Friends of the Earth Scotland

Environmental Law Centre Scotland

19th March 2012

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to Sheriff Principal Taylor's consultation paper for the Review of Expenses and Funding of Civil Litigation in Scotland

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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.

Since 2010 FoES's Access to Environmental Justice campaign has sought to expose the barriers that individuals, communities and NGOs face in attempting to undertake legal action in environmental matters. We consider that the Scottish Government is in fundamental breach of its obligations under the third Pillar of the UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention).

The relevant area of non-compliance with Aarhus, for the purposes of this Review, is that of prohibitive expense of access to justice in environmental matters.

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

[1] For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive

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]

Scottish non-compliance on costs

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 infraction proceedings to the European Court of Justice (ECJ) in April 2011.[6] While the referral relates to complaints regarding English cases, our research[7] shows that the Scottish compliance is demonstrably worse than in England and Wales.

The Scottish Government's position is that the availability of legal aid and Protective Expense Orders (PEOs) ensure Aarhus compliance in terms of costs. In September 2010 the Aarhus Compliance Committee found that even taken together, the provisions England and Wales on costs (legal aid, Conditional Fee Agreements, ATE insurance 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.[8]

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

[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] In response to a Communication from Client Earth and others, concerning the failure to provide Aarhus

Scope of this Review

The Scottish Government consultation paper states that the Taylor Review 'will look among other things at the cost and funding of public interest litigation, including environmental actions'. The paper implies then, that the Taylor Review will see to the broader requirements of Aarhus compliance on costs.

However, we very helpfully met with the Secretary to the Taylor Review on 9th February, and we note that the Taylor Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the Aarhus Convention.

We will, of course, respond to the Scottish Government's consultation on Protective Expense Orders, highlighting these concerns.

Why Aarhus cases are different

Most environmental or Aarhus cases are matters of public interest. Paying for justice in civil matters acts as an incentive to settle private disputes outside of court, and therefore with minimal or no expense to the public purse. Public law is very different, as the petitioner rarely has any personal financial interest in the matter.

In the recent Supreme Court ruling in *AXA,* two of Scotland's senior judges made it clear that the development of public law in Scotland had been severely hindered by decades of judge made law, and pointed out that certain private law principles had 'no place' in judicial review.

It is logical that if an individual or community exercises their democratic right to challenge poor decision-making by public authorities, or breaches of environmental law, the public purse should bear the cost of both sides of the litigation – where there is a case to be answered. In cases against public authorities or developers, Aarhus requires the state to provide a more level playing field for individuals against experienced repeat litigants, often with commercial interests, and money to pay for legal representation.

There is of course a responsibility on the part of citizens not to pursue 'frivolous' cases at the expense of the public purse, but this can be checked at the outset by the courts at a 'permission' stage (First Orders could be reformed to cater for this) where unmeritorious cases are filtered out.

But Aarhus also actively places a duty on citizens to "protect and improve the environment for the benefit of the present and future generations".[9] 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.

Equally however, it is the duty of public authorities to be open and consultative and to seek to make the best informed decisions, which in turn reduces the risk of challenge and

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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

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

therefore the cost to the public purse of both the challenge and defence of cases. We would add that when considering the impact of the cost of litigation on the public purse, it is appropriate also to highlight that public authorities should use taxpayers money judiciously in appointing counsel and outside solicitors.

It is important to note that Aarhus covers all environmental cases, therefore the Scottish Government must also make provision to tackle prohibitive expense in private environmental cases under the terms of the Convention. We are aware that this does not specifically fall under the scope of this Review, but wish to highlight it as there is no indication from Government of any move to tackle this area.

Responses to Review questions

1. What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?

Under the current system there are two key cost related issues that we consider deter potential litigants from court action:

- The enormous overall expense of litigation, and uncertainty over potential total liability for such costs, particularly of judicial review under which most environmental cases would be taken;
- Significant barriers in accessing legal aid for environmental cases; and

Cost of litigation

Aarhus demands that access to justice is not 'prohibitively expensive',[10] but the reality in Scotland is very different. 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. The risk of incurring such enormous costs can deter even those extremely sure of their ground, and this is particularly off-putting to those taking a public interest case. Why risk financial ruin if your own interests are not directly at stake?

There is no doubt that judicial review – under which most Aarhus cases would be taken – 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. In *Forbes v Aberdeenshire Council & Trump* the petitioner was faced with the prospect of paying thousands of pounds of the other side's costs.

