

# Project brief to develop a Prospectus for An Environmental Rights Centre for Scotland

Scottish Environment LINK, March 2017

## 1. Invitation for expressions of interest

This document sets out a project brief for a prospectus developing the case and options for an Environmental Rights Centre<sup>1</sup> for Scotland, and invites expressions of interest to deliver this work by **30 April 2017**.

The Scottish Environment LINK Legal Strategy Subgroup are seeking the production of a prospectus to put before potential funders and partners, covering the following:

- The case for an Environmental Rights Centre – building on and refining the thinking set out in context and vision (Appendix 1)
- What an Environmental Rights Centre could do – developing options from seminar workshops
- How it could be structured and governed – developing options from seminar workshops
- How it could be financed both initially and longer term – developing options from seminar workshops, and outlining a business plan for these
- Potential partners – explore options for potential partnerships with key stakeholders and academic institutions
- How it could be implemented – setting out potential phases for roll out.

In developing various options the prospectus should identify the advantages and disadvantages of different approaches.

## 2. Project budget

Up to £10,000 (including VAT and expenses)

## 3. Project Timescale

6 months, starting May 2017 (potentially negotiable)

## 4. Commissioning Group

The Scottish Environment LINK Legal Strategy Subgroup consists of:

- Lloyd Austin, Head of Conservation Policy RSPB Scotland, chair SE LINK Governance Group
- Mary Church, Head of Campaigns, Friends of the Earth Scotland
- Mark Lazarowicz, advocate, LINK honorary fellow
- Ian Cowan, independent consultant on environmental and planning law

The work will be commissioned by Scottish Environment LINK. The key contacts for this work are:

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<sup>1</sup> Working title: during the development of the prospectus the contractor may consider more appropriate names for a law / rights / justice centre that speak clearly to its intended users

Lloyd Austin, RSPB Scotland 0131 317 4100 [lloyd.austin@rspb.org.uk](mailto:lloyd.austin@rspb.org.uk)

Mary Church, Friends of the Earth Scotland 0131 243 2700 [mchurch@foe-scotland.org.uk](mailto:mchurch@foe-scotland.org.uk)

## 5. Methodology

The methodology should include as a minimum:

1. Review of outputs and materials to date including:
  - An Environmental Law Centre for Scotland? Using the law to promote a better environment, Scottish Environment LINK paper December 2016, Appendix 2
  - Outputs of workshops at LINK seminar held on 14 December 2016, Appendix 3
  - Reports, policy papers and consultation responses referenced in Appendix 4
2. Discussions with the SE LINK Legal Strategy subgroup collectively and individually as necessary
3. Discussions with other key stakeholders, including but not limited to:
  - Legal Services Agency
  - University of Strathclyde Law Clinic
  - Scottish Women's Rights Centre
  - ClientEarth
  - Law Society of Scotland
4. Draft Prospectus to subgroup for comments and feedback

## 6. Format of responses

In no more than 4 sides A4 please outline:

- your interest in this project
- any relevant experience in developing concept projects like this
- understanding of the current legal context in relation to this project
- details of how you will deliver the prospectus taking account of the methodology and other criteria outlined here, including a clear and realistic timetable
- a quotation for delivery of the prospectus including a breakdown of costs

Please also submit a concise CV.

## 7. Appendices

Appendix 1: Background, Context and Vision

Appendix 2: Notes from workshops at Scottish Environment LINK seminar on An Environmental Law Centre for Scotland?, held in Edinburgh on 14 December 2016

Appendix 3: References



# **Appendix 1 Background, Context and Vision**

## **Background**

Scottish Environment LINK has been working to improve access to justice in environmental matters by way of its Legal Strategy subgroup for some years now. Through its members and in partnership with others, the subgroup has:

- campaigned to improve compliance by the Scottish Government with the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters;
- changed the law on standing in judicial review to enable anyone with a 'sufficient interest' to raise such an action;
- successfully pushed for the introduction and improvement of Protective Expense Orders to reduce liability for legal expenses for citizens, community groups and NGOs in taking legal action on environmental issues in the Court of Session;
- developed a strong case for the introduction of a specialist environmental court or tribunal in Scotland, which was the focus of a Scottish election manifesto commitment by the SNP and a consultation last year.

