotland) Act 2003 are another). However, whilst we support specific changes being made for some types of actions – particularly environmental actions – we consider that 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 interest²) 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. Much of the delay in judicial review cases relate to the time taken to issue decisions, or time between different court days to hear the case. We think that 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.

It might be helpful for the SCAJTC to take account of innovations on the use of Protective Expenses Orders which can be granted in cases of public interest.³ We accept that such orders do not assist with the payment of legal fees for the petitioner's own representation, and those outwith the eligibility of legal aid, unless very rich, are unlikely to be able to afford such fees. However, further evidence on this point would be required in order to reach such a conclusion. More innovative issues should also be considered such as qualified one-way cost shifting (see below).

Role of the Scottish Public Service Ombudsman

The discussion paper raises the issue as to what extent the Scottish Public Service Ombudsman (SPSO) could and does offer solutions for administrative law decision making. In our experience, SPSO tend to concentrate on areas where the process of decision-making has been flawed, rather than looking at the substance of that decision. We consider that SPSO could interpret section 5 of the Scottish Public Services Ombudsman Act 2002 in a wider way than it currently does.⁴ Arguably the

² 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

³ See *McGinty v Scottish Ministers* [2010] CSOH 5

⁴ Section 5 (defining the powers of SPSO) states:

"Matters which may be investigated

(1) The matters which the Ombudsman is entitled to investigate are—

- (a) in relation to a listed authority other than one to whom paragraph (b), (d) or (e) applies, any action taken by or behalf of the authority (other than action consisting of a service failure) in the exercise of administrative functions of the authority,
- (b) in relation to a health service body or an independent provider, any action taken by or on behalf of the body or provider (other than action consisting of a service failure),
- (c) in relation to a listed authority other than one to whom paragraph (d) or (e) applies, any service failure,
- (d) in relation to a family health service provider, any action taken by or on behalf of the provider in connection with any family health services provided by that provider,
- (e) in relation to a registered social landlord, any action taken by or on behalf of the landlord.

(2) In subsection (1), "service failure", in relation to a listed authority, means—

- (a) any failure in a service provided by the authority,
- (b) any failure of the authority to provide a service which it was a function of the authority to provide.

'administrative functions' of the authority might provide SPSO wider scope for investigation than it is understood SPSO currently pursue. It might be helpful for further consideration of the SPSO's powers in relation to this. However, the discussion paper seems to consider that SPSO currently has a limited role in providing administrative redress, and we agree with that assessment.

Review of Scottish Legal Aid Board decisions

In relation to legal aid, we consider that the courts are best placed to continue to monitor the decisions taken by the Scottish Legal Aid Board (SLAB). We think that judges are generally best placed to understand e.g what type of cases need what type of resources. We would however propose changes to the system to obtain legal aid to challenge (by judicial review) SLAB itself. This is an unsatisfactory aspect of the system, whereby it involves SLAB essentially looking at the matter 4 times, before being referred to the Sheriff Principal of Lothian and the Borders.

We understand that the sequence of events is generally as follows. SLAB make the first decision (the decision which could be challenged). The decision is made either by an officer of the Board or by one of the Board's Committees in some cases. We understand a different decision maker will reconsider the matter on request. We understand that in some civil legal aid cases both the first decision and the reconsideration (the second decision) are looked at by Committees of the Board. This can sometimes cause delays, given the lead in times to Committee meetings. If refused again, it is open to the applicant to apply for legal aid to challenge the decision, and that application for is generally looked at twice by SLAB, and as we understand, generally by Committees of the Board. Only then can the application for legal aid to review SLAB's decision be referred to the Sheriff Principal of Lothian and Borders. This procedure is long and convoluted. We would draw attention to the comments made in the Scottish Legal Aid Board 2011 CSOH 134 regarding the failure of SLAB to properly engage with the arguments raised by the solicitor, and the delay caused in a very anxious case.⁵ We offer this case as some evidence of the difficulties in obtaining legal aid to go against SLAB itself.

However we think that there is insufficient evidence to justify a tribunal to oversee the Scottish Legal Aid Board. Decisions taken by SLAB will undoubtedly be underpinned by Article 6 of the European Convention on Human Rights (and often Articles 8, 10 and 11). We think that the Court of Session is best placed to consider the balancing

(3) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a complaint only if a member of the public claims to have sustained injustice or hardship in consequence of—

(a) where the matter is such action as is mentioned in paragraph (a), (b) or (e) of that subsection, maladministration in connection with the action in question,

(b) where the matter is such failure or other action as is mentioned in paragraph (c) or (d), the failure or other action in question.

