FACULTY OF ADVOCATES

Consultation Paper on an Environmental Tribunal for Scotland

Response on behalf of the Faculty of Advocates

The five questions posed in the request for a consultation response are addressed in turn below. Before doing so, the Faculty has some general comments to make on the desirability of establishing an Environmental Tribunal or Environmental Court in Scotland as follows.

The Faculty agrees that it would be desirable for Scotland to have a dedicated Environmental Tribunal or Environmental Court.

The changes to be brought about by the Courts Reform (Scotland) Act and the findings of the Aarhus compliance committee that the regulatory regime in England and Wales (and by extension in Scotland) were not compliant with the Convention present an opportunity to address environmental justice in Scotland.

The Faculty notes that Article 9 of the Aarhus Convention requires national processes to be in place to assist with challenges to decision-making which are "fair, equitable, timely and not prohibitively expensive" and which provide "adequate and effective" remedies." It also notes that in relation to cost, the Court of Justice of the European Union has found the UK Government to be in breach of the requirements of Directive 2003/35/EC aimed at incorporating the Aarhus Convention into the law of the Member States (*Commission v United Kingdom*, Case C-530/11, decision of 13 February 2014, [2014] WLR(D) 69).

At the same time, it is important that issues of legality, including issues arising from environmental law, in relation to proposed developments should be dealt with in a timely efficient and cost-effective manner, so that proposals which are not lawful are not implemented, but also so that, if a development proposal is lawful, it is not delayed unduly by the legal process.

The Courts Reform (Scotland) Act and ancillary reforms have the aim of making the procedures of civil justice more efficient, and of securing that litigation may be carried on at a cost which is not disproportionate. The Faculty considers that the establishment of an Environmental Tribunal or Environmental Court should be seen within that context. It should not be assumed that the current court process will be the court process of the future.

The Faculty notes the Lord President's announcement that he intends to carry out a feasibility study into the creation of a specialist Energy and Natural Resources Court within the Court of Session. That proposal has been welcomed by Friends of the Earth Scotland and is supported by the Faculty. Given the close link between energy and environmental issues – evident most obviously in the context of renewables – it would be natural to include environmental law within the jurisdiction of that Court. The Lord President has signalled that such a Court could sit outside Edinburgh as required.

1. **What in your view would the benefits of an environmental tribunal be, particularly, but not limited to matters of cost to litigants and the public purse, and of perceived delays relating to judicial review.**

The main benefits of a specialist Environmental Tribunal or Environmental Court – whether within the Court of Session or a new separate Environmental Court - would be efficiency through specialisation and expertise. This should enable the Court to deal with environmental cases more swiftly and, therefore, more cost effectively than such cases are sometimes dealt with at present.

2**. If an environmental tribunal were to be set up, what should its jurisdiction be?**

The Faculty considers that a body or bodies with specialist environmental jurisdiction should be able to deal with all environmental issues with the exception of criminal and reparation matters.

The jurisdiction need not be confined to questions of legality but could involve a merits based approach – and this would be consistent with the principles of environmental law. In other words, the specialist Tribunal or Court could be given the power to consider the substantive merits of appeals before it in the same manner as the DPEA, and not simply issues of legality.

3. **In your view what would the benefits and disbenefits of incorporating the functions of the DPEA into an environmental tribunal be?**

The DPEA currently has a first instance jurisdiction - that is to say, it may adjudicate upon the merits of any appeal proposal before it. Such a power is appropriate in relation to the consideration of environmental disputes having regard to underlying environmental principles. Much of the DPEA's work in relation to development control has a strong environmental element in a wider sense (quite apart from its remit in relation to hazardous substances and minerals extraction). On this view, the functions of the DPEA insofar as these raise environmental issues could fit within the jurisdiction of an Environmental Tribunal or Court.

The focus and direction of the DPEA since the advent of the Planning Etc. (Scotland) Act 2006 and associated regulations has been to reduce the extent of public participation in its decision making by way of oral representation. The DPEA review of the year 2012-13 reveals that out of total of 510 cases heard that year, oral representation was permitted in only 37 of them. Such an approach is inimical to the underlying aims of the Aarhus

Convention which is to provide greater public information and accountability for decisions made by public bodies which affect the environment. This would be a reason to transfer challenges in environmental cases to an Environmental Tribunal.

However, there would be disadvantages in incorporating the functions of the DPEA into an Environmental Tribunal given the nature of the functions of the DPEA . Cases dealt with by the DPEA may raise both environmental and non-environmental issues and difficulties could arise were these issues to be split up.

4. **In your view where should an environmental tribunal sit, and what are the key benefits of this approach as compared to other options in this paper?**

In keeping with the aims of speed, efficiency and accessibility referred to above in answer to Question 1, the Environmental Tribunal or Environmental Court should not sit only in Edinburgh. The Faculty notes that the Lord President has indicated that the Energy and Natural Resources Court which he has mooted could sit in Glasgow or Aberdeen as required. The Faculty envisages that sheriff court buildings around the country – or, indeed, other public buildings - could be used for hearings of the Environmental Court as required.

5. **Is the current programme of court reform in your view adequate to ensure compliance with the UNECE Aarhus Convention on Access to Information, Participation in Planning and Access to Justice in Environmental Matters? If not why not?**

The current programme of court reform is not adequate to ensure compliance with the Convention. The provisions in relation to expenses require to be addressed. The rules on protective expenses orders should be amended to provide for the availability of such an order in all environmental cases and not simply those arising under Directive 2011/92/EEC (EIA cases) or Directive 2008/1/EC (Pollution Control cases).

In addition the cap of £5,000 by way of a Protective Expenses Order provided for in rule 58A may as well be tens of thousands for an individual on a low income in terms of providing access to the courts at present as they are both equally unattainable. The discretion on the part of the court to lower the cap is inherently uncertain as acknowledged by the CJEU in the *Edwards* case (*R (Edwards and Pallikaropoulos) v Environment Agency*, Case C-260/11, [2013] 3 CMLR 18). In addition, the existence of a cross-cap in the rule, although not formally considered by the CJEU in its judgment against the UK, is likely to create inequality of arms in respect of resources, given that is likely to be unattractive to lawyers acting on a speculative basis or in lengthy cases on behalf of a claimant.

Where an environmental law case raises a matter of significant public interest, which requires in the public interest to be adjudicated upon in the forum which has expertise to do so, the Court should have power to award expenses in favour of a pursuer or petitioner and against a developer or public authority irrespective of success. In effect, if the issue is one which should, in the public interest, be litigated, the Court should have the power to allocate expenses in a manner which reflects that public interest.

Separately, legal aid requires to be reformed in order to allow the grant of public funding for public interest matters and Regulation 15 of the 2002 Civil Legal Aid (Scotland) Regulations requires to be repealed. The Faculty agrees with the suggestion that legal aid should be capable of being given to community groups, rather than individuals within community groups for the reasons stated at page 52 of the discussion paper.

The Faculty notes that the Courts Reform (Scotland) Act imposes a 12 week time limit on the raising of proceedings for judicial review. While the Faculty supports the introduction of a statutory time limit, the period selected may impose a disproportionate barrier to individuals and NGOs in environmental cases who are typically most likely to litigate on environmental matters in the public interest. It is very difficult for such claimants to meet such tight deadlines given their limited resources. If injustice is to be avoided, the Court will require to be prepared to exercise its power to allow proceedings to be raised out of time.

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