In recent months, the subgroup has identified the opportunity to establish an Environmental Rights Centre as a means to respond to a number of clear un-met needs in civil society in enabling the understanding and exercise of legal rights and remedies. In December 2016 SE LINK organised a seminar at which we sought input from legal, environmental, community and academic stakeholders to further develop our thinking. The seminar confirmed our sense of strong need for an Environmental Rights Centre and demonstrated broad support for the initiative.

## **Context**

The Government, local authorities and public bodies regularly make decisions that affect the environment. The environment has no voice, therefore it rests with citizens, communities and NGOs to speak up for it, and hold decision makers to account through the formal processes open to civil society, parliament, and through the courts. Judicial review in the Court of Session is currently the only effective form of legal challenge available. Due to (in some cases long standing) structural barriers, including prohibitive costs, restrictive timing, and lack of access to lawyers, as well as cultural reasons such as a lack of awareness of rights and legal remedies, effectively holding the executive to account for the impact of its decisions on the environment is extremely challenging in Scotland.

While improvements to judicial review procedures have been made, in terms of the introduction of Protective Expense Orders and the change in the law on standing, it is our view that more change is needed, and that an Environmental Rights Centre could play a vital role in promoting further change, and in supporting citizens, communities and NGOs to take legal action on behalf of the environment.

An Environmental Rights Centre is needed more now than ever due to:

- the increasing complexity and importance of environmental law, particularly in the context of global challenges such as climate change
- the changing legal and constitutional landscape in Scotland as the Brexit process goes forward
- calls for appeals against decisions of the new Oil and Gas Authority to be heard in Aberdeen, proposals for an energy and natural resources specialist court in the Court of Session, and the growing case for an accessible, specialist environmental court or tribunal for Scotland.

## **Vision**

Our vision is for an Environmental Rights Centre that:

- provides a one-stop shop for citizens, communities and NGOs to seek advice and assistance in legal and planning matters relating to the natural environment

- educates citizens, communities and NGOs about their rights and responsibilities pertaining to environment and how these can be exercised by law
- plays a role in campaigning for improved access to justice in environmental matters and full compliance with the Aarhus Convention
- seeks to address inequality of arms in experience of litigation and the means to pay for it
- has in-house lawyers who can undertake litigation on behalf of citizens, communities and NGOs, offers non-legal routes of action, and signposts to external lawyers and experts
- identifies and pursues strategic litigation to test and improve environmental law.

# **An Environmental Rights Centre for Scotland?**

## **Using the law to promote a better environment**

The opportunities for using the law and legal system to help bring about a more sustainable Scotland have grown in recent years. The introduction of Protective Expenses Orders, the confirmation of wider standing in judicial review cases, and the growing jurisprudence in the UK and at European level on environmental issues, particularly relating to the Aarhus convention, should make it easier to bring environmental cases before the Scottish courts. These opportunities may be enhanced if the Scottish Government were to take steps to establish an environmental court or tribunal, a move for which there is growing support.

However, by themselves such changes are unlikely to lead to major changes in the way that the law and legal system is used to promote environmental objectives in Scotland. To achieve that, two other things are required.

Firstly, the underlying legislation has to be right. Courts will only act in a manner which promotes environmental protection if the law requires them to do that. And although the Scottish Parliament (alongside the UK Parliament and the European Union) has passed much good legislation on the environment, there are still many areas where environmental legislation falls short.

However, even where the legislation has been put in place, people, as individuals or through organisations, need to be prepared and able to use the legislation and the legal system to make sure that environmental legislation is enforced. That includes ensuring that government, both central and local, complies where appropriate with European legislation (including in whatever form its substance continues to apply if and when Scotland leaves the EU along with the rest of the UK). To do that, Scotland needs a focus whereby failures to comply with environmental legislation can be identified at both local and national level, where government can be presented with well-informed and well-founded proposals for action to bring about compliance, and from where if necessary court proceedings can be initiated or supported.

At present Scotland lacks such a focus. The Environmental Law Centre Scotland did valuable work, with limited funds and mainly on a voluntary basis. Individual NGOs and communities have at times brought legal challenges, but such use of the law has been rare. Most legal proceedings and litigation have tended to be responsive to events in particular locations eg proposals for windfarms, or planning applications. It is noticeable that the current proceedings against the UK government for breach of EU air quality legislation, although it brings in Scottish communities, has been led by the charity ClientEarth, who describe themselves as “activist lawyers committed to securing a healthy planet.”