(4) A person making such a claim is referred to in this Act as the "person aggrieved".

(5) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a request only if the Ombudsman is satisfied that—

(a) it has been alleged publicly (whether or not by a person aggrieved) that one or more members of the public have sustained injustice or hardship as mentioned in subsection (3), and

(b) the listed authority in question has taken all reasonable steps to deal with the matter to which the allegation relates.

⁵ See paragraphs 5 and 10 of the judgement

act in the administration of such public funds, and is best placed understand what is appropriate by ways of grants of legal aid in courts and tribunals as a whole.

Environmental tribunals

We agree that judicial review is not best placed to deal with all challenges in one specific area of the law. We consider that environmental cases (defined broadly as including planning and many other topic areas) should be considered in a specialist tribunal.

While it is helpful that the discussion paper identifies a gap in provision within administrative law challenges in relation to planning, it does not appear to fully appreciate the range and role of decisions that arise in this area. The discussion paper concentrates only on the role of Local Review Boards in reviewing certain local developments. However we consider that there is also a serious gap in provision in relation to major and national planning decisions and all other environmental decisions e.g. regarding licenses granted by SEPA under the Environment Act 1995.

The Committee will be aware of the UK's obligations both in terms of EU law and international law of the role of the Aarhus Convention. The UN Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters is an international treaty that recognizes every person's right to a healthy environment – as well as his or her duty to protect it. The Convention requires signatories to meet a certain standard in national legislation under each of the three 'Pillars' identified in its full title. The EU and the UK are signatories to the Convention, and as justice is devolved, the Scottish Government is bound to comply with it.

EU Directives⁶ 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 information⁷ and environmental assessment⁸ legislation.

The third pillar of Aarhus requires the right of broad and affordable access to justice if rights under the former pillars are denied or if national environmental law has been broken. It is our position that the Scottish Government has not yet adequately complied with these obligations,⁹ and that this has a knock on negative effect on the performance of duties under the first two pillars of Aarhus, in particular in relation to public participation in decision-making. This is supported by the ongoing infraction proceedings against the UK particularly in relation to costs. Following the UK's failure

⁶ 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.

⁷ Environmental Information (Scotland) Regulations 2004

<http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm>

⁸ 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>

⁹ On ratification of Aarhus, the European Council made it very clear that the two Directives did not fully implement the Convention – in particular Access to Justice provisions – and that member states were responsible for complying with these remaining obligations, see 2005/370/EC: Council Decision of 17 February 2005. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML>. Further, decisions of the ECJ 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, see Case C240/09, for a preliminary ruling under Article 234 EC, in Official Journal of the European Union C130/4.

to respond adequately to a reasoned opinion issued in March 2010, the EC referred the UK to the European Court of Justice in April 2011 for non-compliance with the access to justice provisions of Aarhus.

In September 2010 the Aarhus Compliance Committee found that even taken together, the UK provisions on costs (legal aid, Conditional Fee Agreements, and Protective Costs Orders) 'do not ensure that the costs remain at a level which meets the requirements under the Convention', in particular noting that the 'considerable discretion of the courts...without clear, binding direction from the legislature or judiciary' leads to off-putting uncertainty for potential litigants.¹⁰ The Committee also expressed concern as to the 'availability of appropriate judicial or administrative procedures, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review'.¹¹

Although the infraction proceedings were commenced based on cases from England and Wales, our research shows that the Scottish compliance is demonstrably worse than in England and Wales.¹² Compliance with the access to justice provisions of Aarhus falls into three key categories: the cost and affordability of taking a case to court; who qualifies to have a case heard by the courts, or 'standing'; and whether the Courts are able to review the substance or merits of a case.

On costs, Aarhus demands that access to justice is not 'prohibitively expensive',¹³ but the reality is that it can be extremely expensive to undertake legal proceedings (environmental or not), with the costs of taking a judicial review together with liability for expenses running into tens of thousands of pounds if legal aid is not available.

The Scottish Government's position is that the availability of legal aid and Protective Expense Orders ensure Aarhus compliance in terms of costs. However, it is extremely rare for legal aid to be awarded in environmental cases due to Regulation 15 of the Civil Legal Aid Regulations (2002) which requires that if other people would be affected by the case, and therefore reasonably expected to help fund it, legal aid should not be awarded.¹⁴ This has particularly adverse effect in environmental cases, as by their very nature, they tend to impact on more than one person. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. Removal of Regulation 15 is essential for Aarhus compliance.

