An Environmental Court or Tribunal for Scotland

Friends of the Earth Scotland Policy Briefing

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Friends of the Earth Scotland

Introduction

Friends of the Earth Scotland (FoES) warmly welcomes the Scottish Government's commitment to consult on options for an environmental court or tribunal (ECT) in Scotland this year. The creation of an ECT provides the perfect opportunity to take a more holistic approach to compliance with the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. Building on recent civil court and tribunal system reforms, a new ECT could not only provide better access to justice for citizens concerned with protecting the environment, but a speedier, more cost-effective system, and a more level-playing field for developers and operators. This briefing draws out key issues and solutions from our new report 'Litigation over the Environment: an opportunity for change.'[1]

The Aarhus Convention

The Aarhus Convention recognises that protection of the environment is essential for human society to thrive on earth and introduces rights and responsibilities to that end. Aarhus is about enabling decision-makers to make better decisions in the context of the environment we depend on. It requires that people and communities are engaged in decision-making that impacts on the environment, and puts a duty on citizens to act in its defence, including by going to court where necessary.

Ten years on from UK and EU ratification, and despite the recent introduction of Protective Expense Orders (PEOs) and the Court Reform Bill, Scotland remains in breach of the access to justice provisions of the Aarhus Convention.[2] In particular, the cost regime in Scotland needs further reform to comply with the Aarhus requirement that access to justice must not be prohibitively expensive. As a consequence Scotland, along with the rest of the UK, faces further action both from the European Commission and the Aarhus Compliance Committee.

Benefits of an environmental court or tribunal

The benefits an ECT could bring to Scotland would depend on its structure, powers and jurisdiction. In designing an ECT Aarhus values must be at its core in order to ensure compliance with the Convention and the best outcome for the environment and communities. Specialism, strong case management and an inquisitorial approach, such as that embodied in the Scottish Land Court, could not only result in greater efficiency and speedier decision-making but also lower costs to the public purse. Powers to prioritise urgent cases could avoid lengthy delays to high value and high public interest cases. The use of written submissions could avoid extended hearings with expensive legal teams, focusing oral representations instead on the key legal and merits arguments, leading to savings for developers, public bodies and citizens alike. An ECT with a range of remedies at its disposal can help provide a level playing field by removing any economic incentive of non-compliance, an approach the Scottish system is moving towards with the new SEPA penalty regime. ECT's can offer Alternative Dispute Resolution (ADR) mechanisms, thereby further reducing the costs and time involved in cases, where appropriate.

The New South Wales Land and Environment Court is renowned for its strong case management rules, the results of which are reflected in impressive case completion statistics. In 2013 97% of

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[1] http://www.foe-scotland.org.uk/litigationovertheenvironment

[2] Case C 530/11*European Commission v United Kingdom of Great Britain and Northern Ireland* [2014] ECR 0000 http://curia.europa.eu/juris/liste.jsf?language=en&num=C-530/11 and pg 73 of the Report of the fifth session of the Meeting of the Parties addendum http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ECE.MP.PP.2014.2.Add.1_aec.pdf

planning and environmental appeals were closed within 12 months, and 80% within 6 months[3]; 91% of judicial review and civil enforcement cases were closed within 16 months, with an average case length of 126 days.[4] A significant number of cases falling under the jurisdiction of the Court are dealt with by way of ADR.

Industry and developers seeking a more level playing field were supportive of the creation of Vermont's Environmental Tribunal in 1990. The Tribunal aims to provide "effective environmental enforcement" by ensuring it is "more expensive to commit a violation of the laws and regulations than to comply with them".[5] It also saves time and money by sitting locally, holding pre-trial phone conferences, written submissions to narrow the scope of the case and the use of ADR where appropriate.[6]

Both the NSW and Vermont ECTs hear appeals from individuals in certain planning and environmental cases. Fears that new rights of appeal would open the floodgates have not been realised. In Scotland, most Aarhus cases are currently heard by way of judicial reviews and statutory appeals, and the numbers taken are low. The majority that are taken are by developers or third parties with a commercial interest, with very few taken on an Aarhus basis.[7] The introduction of a leave stage, as proposed in the Court Reform (Scotland) Bill, will serve to filter out any frivolous or unmeritorious judicial review cases, and a similar filter could serve in planning and environmental appeals. A key benefit of more open access to the courts is improved engagement and decision making from developers and public authorities, who know their actions can be effectively challenged. In other words, it is the credible threat of legal action which is crucial to ensure decision making is of a high quality. We consider that this credible threat is largely absent in Scotland.[8]

Defining an ECT for Scotland

Just as the distinction between courts and tribunals is somewhat blurred, there is no hard and fast definition of what an ECT should look like, with various different models operating worldwide. Scotland has the opportunity to create an ECT suitable for our unique legal context, adopting tried and tested best practice from different jurisdictions as appropriate. However, Aarhus principles must serve as a guide to answering questions of jurisdiction, place and structure.

