Friends of the Earth Scotland

Environmental Law Centre Scotland

29th June 2012

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to the Scottish Government Consultation on Proposals for a New Tribunal System for Scotland.

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

FoES and ELCS are working together for improved access to environmental justice in Scotland and it is with this in mind that our response is framed. We very much welcome the opportunity to respond to the consultation paper, and we are grateful for the extended deadline for response.

Broadly speaking, we welcome the Government's proposals for Tribunal reform to simplify the system and provide a coherent structure into which additional tribunals can be added.

We support the underlying recognition in these proposals of the importance of 'administrative' justice, and consider that reform of the Tribunal system could help to widen access to justice. There are systematic issues with obtaining access to environmental justice in Scotland, and consideration should be given to the introduction of an environmental tribunal in Scotland.

Prior to answering the detailed questions (as far as we can comment on them) we

think it would be helpful to comment briefly on the background to Scotland and the UK's environmental justice obligations.

Compliance with the Aarhus Convention

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 as justice and the environment are devolved, the Scottish Government is bound to comply with the Convention. EU Directives[1] 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 information[2] and environmental assessment[3] legislation.

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]

On ratification of Aarhus, the European Council (EC) made it very clear that the Public Participation Directive and the Public Access to Environmental Information Directive did not fully implement the Convention – in particular its access to justice provisions – and that member states were responsible for complying with these remaining obligations. [5]

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.

This is supported by the ongoing infraction proceedings against the UK for non-compliance with the Public Participation Directive (which contains some access to justice provisions of Aarhus), particularly in relation to costs. The Commission did not accept the UK's response to its reasoned opinion issued in March 2010, and pursued

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[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
[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] 2005/370/EC: Council Decision of 17 February 2005: "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations." http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML

infraction proceedings to the European Court of Justice (ECJ) in April 2011. [6] 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 research[7] shows that compliance in Scotland is demonstrably worse than in England and Wales.

Aarhus also actively places a duty on citizens to "protect and improve the environment for the benefit of the present and future generations". [8] 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.

Environmental decision-making happens in a complex framework of legislation – not all specifically environment-related – and is initiated and regulated by numerous public authorities and bodies. The requirement for Scotland to comply with Aarhus in relation to costs and standing offers the chance to rationalize and simplify this framework, and an environmental tribunal could provide for this.

The present system in Scotland

One of the most pressing issues in Scotland is the cost of raising challenges to environmental decisions. Generally this will be by way of judicial review. Even with the introduction of Protective Expenses Orders, [9] to be represented by Counsel and pay the various outlays and court fees involved will cost thousands of pounds. Figures obtained from the Scottish Government regarding the costs to the public purse of defending such judicial reviews or statutory appeals show the costs running to tens of thousands of pounds.

While the influence of the Aarhus Convention is likely to increase the number of environmental challenges being brought to the courts, numbers likely to remain relatively low. Even at such levels, we consider there is scope for an environmental tribunal to operate within a existing tribunal system offering a lower cost method of compliance with Aarhus obligations.

There is one other preliminary point we wish to make. We note the consultation paper's comments at paragraph 4.48 and in particular the desire to have user friendly rules and procedures. Whilst we do not disagree with that as a principle, we would be concerned if that was then mistaken for justification as to whether a system of legal aid was required for individual tribunal applications. In our experience we have noted a number of cases where the government body or department, or the private developer, has had access to a far great range of resources than the individual litigant. It is essential that user friendly procedures are not seen as an alternative to

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

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

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

9 See decision of Lady Dorrian in McGinty v Scottish Ministers [2010] CSOH 5

legal aid and in particular in areas where the reality is that the government body/developer will be represented at the highest level. We would also comment that this is particularly important for some of the categories of person listed in question 6, who may struggle to effective participate no matter how user friendly the procedure may be.

Question 1: Should the distinctive tribunals system be capable of reconsidering decisions and hearing appeals and, if so, what grounds of appeal from the First-tier Tribunal to the Upper-tier should be allowed?

We consider that First-tier tribunals should have the power to correct its decisions where there is an administrative or arithmetical error in the decision, but any other powers should only be exercised by the appellant court on appeal.

Although we appreciate that this consultation does not seek views on an environmental tribunal as such, it may be helpful for us to advise that we think the there are arguments that a first-tier tribunal should have a merits based function in relation to challenges to environmental decisions, and we think that there may be arguments for appeals thereafter to be the Court of Session. We note that this exists already in certain areas (eg mental health).

Question 2: Which functions of judicial leadership in the tribunals system should be exercised by the Lord President, the President of Scottish Tribunals and the Chamber Presidents, respectively?

We have no detailed comment on this question, but would observe that it is vital the President of Scottish Tribunals has a strong leadership role to ensure that tribunals preserve and develop their role and character.

Question 3: Should any restrictions be placed on the ability of an appointed member to sit and hear cases in a chamber other than the chamber of their primary assignment? If so, what restrictions?

We support the principal that there should be judicial specialistion, and whilst the most effective use of resources is important, it is vital that judges do not sit in tribunal chambers for which they do not have the requisite specialist knowledge.

We would also comment that in order to attract the sort of specialist members with the correct range of skills to judicial roles, it may be necessary for the Judicial Appointments Board for Scotland to consider outreach and proactive work . We would draw attention to the Judicial Appointments Board which currently recruits tribunal judges for UK reserved tribunals and which has various communication policies which seem to aim at encouraging applications from a diverse range of applicants. This sort of approach may have to follow a wider responsibility for judicial appointments.

Lastly although not a specific question, we would comment that as raised by paragraph 4.52 any appointments of expert advisers by Scottish Ministers should be done through the Public Appointments Commission in an open and transparent way.

Question 4: Is this the most appropriate option for judicial remuneration and if not, what other options are there to remunerate fairly the judicial members of the Scottish tribunal system?

We have no comments on this question.

Question 5: How should procedural rules for the new tribunal system be made?

We generally agree with the proposals in the consultation paper, although we would emphasis that there should be wide consultation and would also suggest tribunal user groups as a helpful way of ensuring that the rules act in a proportionate way.

Question 6: What issues/opportunities do the proposed changes raise for people with protected characteristics (e.g. age, disability, gender reassignment, race, religion or belief, sex and sexual orientation) and what action could be taken to mitigate the impact of any negative issues or to capitalise upon opportunities?

As set out above, we think that it is vital that legal aid is available for most if not all tribunals. As indicated, some sectors of society will be unable to represent themselves (eg through disability) even with user friendly rules. In our experience, it is those in poorer and usually less well resourced communities who suffer the worse environmental effects. It is also those communities whom we suspect would be less likely to access remedies. This is particularly so if such communities do not have access to legal assistance, but on the other hand, the government department/developer did not require to rely on user friendly rules, being legally represented as a matter of course.