It is now time for the environmental movement in Scotland to facilitate the establishment of such a focus for action here as well – through the courts where necessary, but also to promote education, awareness, networking, and good practice by government and business. There are various possible ways this objective could be achieved.

Scottish Environment LINK’s preferred option is to establish an independent Scottish centre for environmental law or rights. Such a centre would aim to develop close working relationships with ClientEarth and other agencies with an interest in this area of activity such as the Legal Services Agency, but other options could no doubt be considered. The level of funding required at the initial stage need not be substantial, although it can reasonably be hoped that such an initiative could be attractive to trusts, NGOs, and individuals, both through traditional fund raising methods and newer mechanisms such as crowd funding. The following annex outlines proposals for the type of activities that would be undertaken by such a centre, together with how it might be structured.

## **What would a new Scottish Environmental Law Centre do?**

The proposed centre would undertake both the provision of legal services and the organisation of educational and awareness-raising activities.

### **Legal services**

The centre would be able to conduct selected litigation on environmental matters on the basis of:

1. Direct requests from members of the public, charities and other NGOs, and corporate bodies with a social objective.
2. Referrals from other legal entities eg solicitors' firms, law centres and advice centres.

In addition, the centre would be able to conduct strategic litigation in its own right on environmental issues which raised important issues which it was considered appropriate to pursue. The identification of such issues could be undertaken by the centre itself, or in liaison with the membership of Scottish Environment LINK and the wider Scottish environmental community.

### **Education and fund-raising activities**

The centre would also seek to promote wider knowledge of environmental law, and in particular the opportunities open to individuals, NGOs, and local communities to utilise environmental legislation (from Scottish, UK and possibly international, sources) to promote environmental sustainability and to protect the environment, at both local and national level. This type of activity could range from supporting a community on a particular local environmental issue to seeking to correct a failure at governmental level to comply with EU environmental legislation (or its successor), to give two examples.

In general, the centre would not seek to undertake its own research or develop its own policy agenda, but would seek to draw upon, and publicise more widely, the work of NGOs, academic institutions, and research centres. It might, however, make its own proposals for legal reform and access to justice in relation to environmental law matters. It might also act as a centre for information exchange and as a clearing-house to keep environmental NGOs up to date with changes in environmental legislation, policy, and governance arising from UK departure from the EU.

The type of activity that could be undertaken is likely to include:

1. The organisation of seminars and conferences, and opportunities for networking
2. Setting up a website with appropriate information, links and contacts
3. Producing a regular briefing on current legal issues and developments of relevance (possibly in two versions – one directed at individuals and environmental NGOs, and one aimed more for legal practitioners and academics)
4. Research and information exchange in specific projects, such as the consequences for environmental NGOs in Scotland of 'Brexit'.

## **Structure**

The centre would have access to its own legally qualified staff. A possible structure would be for the centre to be set up as a charity, with a formal contractual relationship to its own solicitors' firm which would employ the legally qualified staff. This is the model which is utilised by a number of the law centres in Scotland.

However, other structures are likely to be possible, and could be considered. In addition, it would have staff to undertake its educational and awareness-raising activities, and any specific research projects.

Staff levels would clearly depend on the level of funding available. At the very minimum, however, the centre would need to have one dedicated solicitor, with access to cover to allow for illness and holidays. It should also have one research/information worker, and appropriate administrative

support (perhaps one staff member to provide shared support to both staff). The centre would also aim to draw upon the expertise of the wide range of environmental law practitioners, academics, and other experts who would undoubtedly wish to support its work on a voluntary and pro bono basis.

The centre would be established as an independent organisation, but with a close working relationship with Scottish Environment LINK. If space permitted, it could initially be based at the LINK office in Hunter Square, Edinburgh, whose proximity both to the Court of Session and the Scottish Parliament would make it a good location. Alternatively, it might be based in a law centre or other legal premises.