Only two protective expense orders have ever been issued by the Scottish courts, and in each, the cap was set high (in McGinty at £30,000 in Walton at £40,000). Lord Gill in his 2009 review of the Scottish Civil Courts recommended codification of the rules of court on PEOs to help meet Aarhus requirements. The Government recently issued a consultation on their proposals for PEO rules, however they fall

¹⁰In response to a Communication from Client Earth and others, concerning the failure to provide Aarhus compliant access to justice to challenge a Government license for contaminated materials disposal issued to the Port of Tyne, see Compliance Committee rulings on communication, ACCC/C/2008/33, 132-134, at <http://www.unece.org/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf>. For a consideration of how the matters relied upon in an English context apply in Scotland, see McCartney 'The Aarhus Convention: Can Scotland Deliver Environmental Justice?' Edinburgh Law Review Volume 15 pages 128-133

¹¹ACCC/C/2008/33, 125

¹² See our 'Tipping the Scales' report: <http://www.foe-scotland.org.uk/tippingthescales>, also See also McCartney "The Aarhus Convention: Can Scotland deliver Environmental Justice?" (2011) Edinburgh Law Review 128

¹³ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9

¹⁴ For a fuller examination of the problem with legal aid see Frances McCartney, 'Public interest and legal aid' in Scots Law Times: Issue 32: 15.10.2010

considerably short of compliance both in scope and design: the rules would not apply to all Aarhus cases; the presumed level of cap is set too high; and the inclusion of an automatic cross cap could leave individuals who take and win a public interest case considerably out of pocket for their trouble.¹⁵

We believe that the best way to ensure Aarhus compliance in this area is to introduce 'Qualified One-Way Cost Shifting', where unsuccessful litigants should not be ordered to pay the costs of any other party unless they had acted unreasonably taking the case. This is the cost regime recommended by senior English judges, who point to inherent shortcomings with cost capping orders.¹⁶

Aarhus also requires that both the "substantive and procedural legality of any decision, act or omission" relating to environmental matters can be reviewed by the courts.¹⁷ However, the Courts are traditionally reluctant to comment on the substance of cases, and the Scottish Government has done nothing to tackle the issue of substantive review. In fact, the Government has stated that in principle it objection to substantive review as a function of the courts.¹⁸

Arguably a lack of specialism in environmental public law makes it difficult to implement substantive review in the current system, therefore the best way of achieving compliance in this respect is to introduce specialist environmental courts or tribunals, perhaps modelled on the existing Scottish Land Court. The Government's manifesto commitment to look into environmental courts / tribunals is the perfect opportunity to open this debate.¹⁹ Effectively this specialist court/tribunal would offer a third party right of appeal.

In summary, the Aarhus Convention establishes the need for a merits based approach to reviews, which we think is best placed to be done via an environmental tribunal. We would however wish to see an environmental tribunal operating similarly to the Scottish Land Court, which is staffed by a judge with the equivalent status to a Court of Session judge, and any appeal directed to the Inner House.

Equality of arms

The underlying realism that we think the SCAJTC should take account of is that whether in a court system or a tribunal system, the public authority defending the decision will inevitably be legally represented. Whilst administrative tribunals can assist an individual presenting their own case, the reality is that usually an inequality of arms arises where an individual is against an authority that is legally represented. We would be extremely concerned if there was the perception of fairness (a tribunal which on the face of it looked accessible) but in reality they were deep differences in the availability of representation.

¹⁵ The consultation proposes rules only for cases falling under the Public Participation Directive, not the Aarhus Convention as a whole, while the Ministry of Justice is consulting on equivalent rules for all Aarhus cases in England and Wales; the proposed £5,000 cap is arguably too high for non wealthy individuals and communities; the proposed cross cap is set at £30,000 meaning a case where the petitioners costs were £80,000 (as in Marco McGinty's recent judicial review) would see a litigant forking out up to £50,000 to successfully hold the Government to account for poor decision making.

