Planning Democracy's response to the Scottish Government consultation paper seeking views on Rules of Court for Protective Expenses Orders in legal challenges to certain environmental decisions

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Introduction

Planning Democracy wish to respond to the Scottish Government consultation paper seeking views on Rules of Court for Protective Expenses Orders (PEO) in legal challenges to certain environmental decisions.

Planning Democracy is an organisation campaigning for a fair and inclusive planning system. Our purpose is to promote fair and accountable decision making in the planning system in Scotland based on a level playing field between the public and other stakeholders.

Our mission is to undertake practical and academic research on the state of community participation in the Scottish planning system; campaign for just and open decision making; and promote practical changes. People contact us with their concerns about the planning system and we relate their specific concerns to how we might advocate for change in planning legislation, regulations, policy or how to promote change in culture and practice.

We are made up of a group of concerned planners, community councillors, individuals and groups with experience relating to planning. We are active members of Scottish Environment LINK, SCVO and work with a number of community based organisations.

Our concern lies with ensuring that there is a level playing field in matters relating to planning. Many of the groups and individuals with whom we speak are commenting on environmental issues relating to planning developments, proposals or plans. Whilst some of the issues that have come before us have raised matters regarding the law of nuisance, a common theme running through all the cases is the strong public interest in having environmental law enforced for the benefit of the wider community and individuals within the community. Therefore we have an interest in making environmental, public law legal challenges just and affordable and Aarhus compliant.

In 2007 the European Commission commissioned a report on access to environmental justice in 25 Member States which classified the UK as one of the worst cost regimes for access to justice in environmental matters (amongst the bottom 5) and concluded that current costs rules represented a "significant obstacle to access to justice in the United Kingdom". We note that report mainly considered the position in England and Wales which we consider is far better insofar as access to justice is concerned, compared with the position in Scotland. As such we welcome this consultation, but urge you to consider substantial improvements that ensure that those seeking justice in Scotland have access to justice that is “fair, equitable, timely and not prohibitively expensive”

Questions:

Q1 In your opinion should there be a scheme for the capping of costs in legal challenges to public authorities' decisions within the scope of the PPD

We have supported Mr McGinty in his judicial review of the designation by the Scottish ministers of a new power station and transhipment hub at Hunterston, as a national development in a National Planning Framework 2. We felt that this was an extremely important public interest case that sought to highlight the limitations of the NPF consultation on national developments and the SEA requirements for consideration of alternatives. However in the process it has also served to demonstrate to us the extraordinary difficulties that ordinary citizens, seeking justice in the planning system, have to overcome in taking a case of this nature.

It is somewhat ironic therefore that the proposals outlined in this consultation are restricted to cases falling under the Public Participation Directive (PPD), and therefore do not apply to Mr McGinty's challenge (which relates to the SEA Directive). Nor do the proposals do anything to tackle difficulties in obtaining legal aid presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which has a particularly adverse effect in environmental cases as again demonstrated by Mr McGinty's unsuccessful application for legal aid for his public interest case.

Cases falling under the PPD are narrow in scope and do not include all areas of European environmental law. In particular the Court of Justice of the European Union has confirmed that Aarhus has an indirect effect in all EU environmental law issues. Failing to bring these cases within the scope of the rules of court is likely only to lead to much time, energy and expense on litigation on PEOs in such cases.

Planning Democracy and Mr McGinty have recently filed a complaint with the Aarhus Complaints Commission. The complaint relates to (1) a breach of Article 6 (2) of the convention in respect of the public participation regarding the consultation to the adoption of aspects of the National Planning Framework 2 for Scotland by the Scottish Government and (2) a breach of article 9 of the Convention in relation to the delay in the court determining the case and (3) the cost of access to the court to challenge the decision in this particular case and in general in challenges to environmental decisions in Scotland.

We feel that it is crucial for the Government, in order to be compliant with the Aarhus Convention, includes all environmental cases, not just those falling under the PPD. Proposals for England Wales and Northern Ireland are to include all cases and it seems prudent (considering that the impetus for this consultation comes from proceedings taken against the Scottish Government by the European Commission), to ensure that the Scottish Government is fully Aarhus compliant.

Q. 4 Should the figure be higher or lower than £5000

Mr McGinty was awarded a Protective Expenses Order that capped his costs at £30,000, which is an exceedingly high cap for someone unemployed with few savings. It is not the only barrier that Mr McGinty has faced these other barriers are described below.