Only two protective expense orders have been granted by the courts to date in Scotland, and in each, the cap set high: *McGinty*[11] at £30,000, and *RoadSense*[12] at £40,000. However, the Government has recently issued a consultation proposing new rules of court for issuing PEOs in a limited number of cases (see below). Codification of the rules of court in this area were recommended by Lord Gill, and the obligations of the Aarhus Convention was noted in the Civil Courts Review.

[10] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9
[11] Marco McGinty v Scottish Ministers [2010] CSOH 5 http://www.scotcourts.gov.uk/opinions/2010csoh5.html
[12] RoadSense and William Walton v Scottish Ministers [2011] CSOH 10 http://www.scotcourts.gov.uk/opinions/2011CSOH10.html

However, the proposals outlined in the Scottish Government consultation on Rules of Court for Protective Expenses Orders are limited to cases falling under the Public Participation Directive (PPD), therefore excluding a range of possible Aarhus cases that would fall under other European and domestic environmental legislation. We should add that we do not think the current Scottish Government proposals, even in their best possible form, will provide PPD compliance, as 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. We have outlined further problems with the current proposals in our answers to Questions 25 and 26.

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 interest[13]) 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. 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.

Barriers to legal aid

Unlike in England and Wales, 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, 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.

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.[14] 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.

Community groups cannot apply for legal aid in Scotland. By contrast, England and Wales have a system that allows the joint funding of a case, where the Legal Services Commission grants legal aid to an individual subject to a wider community contribution, based on what the community group can pay. Although Scotland has provision whereby if a third party contributes to the cost of a case it can be paid over to the legal aid fund, these provisions were not designed for environmental cases, and would require reform to allow a system such as that which operates in England.

We consider that removal of Regulation 15 is essential for Aarhus compliance.

25. Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?

[13] 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

[14] For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' as above

26. Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?

Under Article 9(3) of the Aarhus Convention, the Scottish Government is obliged to introduce measures to ensure that access to justice in environmental matters is available, and not 'prohibitively expensive'. PEOs are one way of tackling the issue of prohibitive expense, in providing some certainty and clarity in relation to costs from an early stage.

Although we accept that PEOs are an important part of the overall system of compliance with the requirements of Aarhus, we are concerned that there is a presumption within the consultation paper that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative basis. Judicial reviews being brought by community groups, NGOs or individuals are relatively rare in Scotland. There may be a number of reasons for that such as costs, knowledge and availability of legal advice. By and large Scottish environmental NGOs do not have in-house solicitors – and this hinders the expertise and development of environmental law in Scotland.

We consider that the Government's current draft proposals for Rules of Court for PEOs – which set out only to provide compliance with the Public Participation Directive, not Aarhus as a whole – are insufficient to comply even with the PPD, and will ultimately leave the Government open to further legal action from the European Commission.

We consider that at £5,000 the presumed cap is too high, and will remain prohibitively expensive for the 'ordinary person'. There is no rational for the presumed level of cap being set at £5,000 other than that it is proposed in England and Wales for similar rules.[15] In a Scottish context, even the sum of £2,000 - £3,000 would be difficult if not impossible for many community groups to find, let alone individuals. Based on the experience of the Environmental Law Centre, we would expect that community groups in Scotland who wish to raise a judicial review action would have access to fewer funds, and probably a smaller potential membership than many in England and Wales. In other words, even if the cap of £5,000 is appropriate for England & Wales (which we doubt it is) it is not appropriate in Scotland.

We also consider that the inclusion of an explicit cross-cap is problematic, and ultimately not compliant with Aarhus as it could leave individuals who take and win a public interest case considerably out of pocket for their trouble, thus retaining a financial disincentive to pursue public interest cases. Further, if challenges to either cap are allowed this retains a level of uncertainty over liability for costs that would continue to see a 'chilling effect' – where uncertainty about potential liability puts people off commencing cases. A cap that was left to judicial discretion (or a presumptive cap open to challenge) would also potentially be in breach of Aarhus requirements of certainty.

Further, the Government's proposals do nothing to tackle difficulties in obtaining legal aid for environmental cases, presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which, as discussed above, has a particularly adverse effect in environmental cases.

Therefore if as a result of this Review, the Rules of Court for PEOs were extended to all public interest cases, thus encompassing most other Aarhus claims, they would be insufficient to comply with Aarhus, and as such not adequate to avoid further legal action from the European Commission.