¹⁶ In spite of the fact that the English Protective Cost Order regime is considerably more advanced than Scottish PEOs. Lord Sullivan in Ensuring access to environmental justice in England and Wales, Update Report (2010) and Lord Jackson in Review of Civil Litigation Costs: Final Report (2010)

¹⁷ Article 9(2) <http://www.unece.org/env/pp/documents/cep43e.pdf>

¹⁸ In Ministerial correspondence dated December 2011 (hard copies available)

¹⁹ SNP Manifesto 2011, page 39 at http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf

We are aware that legal aid is not available for many tribunals, and think that this should be at the heart of discussions going forward. We would not be in favour of any alteration in the system that meant that legal aid (which is currently available for a judicial review) is no longer available because a specialist tribunal has been set up which is thought to be accessible enough for an individual to present their own case.

The evidence is that those who are represented (by skilled advice workers or lawyers) tend to have better outcomes from tribunal decisions.²⁰ Accordingly the reality is, that particularly if the type of decisions that are being suggested were dealt with by judicial review (where the public authority will not just have used solicitors for legal advice but also have used advocates), those public authorities are likely to continue to rely upon the highest level of representation at such a tribunal. In those circumstances, legal aid must continue to be available.

Other comments

A theme from the discussion paper is that individuals are left without the ability to challenge a decision that has profound effects on their lives. We agree that there are wide spread problems to accessing justice in many areas, and that decisive action should be taken to remedy these problems.

We would however raise the issue of public legal education in respect that those affected require to identify that a legal problem arises, and secondly education within the legal profession itself, as at least partial solutions. We note that in England & Wales the Public Law Project receives public funding, part of which is to assist solicitors by way of a telephone helpline with public law cases, and also to raise awareness of the area of public law within the profession at large. We consider that those issues should also be considered in Scotland.

Further, we consider there is strong evidence that administrative law has been much under-resourced. By this we mean both by way of academic and other studies as to the underpinning principles of administrative law, but also research as to the way that administrative law does and is working in practice.

²⁰ H Genn and Y Genn, *The Effectiveness of Representation in Tribunals*, 1989, Lord Chancellor's Department

CONSULTATION QUESTIONS
(Please delete 'yes' or 'no' as required)

1. Do you agree that that, unless there are compelling reasons to the contrary, citizens should have the right to appeal against administrative decisions, and that the onus should be on government to rebut that right where it considers that it is not in the public interest to assert it.	yes	
---	------------	--

2. Which of the following policy areas do you have experience of? <i>Please delete 'yes' or 'no'.</i>		
Community care		no
Higher education		no
Housing		no
Legal aid	yes – go to question 6	
Planning	yes – go to question 7	

7. PLANNING (for details see <i>Discussion Paper</i> , Chapter 4).		
7.1. Do you regard the existing position, in which appeals against local planning decisions are decided by Local Review Boards, as satisfactory?		no
7.2. (Please only respond if you answered 'no' to 7.1). Do you think something should be done to remedy the situation?	yes	
7.3. (Please only respond if you answered 'yes' to 7.1). Do you think that, in the interests of local democratic accountability, nothing should be done about the situation?		
7.4. Would you favour any of the following?		
• establishing a right of appeal against an adverse planning decision to a court	yes	
• establishing a right of appeal against an adverse planning decision to an independent tribunal	yes	
• establishing a right to an independent review of an adverse planning decision,		no
• expanding the jurisdiction of the SPSO to enable it to investigate the correctness of an adverse planning decision		no
• some other way of challenging adverse planning decisions. (<i>Please specify</i>).		no

Thank you very much for taking the time to give us your views. Please indicate in the box below if you would like to receive a copy of our final report, which will be based on the results of this Consultation Exercise.

I would like to receive a copy of SCAJTC's final report.	yes	
--	------------	--

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 & the Environmental Law Centre Scotland

Title: Mr Mrs Ms Miss Dr. Lord *Please tick as appropriate*

Surname

Church

Forename

Mary

2. Postal Address

Friends of the Earth Scotland
5 Rose Street
Edinburgh

Postcode EH2 2PR

Phone EH2 2PR

Email mchurch@foe-scotland.org.uk

3. Permissions

I am responding as ...

Individual



Please tick as appropriate

Group/Organisation



Do you agree to your response being made available to the public on the Scottish Committee page of the AJTC website?

Please tick as appropriate Yes No

Where confidentiality is not requested,

we will make your responses available to the public on the following basis

*Please tick **ONE** of the following boxes*

Yes, make my response, name and address all available

Yes, make my response available, but not my name and address

Yes, make my response and name available, but not my address

The name and address of your organisation **will be** made available to the public on the Scottish Committee page of the AJTC website.

Are you content for your **response** to be made available?

Please tick as appropriate **Yes**

OFFICE USE ONLY
DATE RECEIVED

2012