Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to the Scottish Courts Service consultation on proposals for a court structure for the future

21 December 2012

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. Aarhus actively places a duty on citizens to "protect and improve the environment for the benefit of the present and future generations", including taking legal action on behalf of the environment because it cannot do so itself.[1] The importance of this approach has been emphasised in recent rulings by the Supreme Court and the European Court of Justice.[2] This helps to illustrate 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 ensure that all reforms to the civil justice system, including proposed changes to court structures, meet Aarhus requirements.

Aarhus Compliance

3. 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. The third pillar of Aarhus requires that members of the public have access to justice if rights under the former pillars – information and participation – 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". [3]

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[1] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble http://www.unece.org/env/pp/documents/cep43e.pdf
[2] *Walton v The Scottish Ministers* [2012] UKSC 44 (Lord Hope's comments are at paras 151-154) http://www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf and Opinion of Advocate General Kokott, 18 Oct 2012 Case C-260/11 *(R) Edwards v Environment Agency* http://curia.europa.eu/juris/document/document.jsf?text=&docid=128663&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5062597
[3] Aarhus Convention, Article 9(3)

4. It is our position that the Scottish Government has not yet adequately complied with its access to justice obligations – particularly in relation to the cost of legal action[4] – 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.

5. 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 research[6] shows that compliance in Scotland is demonstrably worse than in England and Wales.

Question 6: Do you agree with the proposal that the sheriff and jury centres should become centres of specialism in the civil, administrative and miscellaneous jurisdiction exclusive to sheriffs?
Question 9: What impact would shrieval specialisation based in the sheriff and jury centres have on you? Please give reasons for your answer.

6. We are supportive of moves towards geater specialisation in the courts. Lack of specialisation is a key factor in the length and associated cost of hearings in complex environmental cases. However, we consider that the best way to address specialisation and other aspects of Aarhus compliance is through the establishment of an environmental tribunal. 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.

7. Currently, appeals in planning and environmental matters are heard over a number of courts and tribunals in Scotland. The Sheriff Court has jurisdiction as diverse as Coal Mining Subsidence Act 1991, access to land under the Land Reform (Scotland) Act 2003, the Animal Health Act 1981 and the Animal Health and Welfare (Scotland) Act 2006, appeals on abatement notices in respect of statutory nuisance claims, appeals in respect of contaminated land, and private water supplies. The Scottish Land Court has jurisdiction in environmental matters on nature conservation, notices concerning nitrate vulnerable zones and agricultural subsidies. The Department of Planning and Environmental Appeals has jurisidiction in a wide range of planning appeals, including reviews of minerals permissions, hazardous substances consents and some environmental appeals (to the Scottish Ministers but dealt with by the DPEA) in a range of issues, including pollution prevention and control and water supplies.

8. While the influence of the Aarhus Convention is likely to increase the number of environmental challenges being brought to the courts, numbers are still likely to remain relatively low. Even at such levels, however, we consider there is scope for an environmental tribunal to operate within a existing tribunal system or within the Sheriff Court, offering a lower cost method of compliance with Aarhus obligations. We note that the Scottish Government has committed to publishing an options paper on the introduction of an environmental tribunal.

Question 23: If there are any aspects of this consultation paper about which you wish to comment and an opportunity to do so has not arisen in any of the earlier questions, please let us have your comments here.
Question 24: If there are any aspects of the provision of court services in Scotland about which you wish to comment, express a view or offer an idea, and an opportunity to do so has not risen in any of the earlier question, please let us have your comments, views and ideas here.

9. In the context of Aarhus obligations and EC infraction proceedings, the Scottish Government should undertake a comprehensive revew of the impact of proposed changes to the court system on access to

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[4] Raising challenges to environmental decisions will generally be by way of judicial review, and there is no doubt that such proceedings are prohibitively expensive for the ordinary person. 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.

[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

justice as a whole, with special attention paid to the unique requirements for access to justice in environmental matters, under the rights granted by the Aarhus Convention.

10. We are concerned that the Government's approach to improving access to justice in environmental matters effectively gives with one hand while taking with another. Raising challenges to environmental decisions will generally be by way of judicial review, and there is no doubt that such proceedings are prohibitively expensive for the ordinary person. Codification of rules of court for protective expenses orders will improve the current cost regime in terms of judicial and statutory review challenges, however increases to fees at the Court of Session will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court.[7] As emphasised by the Gill Review, the Civil Courts exist to provide a vital public service, and we consider that they should be funded and designed as such.

11. However, we recognise the financial constraints the Courts face, and consider that changes could be made to procedure across all types of judicial and statutory 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 interest[8]) and whether a PEO 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. 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.

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[7] Fees for the Court of Session are already very expensive particularly in relation to the time spent in court in judicial review 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 new regime, McGinty's costs for time spent in court alone would double to £3,240 in 2014; and Walton's more than double to £12,060.

[8] 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