## **Appendix 3 Notes from workshops at Scottish Environment LINK seminar on An Environmental Law Centre for Scotland?, held in Edinburgh on 14 December 2016**

### **i. Note of Outputs Workshop**

#### **What would an ERC do?**

- Scope:
  - o Aarhus Convention: environmental and planning.
- Strategic litigation:
  - o Targeted legal cases – e.g. air pollution, climate change & planning.
  - o EU law: e.g Habitats Directive, Marine Directive.
  - o Land Reform, including supporting Local Authorities in Litigation.
  - o In-house solicitor.
- Advice/assistance/referral:
  - o Basic information, advice and signposting.
  - o Help using law without going to court.
  - o FoI and planning assistance.
  - o Legal research/opinions.
  - o Referral to pro bono solicitors.
- Public education/campaigning:
  - o Training and advice for communities, NGOs and legal sector.
  - o Campaigning on Aarhus: access to information, public participation, access to justice.
  - o Campaign for an environmental court.
- \*May require different funding streams to deliver these different aspects.

#### **What problems could an ERC respond to?**

- Cost issues - noted need for clarity over PEO rules.
- Timing.
- Equality of arms and experience.
- EL/RC as a one-stop shop:
  - o Awareness-raising role.
  - o Cross-disciplinary advice and legal/planning assistance.
  - o Guidance through process.
  - o Different levels of legal action: from letters to judicial review.
  - o Access to solicitors willing to take Legal Aid cases.

### **ii. Note of Governance Workshop**

#### **Aims/Purpose**

- Links to social justice are important.
- How to define 'the environment'?
  - o Air pollution.
  - o Noise.
  - o Lack of green space.
  - o Public health.
- Aarhus aims – right of every person to live in an environment adequate to their health and wellbeing.



- Potential roles of the centre:
  - o 'Gatekeeper' – needs to be more than a neutral source of advice – should direct clients towards the most effective route of action.
  - o Capacity-builder.
  - o Campaigner/advocate – needs to work with other campaigners also.
  - o Watchdog role (context of lack of capacity of the State in this area):
    - Focus on regulators and prosecutors (additionally to polluters) – are they fulfilling their duties? Encourage them to take up certain issues.
  - o Information provision – adopt a publishing strategy? Publishing strategy? E.g. LSA publications helpful in fields where there is not already much information – self-help guides, finding cases, etc.
- Need to avoid replicating the work of other bodies – e.g. consider what CABs cover.

## Models

- NGO.
- Academic.
  - o Could use students on education work, administration and internal research.
  - o Lots of expertise amongst universities – links needed.
- Independence is critical.
  - o Dependence on government funding challenges independence.
- Separate company model – alongside charity. Fee income can then be recycled into the charity.
- Social enterprise model - has had some problems for Law Society (alternative business structures debate) - a simple model is to be proposed. Needs someone to ask regulatory bodies to set up an alternative structure.
- Law Centre model.

## Examples

- [Centre for science and the environment](#).
- [PAS](#) model.
- [Better than zero](#).
- [ClientEarth](#).
- [Legal response initiative](#).
  - o Simons & Simons - International advice - office within law firm.

## Key Questions

- Who should employ the staff?
- Where can genuine value be added – where can legal expertise be most effective?
- Should the ERC start with a campaigning element (e.g. campaigning for environmental court, etc.)? Or should the initial focus be on getting the organisation up and running, with a funding strategy in place to sustain it – with a later stage of looking at options?

## Misc.

- Resilience of the centre is critical – it is important that it is not reliant on one individual.
- Challenge of retaining focus on strategic issues – this is the trustees' role.
- Expertise exists for the other functions (e.g. in LINK) and some of the set-up work, pending injection of larger amount of funding. Pull this support in now, and look for partnerships over premises, research and other share-able elements, via academia, NGOs, legal practices.
  - o For example, LINK and members could pull in LSA who would be happy to host/provide hotdesk, Environmental Law Foundation, Client Earth, SWRC, lawyers.

### iii. Note of Funding Workshop

#### Key Factors for funding

- Fundraising effort should be led by experts with track record who are able to commit adequate time.
- ERC's board needs fundraising expertise and knowledge of contracts.
- Critical to start with a strong vision and a name which conveys a sense of purpose:
  - o Name must say the right things to users and not frighten funders. e.g. 'Natural Justice: Scotland's Environment Law Centre'
- Need for a mixed economy approach, with different funding sources.
  - o e.g. Legal Services Agency supported by Govt, LAs, trusts and legal aid work (~50:50).

