Participation Form
Scotland's National Action Plan for Human Rights

Views are sought from all individuals and organisations who have experience or expertise that can help to shape Scotland's National Action Plan for Human Rights.

The Scottish Human Rights Commission will be collecting and analysing all responses received before the 29 March 2013. Early responses are appreciated.

Unless respondents request that their views remain confidential or anonymous all responses will appear online with the name of the organisation or individual. Contact details will not appear online.

☐ Please tick this box if you do not wish your response to appear online.

☐ Please tick this box if you are happy for your response to appear online but not your name or the name of your organisation.

☐ Please tick this box if you would prefer we did not link to your website.

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You can also fill out this form online at www.scottishhumanrights.com/actionplan

Scottish Human Rights Commission

Participation Form
Scotland's National Action Plan for Human Rights

1. Based on the evidence presented in the report Getting it right? Human rights in Scotland, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) consider access to justice to be one of the most pressing human rights issues in Scotland, and as such should be addressed in the National Action Plan. 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. 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 very much welcome the opportunity to respond to proposal for a National Action Plan for Human Rights.

Aarhus and environmental rights

The human right to a dignified life is fundamental, and there is a clear link between protecting this right and protecting the environment. Environmental justice is a concept that 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]

There are two defining elements of environmental justice; that of distributive and that of procedural justice in relation to the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and as such, everyone has a right to a healthy and safe environment; i.e warm housing, clean drinking water, unpolluted air and food that is safe to eat.

Procedural environmental justice requires that in order to uphold the former – and because the environment has no voice – 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. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention) enables people to be that voice.

The Aarhus Convention recognizes every person's right to a healthy environment and aims to improve the accountability, transparency and responsiveness of decision makers and authorities. But it also actively places a duty on citizens to "protect and improve the environment for the benefit of the present and future generations".[2] Equally, it is the duty of public authorities to be open and consultative and to seek to make the best informed decisions. 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.[3]

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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, preamble

[3] 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

Compliance with the third Pillar is critical to ensure that the procedures established by the former two are properly adhered to. Going to court to defend the environment where a law has been breached is a form of participation that citizens should be encouraged to undertake, albeit as a last resort. However, in this respect, Scotland falls considerably short of meeting its international obligations.

Barriers to access to justice in environmental matters

As the chapter on Access to Justice and the Right to Effective Remedy notes, a number of important strides have been made in recent case law. Rules of court have just been enacted providing a statutory basis for obtaining a Protective Expense Order (PEO) in certain circumstances.[4] We note that such rules have been introduced in response to infraction proceedings taken by the European Commission regarding implementation of the Public Participation Directive.[5] In addition the Scottish Government has recently introduced a Court Reform Bill[6] that will introduce changes to judicial review procedure.

We are concerned that there are significant difficulties in access justice in environmental cases. While PEOs are a step forward they do not tackle the problem of prohibitive expense in cases that are outwith the scope of the Public Participation Directive. Our view of the rules is that they are inadequate to provide compliance with the access to justice provisions of the Public Participation Directive, and fail to deal with Aarhus cases falling outwith that Directive. Further, we perceive a reluctant by the Scottish Courts to consider the substantial merits of a decision, which we think is required by the Aarhus Convention.

- **Costs**

The third pillar of Aarhus requires that members of the public have access to justice if rights under the former pillars are denied (i.e. rights to participate in decision making and to access information as enshrined within the PPD and Directive 2003/4/E) and if national environmental law has been broken.[7] Under Article 9 (4) these procedures must provide effective remedy and be "fair, equitable, timely, and not prohibitively expensive".[8]

In Scotland, as throughout the UK, raising challenges to environmental decisions will generally be by way of judicial review or statutory review. There is no doubt that judicial review is very expensive, and prohibitively so for the ordinary person. In *Uprichard v Fife Council*[9], the petitioner faces a total bill of £173,000. In *McGinty v Scottish Ministers*[10], despite being awarded the first ever Protective Expense Order (PEO) in Scotland, the estimation of Mr McGinty's costs was around £80,000 if he was to lose.

In response to legal action from the European Commission, the Government's moves to tackle the excessive cost of environmental litigation are limited to codification of rules of court for PEOs in cases under the Public Participation Directive only.[11] However, the new rules in Scotland fall far short of providing for the kind of

[4] http://www.legislation.gov.uk/ssi/2013/81/made
[5] http://europa.eu/rapid/press-release_IP-11-439_en.htm and http://www.scotland.gov.uk/Topics/Justice/legal/Civil/PEOs
[6] http://www.scotland.gov.uk/Publications/2013/02/5302
[7] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 http://www.unece.org/env/pp/documents/cep43e.pdf.
[8] Aarhus Convention Article 9 (4)
[9] http://www.scotcourts.gov.uk/opinions/2011CSIH59.html
[10] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html
[11] The Government has indicated that the Taylor Review will see to the broader requirements of Aarhus compliance on costs. However, we met with the Secretary to the Taylor Review in February 2012, 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.

assurance against prohibitive expense required by the Aarhus Convention, and in the context of difficulties in accessing legal aid and increases in court fees,[12] these rules are unlikely to substantially improve access to justice.

