Friends of the Earth Scotland Policy Briefing Paper

Scottish Government Debate: Taking Scotland Forward - Justice

13 June 2011

Friends of the Earth Scotland welcomes the opportunity to brief members ahead of the Scottish Government debate on Justice. As an organisation whose objectives are rooted in environmental justice, we have an interest in ensuring Scotland's system of justice enables and respects our citizen's environmental rights. For the purposes of this debate therefore we will be focussing on issues of procedural environmental justice.

Procedural environmental justice requires that in order to uphold the right to a healthy and safe environment, citizens need to be informed about and involved in decision making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices.

Environmental Justice

Environmental justice is a concept which arose out of the civil rights movement in America, as a result of increasing recognition that poor ethnic minority communities were bearing the brunt of environmental damage and pollution. While the concept has evolved from 'environmental racism', environmental damage - whether caused by climate change, pollution or over development – continues to affect the poor and disadvantaged disproportionately. This is true in present-day Scotland, as it is across the globe: a 2005 report found that people living in deprived areas in Scotland suffered disproportionately from industrial pollution, poor water and air quality.[1]

Achieving environmental justice - the Aarhus Convention

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters recognises that 'adequate protection of the environment is essential to human well-being and basic human rights'[2] and sets out how procedural environmental justice should be achieved.

Since UK ratification of the treaty in 2005, Scotland is obliged to implement Aarhus, and a growing body of domestic and international environmental legislation makes it imperative that we do so.

Aarhus demands broad and affordable access to justice, but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not) in Scotland; with the costs of taking a judicial review together with liability for expenses running into tens of thousands of pounds. In addition, rules on standing – and the interpretation of these rules by the courts – are extremely restrictive, making it very difficult for individuals, communities and NGOs to demonstrate that they have 'title and interest' to take an environmental case.

England and Wales have made considerably more progress than Scotland with altering court procedures to comply with Aarhus, but despite this England has been found to be in non-compliance with Aarhus in relation to access to justice. Furthermore, the European Commission has recently commenced infraction proceedings against the UK (a case is being brought to the European Court of Justice) for non-compliance. In light of this, Scotland must act quickly.

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[1] SNIFFER, Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation, 2005 http://www.sniffer.org.uk/Webcontrol/Secure/ClientSpecific/ResourceManagement/UploadedFiles/UE4%2803%2901.pdf

[2] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 Preamble http://www.unece.org/env/pp/documents/cep43e.pdf

The Benefits of implementing Aarhus

Going to court to defend the environment where a law has been breached is a form of participation which citizens should be encouraged to undertake, albeit as a last resort. The benefit of more open access to the courts comes from improved decision making by public authorities, who know that their decisions *can* be challenged. In other words, it is the credible threat of legal action which is important.

Fears that an improved system will open the flood gates and see the courts grind to a halt are not justified. Evidence from other jurisdictions suggests that groups and individuals do not often resort to court actions, and a permission or leave stage (as recommended by Lord Gill) can ensure that frivolous cases are weeded out at the onset. Indeed, if democratising access to justice does result in the floodgates opening, it would demonstrate a systematic problem with the interpretation or implementation of environmental laws, which government and decision makers would surely be quick to act on.

Conclusion and Recommendations

This is a key time for reform of Scotland's legal system. It is clear that Scotland is not properly in line with the Aarhus Convention, nor does the legal system properly safeguard the environment and the people within it. The Scottish Government as part of its 'Making Justice Work' programme, should therefore take steps to:

1. Ensure that access to environmental justice through existing (and future) channels is free or inexpensive, by:

- introducing qualified one-way cost shifting so that individuals and NGOs taking an environmental case or other public law case can be confident that they will not be liable for the other side's costs.
- removing the test for legal aid that effectively bars individuals from accessing aid if their case affects more than one person, and improving access to legal aid for community groups in environmental cases.

2. Ensure that the application for the new 'sufficient interest' test by the courts is in line with the legal right of 'actio popularis' – action in the collective interest.

3. Ensure that questions as to whether a case has merit; whether the petitioner has standing; or whether the petitioner should be liable for costs, are established at the earliest possible point, and without risk of high costs in getting to that stage. This could be done by improving First Orders procedure or introducing a 'permission' or 'leave' stage for judicial review.

4. Take measures to ensure that both the procedural and substantive legality – including the merits – of a decision can be reviewed. This could include:

- revision of judicial review to incorporate procedural and substantive legality in Aarhus Cases – including the merits of a case – and provide for appropriate remedy;
- setting up an Environmental Court or Tribunal to simplify environmental appeals and the regulatory system while increasing specialisation in environmental law.

These changes could be implemented through the passing of an Environmental Justice Act enshrining the Aarhus Convention in Scotland.

5. Finally, there is a clear need as identified by Lord Gill's Review of the Civil Courts to create a more streamlined, user-friendly court system with plain-English rules and provide help to users; and improve public legal education to help create a wider legal culture in which citizens recognize their legal, and environmental, rights and duties, and learn to recognize problems and injustices which may have a potential legal solution.

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