We consult with many communities in Scotland and have heard from a variety of different individuals and communities about the problems they have faced in accessing justice. There are other significant barriers including the intimidating nature of taking a case, the huge time implications for those taking legal action and not least the cost implications.

From our perspective, the people who we have been consulting in our research are those who are working in terms of the public interest. Nearly everyone who comes to us has a concern not only for their own property and interests but for the wider community and environment. As such they should not be required to pay a financial cost as well as taking on the other burdens of taking a court case.

We feel that the toll of taking court cases and the impact on people's lives is severely under estimated by those more familiar with the workings of the legal system. People do not take judicial reviews lightly; there is a lot at stake, not just their finances. We do not think the current proposals should be limited in scope simply because of a fear of opening the floodgate. In our view, legal action is taken as a last resort when other options have failed, and is unlikely to be undertaken lightly.

We have spoken to disadvantaged mining communities whose lives are massively impacted by mine workings, vehicle movements, blasting, noise and other nuisances such as dust and fumes. Those financially disadvantaged communities would not undertake a judicial review lightly, and would consider it an unusual step to take, as it goes against the conventional rules and patterns of social behaviour. It takes courage to ignore such conventions when you have lived in a small community for years. This in itself can be a major barrier to bringing a case and indeed to raising the required funds needed from within the community. We have spoken to communities whose lives are affected everyday by odours and pollution from landfill and contaminated land. These people have faced intimidation, such as letters threatening to sue, that have been a factor that prevented them from taking a judicial review. We have spoken to tenants and farm workers who fear that taking judicial review might cost them their jobs and livelihoods. These obstacles along with the amount of time and effort required to continue with protracted and complex legal process are barriers enough.

We therefore feel strongly that people must have categorical assurance that the legal proceedings will not also take a financial toll. The PEO cap must be set at zero. Because of the multitude of other barriers to taking a case to court we do not believe this will result in the courts being flooded with cases.

Q25. Would the proposed rules on PEO's enable you to bring a judicial review in the court of Sessions

Individuals, groups and communities currently do not have an equal right to participate in the planning system.

Currently there are two routes that users of the planning system (ie the public) who are dissatisfied with the system can go down,

- one is to complain to the Scottish Public Services Ombudsman (SPSO)
- the other to go to judicial review.

The SPSO can and does consider administrative defects of planning authorities, however this may not be actually what people want to look at and so the SPSO end up looking at shadow issues rather than substantive ones. The SPSO does not look at the merits of a case and cannot reverse a decision. It is not an equitable route for those seeking justice.

We believe an appropriate system of independent review would be to a specialist environmental court or tribunal process designed to be more accessible than the Court of Session. Such a court does not currently exist under the current planning system (which we believe is weighted heavily against people because of this lack of an affordable, accessible right of redress) so people are forced to consider judicial review.

We are aware of people currently considering their options from those communities mentioned earlier. These are all poor communities who have no access to the finances required to take a judicial review, but for whom life is rendered intolerable due to the nuisance effects of neighbouring developments. (Not to mention the added disempowerment of being unable to influence decisions affecting their local area leading to depression, anger and cynicism). We think the Scottish Government should consider these communities for whom a zero cap is realistically the only option to offer any access to justice.

We welcome the decision by the UK Supreme Court to award Penny Uprichard a Protective Cost Order for her appeal case to the Supreme Court. We believe this may be the first time the Supreme Court has done this for a Scottish case. We note the generally sympathetic cover of this in the Scottish media, and think the Scottish Government should take heed that widening the scope of the rules (and lowering the cap) will have general public support. We also think this may be some indication that the Supreme Court are in sympathy with increased access to the courts and it may be that Scotland will have to come into line with other parts of the UK. However it should be noted that Miss Uprichard still faces enormous costs for her public interest case, which we feel is not at all a just situation.

Planning Democracy does not have legal advice nor the funds to be able to have an in-house solicitor. We are however members of Scottish Environment Link and we fully support their response to this consultation as well as the response from the Coalition for Access to Justice and the Friends of the Earth Scotland/ Environmental Law Centre's submission the only difference being that we feel that the level of the cap should be set at zero rather than £1000. We wish to reiterate their request for you to consider a Qualified One Way Cost Shift as recommended in the Jackson and Sullivan reports.