#### Sources of Funding

- Endowments from wealthy individuals.
- Annual, gift-aided donations from individuals (Amnesty model).
- Local authorities (if they see the work as relevant to their remit).
- Crowd-funding - can support specific cases with clear objectives.
- [38 Degrees](#).
- Funding streams associated with community empowerment legislation.
- Climate change funding opportunities - other global impact funding services may exist.
- Trade unions.
- Trusts sector & Lottery (as 'seed corn'/medium-term funding). Research which trusts support similar centres.
  - o Joseph Rowntree Charitable Trust (core funding element which others may not support),
  - o Rowling fund,
  - o Robertson Trust.
- Legal aid (e.g. for judicial reviews).
  - o Important at outset to establish case strategy. Don't assume the 'right case' will be available to draw legal aid funds.
  - o Legal aid funds trainees in first year at least (?)
- Fees:
  - o From clients – need to consider what rates will be charged.
  - o For providing capacity-building and training events.

#### Research

- Funding was the Achilles heel of former Environmental Law Centre Scotland (ELCS) – an assessment of the ELCS's experience could be useful.
- Research on existing organisations fulfilling similar roles to find out what works/doesn't in terms of funding. Examples:
  - o [Environmental Law Foundation](#) (E&W);
  - o ELC;
  - o [UKELA](#);
  - o [Leigh Day Associates](#) - environmental work is rarely paid for - subsidised by its general legal work. Crowd Justice therefore plays a role in funding environmental matters.
  - o [Crowd Justice](#).
  - o [Scottish Womens' Rights Centre](#) – shares legal practice with law clinic/crisis centre for students; hybrid model. Board has governance role in balancing these. Value in bringing related groups together in this way.

#### Misc.

- Important to acknowledge that Scotland is backward in terms of public interest litigation:

- Higher degree of heel-biting needed in Scotland.
- Demystification, greater intention towards litigation, and more test cases will be critical.
- Pursuing judicial review can't be done upfront without source to cover costs - hearings, referrals can be done relatively cheaply.
- Small working group needed to consider forthcoming legal aid consultation and draft response – to ensure Legal Aid is made appropriate to need (i.e. covers environmental litigation).
- Director/Agitator/Coordinator is key person needed to progress work in pursuit of objectives, coordinate volunteers, help move things forward.
- Some funders like causes where there is a demand to be responded to – air pollution with human face (crowd funding would relate).
- Would 'partnership' in the name/title help, for partners involved, for organisation's public face, for community empowerment aspirations, and in reaching out to other organisations – should the aim be a cooperative organisation where none is subservient?

## Appendix 4 References

Scottish Environment LINK, response to Scottish Government consultation on Developments in Environmental Justice in Scotland 2016

<http://www.scotlink.org/wp/files/documents/LINK-Response-to-EJ-Consultation-June2016.pdf>

Friends of the Earth Scotland response to Scottish Government consultation on Developments in Environmental Justice in Scotland 2016

<http://www.foe-scotland.org.uk/EnvironmentalJusticeConsultationResponseJune2016>

RSPB Scotland response to Scottish Government consultation on Developments in Environmental Justice in Scotland 2016 [https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view\\_respondent?uuld=66651408](https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view_respondent?uuld=66651408)

Ian Cowan's response to Scottish Government consultation on Developments in Environmental Justice in Scotland 2016 [https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view\\_respondent?uuld=138634173](https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view_respondent?uuld=138634173)

Friends of the Earth Scotland report 'Litigation over the Environment: an opportunity for change' 2015 <http://www.foe-scotland.org.uk/litigationovertheenvironment>

Friends of the Earth Scotland briefing 'An Environmental Court or Tribunal for Scotland' policy 2015 <http://www.foe-scotland.org.uk/ECTPolicyBrief>

Friends of the Earth Scotland briefing 'Access to Justice in Environmental Matters' 2013 <http://www.foe-scotland.org.uk/A2EJPolicyBriefJune2013>

Scottish Environment LINK report 'Governance Matters: the Environment and Governance in Scotland' 2011 <http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf>

Friends of the Earth Scotland report 'Tipping the Scales: complying with the Aarhus Convention on Access to Environmental Justice' 2011

<http://www.foe-scotland.org.uk/tippingthescales>