Briefly, our key concerns with the new rules include:

Level of cap: the presumptive cap of £5,000 for petitioners is in our opinion much too high. Based on the experience of the Environmental Law Centre Scotland, the sum of £5,000 would be difficult if not impossible for many community groups to find, let alone individuals. Evidence suggests that deprived communities suffer from the brunt of poor environmental decision making, with people living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality, [13] therefore such a limit would disproportionately impact on these communities.

Eligibility: the rules apply only to individuals and 'non-governmental organisations promoting environmental protection'; and specifically preclude 'persons who are acting as a representative of an unincorporated body or in a special capacity such as trustee'.

Judicial discretion: despite the fact that the rules only apply to cases falling under the Public Participation Directive – which requires challenges not to be prohibitively expensive – Petitioners taking a case under the PPD are not automatically considered to be eligible for a PEO. Instead applications must be made by motion therefore potentially incurring not inconsiderable expense in getting to this stage. Furthermore, the rules include a provision whereby the court must be 'satisfied that the proceedings are prohibitively expensive for the applicant', implying judicial discretion as to what prohibitively expensive is. The rules do not address whether prohibitively expensive is a subjective or objective test.[14]

Appeals: the rules allow for PEOs to be awarded in appeals, but the cost limits are left to judicial discretion, taking into account decisions on costs in the lower court, meaning there is no certainty as to the cost of taking a case to appeal. There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed.

However, notwithstanding the availability of PEOs, there is nothing in the rules that assists with the costs of taking legal action. As we set out further below, there are significant issues with legal aid or finding solicitors/advocates who will act on a speculative basis.

- **Substantive review**

Aarhus also requires that "members of the public concerned…have access to a review procedure…to challenge the substantive and procedural legality of any decision, act or omission…relevant [to] provisions of this Convention" and that these procedures "shall provide adequate and effective remedies". [15]

The Scottish Courts rarely stray into the substance of cases and are openly reluctant to do so.[16] While understandably there is some tension between the ability of governments to take decisions and be

[12] See our briefing to the European Commission on the excessive costs of challenging environmental decisions in Scottish Courts http://foe-scotland.org.uk/excessivecostsDec2012
[13] 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
[14] A ruling from the European Court of Justice is expected on 11 April 2013 in *R Edwards v Environment Agency* which will clarify whether prohibitively expensive should be applied subjectively or objectively.
[15] Aarhus Convention Article 9 (1)

accountable for them, and the availability of judicial review, it could be argued that there is a contrast between the jurisprudence of public law cases north and south of the border. This may partly be due to a lack of specialism in the Scottish Courts. We note that Lord Gill's review of the Civil Courts examined this issue and recommended specialisation of judges. The current court reform programme tackles to this to a degree, and Tribunal reform offers further scope for considering it.

- **Standing**

We note the changes made in *Axa v Lord Advocate and others*,[17] when the Supreme Court replaced the archaic test of 'title and interest' to sue with the broader 'sufficient interest', mean individuals can now take public interest cases to court. The Court noted in this case that the development of public law in Scotland had been severely hindered by decades of judge made law.

While this new test should serve to improve access to justice in environmental – and other public interest – cases, it is worth noting that the Scottish courts have not been quick to apply it. In a subsequent ruling, the Supreme Court felt the need to make it clear that legal challenges to important decisions and acts by public authorities are a vital means of up upholding the rule of law, following the Inner House's comments regarding standing in *Walton v Scottish Ministers*.[18] The Supreme Court in Walton emphasised the importance of individuals and NGOs taking cases on behalf of the environment. [19]

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2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

Costs

- **One way cost shifting**

'Qualified One Way Cost Shifting' (QuOWCS), is a system where unsuccessful litigants are not ordered to pay the costs of any other party unless they have acted unreasonably in taking the case. This is the cost regime recommended by senior English judges, who point to inherent shortcomings with cost capping orders, such as PEOs.

The Jackson Review (2010) looked at the costs of civil litigation in England and Wales. Lord Jackson found that while Protective Cost Orders (English equivalent of PEOs) 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 Jackson 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'.[20]

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.