[15] Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, para 36. We note that in their response to the Ministry of Justice's proposals for Protective Cost Order rules, the Coalition for Access to Justice for the Environment (CAJE) consider £5,000 is too high to comply with Aarhus.

We consider that the best way to ensure Aarhus compliance in this area is to introduce '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.

The Jackson Review (2010), which the Taylor Review consultation touches on, looked at the costs of civil litigation in England and Wales. Jackson found that while PCOs can provide early certainty and control the level of a claimant's cost liability, the system currently does not provide for Aarhus as compliance PCOs are granted restrictively, and at the judges' discretion; therefore he recommended England and Wales should 'expand the [PCO] test and…introduce qualified one way cost shifting (QuOCS) for all judicial review claims, leaving the 'permission' requirement as a sufficient mechanism to weed out weak claims'.[16]

The Sullivan report (2008) focussed specifically on Access to Environmental Justice in England and Wales. Following the Jackson Review, Sullivan issued an update report in 2010 to take account of those findings. Sullivan's 2010 update report agreed with Jackson's findings, and recommended one-way cost shifting, instead of tinkering with the PCO system, finding this to be the simplest and most effective way of complying with the Aarhus demands that access to justice must not be prohibitively expensive, and to avoid the 'chilling effect' by ensuring all possible costs are up front from the start.

Sullivan's proposal went further than Jackson in amending the qualification test, so that 'an unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings'.[17]

We are not opposed to PEOs being available in other public interest cases, and can see benefits in other areas of social justice where decisions might have wide implications. However, we consider that Aarhus cases demand special treatment by virtue of the UK and the EU's ratification of the Convention. Therefore the Government must introduce a system that will satisfy the EC in respect of Aarhus: if it chooses to extend any such rights or procedures to other areas it could contribute to improvement in understanding and practice of public law in general. The 'permission requirement'[18] could be applied to all public law cases and means that claimants must seek the court's permission to take a case, effectively ensuring that unmeritorious or poorly argued cases fall at the first hurdle. This requirement deals with the concern that cost shifting (or indeed any other measure to improve access to justice) would open the floodgates to time and money-wasting cases.

Concluding remarks

Scottish Government is in breach of its obligations under the Aarhus Convention to provide fair and effective access to justice in environmental matters that is not prohibitively expensive. The UK is the subject of EC infraction proceedings for non-compliance on costs.

We consider that in order to achieve compliance on costs the Scottish Government should:

- Remove Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, so that public interest cases are no longer effectively disqualified

[16] Jackson, Review of Civil Litigation Costs: Final Report (2010), part 5, chapter 30 para 4.1

[17] Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 30

[18] Arguably, in Scotland 'First Orders' (the initial review of the Petition by the judge) acts as a permission requirement in a judicial review. However, in order for one way cost shifting to work, the rules of procedure might have to be changed to allow greater discussion of the merits of the case at the First Orders hearing, or a permission or leave stage introduced, as recommended by Gill.

- Reform legal aid legislation so that communities can access public funding
- Introduce Qualified One-way Cost Shifting so that individuals, communities and NGOs taking a public interest Aarhus case can be confident that they will not be liable for the other side's costs
- Introduce a 'permission' stage (or improve First Orders procedure) for judicial review to ensure that questions as to whether a case has merit; whether the petitioner has standing; and whether the petitioner should be liable for costs, are established at the earliest possible point (and without risk of high costs to any party in getting to that stage).

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

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Other** ☐ **Please Specify**_____

Surname

Church

Forename

Mary

2. Postal Address

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3. Permissions. I am responding as

Individual ☐ / **Group/Organisation** ☒

Please tick as appropriate

(a) Do you agree to your response being made available to the public through the Taylor Review Website?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) 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 ☐

or

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

or

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

(a) The name and address of your organisation ***will be*** made available to the public through the Taylor Review Website

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

Please tick as appropriate ☒ **Yes** ☐ **No**

The independent Taylor Review is preparing a report for the consideration of the Cabinet Secretary for Justice, which may lead to proposals from the Scottish Government for legislation. If you have agreed that your response may be made public, the Scottish Government may wish to contact you in the future, but they require your permission to do so. Are you content for the Scottish Government to contact you in relation to this consultation exercise?

Please tick as appropriate ☒ **Yes** ☐ **No**