Jurisdiction

The key question in considering an ECT for Scotland regards jurisdiction: should it have jurisdiction over all disputes impacting on the environment or should its role be within specified limits? The introduction of new civil penalty powers for SEPA, as part of a shift towards civil enforcement of environmental law, is one of the driving forces for the introduction of a specialist ECT in Scotland. However, an ECT might not be the appropriate place to hear all environmental enforcement cases, with the stigma of a conviction in a criminal court a powerful deterrent for the most serious offences.

The ECT must provide for a route of appeal for members of the public with a sufficient interest to challenge 'acts and omissions' by public and private bodies that breach environmental law, as required by Article 9 (3) of the Convention. This could be achieved by way of the introduction of equal rights of appeal in certain planning cases, for example those that meet specific criteria such as being subject to Environmental Impact Assessment, to be heard by the new ECT.

The Aarhus requirement that access to justice be 'fair, equitable, timely and not prohibitively expensive' as well as providing adequate remedy must inform whether an ECT would hear judicial review cases, as the New South Wales Court does. Most Aarhus cases in Scotland are currently heard by judicial review and at considerable expense (and duration) to both the petitioner and the

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[3] See http://www.lec.justice.nsw.gov.au/lec/types_of_disputes/class_1.html
[4] http://www.lec.justice.nsw.gov.au/lec/types_of_disputes/class_4.html
[5] Former judge of the Vermont Environmental Court, in M Wright, 'The Vermont Environmental Court' 2010 3(1) Journal of Court Innovation 201
[6] http://www.law.pace.edu/sites/default/files/IJIEA/Commentary-Environmental_Court_of_Vermont_May_18_2011.pdf
[7] Brodies, Feb 2013 Judicial Review of Planning Decisions in Scotland, http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf
[8] An example of this is the recent complaint regarding continual planning breaches by the Trump organisation in its development at Menie (see http://www.heraldscotland.com/news/environment/trump-criticised-for-planning-breaches.21352328); given the difficulties that one resident had in trying to obtain access to the courts over a number of persmissions, including one over her own home, it is not surprising that no other resident or NGO has considered taking legal action.

public purse. Recent rulings of the ECJU and the UK Supreme Court leave little doubt that, despite the introduction of PEOs, the Scottish system requires further reform to comply with the prohibitive expense requirements of Aarhus and the EU Public Participation Directive (PPD). A pragmatic approach to whether the Court of Session is the best place to provide Aarhus compliant access to justice in these cases is needed when assessing the scope and jurisdiction of an ECT.

Structure and Place

There are several options for an ECT in the existing and emerging court structure. A new tribunal under the Tribunals (Scotland) Act 2014 might be the most obvious place to start afresh and create an accessible, flexible, efficient and affordable ECT. However, the Scottish Land Court, which has many of the strengths identified in ECTs, already functions as a *de facto* ECT in certain appeals. The Scottish Land Court is Ministers' preferred route of appeal for SEPA's new civil penalty powers for the time being, and it may be that extending the jurisdiction – and resourcing – of the Land Court is a more cost effective approach to Aarhus compliant access to justice.

An ECT that is able to sit throughout Scotland, as the Scottish Land Court and Lands Tribunal currently do, utilising local courtrooms and other public buildings is highly desirable to ensure accessibility, and reduce costs both to the litigant and the public purse.

The Lord President has indicated his intention to conduct a feasibility study into a specialist energy and natural resources court within the Court of Session. While we welcome the implicit recognition of the complexity and value of certain environmental cases, we seek assurance that the Scottish Government will, in parallel, approach its commitment to looking into options for an environmental court or tribunal from an Aarhus perspective, with environmental protection and rights at its core.

Costs

While case management, structure and place have important roles to play in reducing costs to both users and the public purse, they can only go so far in ensuring Aarhus compliance on this front. As long as the 'loser pays' principle continues to dominate, litigants in public interest cases risk significant legal costs for standing up for the environment. While a well-designed ECT should enable litigants to represent themselves, it is anticipated that it will often be necessary for litigants to have legal representation, particularly if an ECT takes on a judicial review role.

Setting aside the fact that the new PEO rules are restricted to litigants seeking judicial or statutory review cases falling under the PPD, the system exposes individuals to upwards of £35,000 in costs in the event of a decision going against them. Given that this sum is considerably more than average annual Scottish earnings, we consider it to be prohibitively expensive and the system in need of further reform.

Reform is also required to Regulation 15 of the Civil Legal Aid Regulations which has for many years acted as a particular barrier to applicants seeking financial assistance in environmental cases. The rule strongly implies that a private interest is not only necessary to qualify for legal aid, but that a wider public interest – practically inherent in most environmental challenges – will effectively disqualify the applicant. That an ECT is designed to allow litigants to represent themselves must not count against those seeking financial assistance.

Conclusion

The Scottish Government has an opportunity to create a world class ECT that provides for affordable access to justice, reduces costs to the public, speeds up decisions and provides a more level playing field for developers. Learning from the experience of established ECTs around the world we can create a system that works for the environment within Scotland's unique legal system. Aarhus compliance must, however, be at the heart of thinking around what an ECT for Scotland should look like in order to ensure we build a system fit to respond to the increasing importance of environmental issues.

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