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[16] For example Lord Brailsford in McGinty v Scottish Ministers http://www.scotcourts.gov.uk/opinions/2011CSOH163.html
[17] http://www.supremecourt.gov.uk/decided-cases/index.html
[18] http://www.scotcourts.gov.uk/opinions/2012CSIH19.html
[19] www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf
[20] Jackson, Review of Civil Litigation Costs: Final Report (2010), part 5, chapter 30 para 4.1

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".[21]

We consider that the best way to ensure Aarhus (and PPD) compliance in this area is to introduce one way cost shifting for all environmental cases where there is a public law point to be answered.

- **Legal Aid**

The presumptive cap on PEOs is particularly unfair considering that legal aid is effectively denied to those seeking to pursue a public interest environmental case, and given the Government has no proposal to tackle difficulties in obtaining legal aid for environmental cases, presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002,[22] which has a particularly adverse effect in environmental cases.

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. In addition, 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.[23] 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. We are only aware of legal aid being awarded in cases restricted to subject matters that affect a small number of households, or where the Scottish Legal Aid Board has decided that Regulation 15 does not apply to the application.

Moreover, 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.

In addition, we note that the Scottish Legal Aid Board has recently introduced caps on legal aid certificates, which will mean that all the expenses of the case (including Counsel's fees, Edinburgh agents fees, solicitors fees and outlays) will be capped at £7,000. Freedom of Information requests have revealed that in some cases public authorities spend far larger sums defending judicial review cases, and consider the introduction of this cap will led to gross inequality of arms. Although there is provision for applications to be made to the Scottish Legal Aid Board for the cap to be increased, we consider that is likely that fewer solicitors will be willing to take

[21] Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 30
[22] http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made
[23] For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' as above

on judicial review cases. The solicitor runs the risk of incurring liability for counsel's fees and outlays which are not covered the level of the cap. We think that £7,000 is an unrealistic figure to run a complex judicial review, and consider most if not all environmental judicial reviews are likely to be complex. The introduction of this cap is likely to lessen the number of solicitors willing to act in this area, and places another barrier on obtaining access to the courts on a legally aided basis.

We consider that removal of Regulation 15, and the introduction of a mechanism to enable community groups to access legal aid is essential for Aarhus – and Public Participation Directive – compliance.

- **Court Fees**

The Scottish Government is in the process of implementing a policy of full cost recovery in court fees.[24] Fee proposals for 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.

Fees for the Court of Session are already very expensive – prohibitively so for the ordinary person – particularly in relation to the time spent in court in judicial review cases. For example in *McGinty* the Outer House hearing took 18 hours, which we estimate would incur costs 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 in our estimate 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. Because of the restrictions on legal aid in environmental cases, it follows that such cases are highly unlikely to secure an exemption from court fees on the basis of legal aid[25].

We consider that comprehensive research into the impact of increased court fees on access to 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 should be undertaken.

Civil Court Reform

The present Government's response to Lord Gill's 2009 Review of the Scottish Civil Courts in establishing the 'Making Justice Work' programme provides the perfect opportunity to build on progressive Freedom of Information and Strategic Environmental Assessment legislation, by finally implementing the last Pillar of Aarhus, and securing procedural environmental justice in Scotland.

- **Judicial review**

The Scottish Civil Courts Review recommended three key changes to judicial review procedure:

- to widen the law of standing;
- to introduce a time bar within which to bring judicial reviews; and
- to introduce a requirement to obtain leave before being able to bring a judicial review

[24] http://www.scotland.gov.uk/Publications/2012/12/6391
[25] The granting of a legal aid certificate (together with some other exemptions in terms of receipt of certain benefits) give an exemption from the payment of a court fee

Under current legislative proposals to implement the Review, the Scottish Government considers that *AXA* has sufficiently broadened the law on standing, but plans to bring forward changes to introduce both a time limit and a leave stage in bringing judicial reviews.

We support the introduction of a leave stage and consider that it will help filter out unmeritorious cases and ultimately reduce the burden on the courts and the cost of litigation. However we are concerned with the proposal to introduce a three-month time limit that might cause problems in complex cases and particularly where there is uncertainty in funding. We also think that there is a real issue with a finding a solicitor able to act on a pro bono, reduced fee or legally aided basis, and the introduction of a time limit will exacerbate this. **Given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, they should consider a time limit of a year for such cases.**

- **Tribunal reform**

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 and moves towards specialisation in the courts could help to widen access to justice.

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. **A specialist environmental tribunal offers the chance to rationalize and simplify this framework, and could also give the judiciary greater authority and confidence in touching on issues of substance review.**

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.