Consultation response - Electricity infrastructure consenting in Scotland 29 November 2024

1. Introduction

The Environmental Rights Centre for Scotland (ERCS) assists the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We provide free legal expertise in public interest environmental law, awareness raising and outreach to marginalised groups, and advocacy in policy and law reform.

This is ERCS's response to the UK Government's Department for Energy Security and Net Zero 'Electricity Infrastructure Consenting in Scotland: Proposals for reforming the consenting processes in Scotland under the Electricity Act 1989' consultation.

We have provided legal advice to individuals and community groups in relation to electricity infrastructure projects in Scotland where consent has either been sought or granted.

ERCS broadly supports the development of renewable electricity infrastructure to facilitate the transition to a low carbon society. We also recognise that some developments have significant impacts on communities and the environment. Members of the public must be able to access justice to challenge unlawful decisions in order to uphold the rule of law and maintain public confidence in the consenting process.

This response addresses the proposals to introduce pre-application consultation requirements and reduce the time limits for taking legal challenges against onshore consenting decisions. In summary, our position on these proposals is as follows:

- We support the proposal to introduce pre-application requirements. However, the proposed duty to consult is unlikely to lead to meaningful consultation and should be strengthened.

- We oppose the proposal to reduce the time limits for taking legal challenges for several reasons including that it will severely restrict access to justice and the case for change is flawed.

2. Pre-application requirements

We support the proposal to introduce pre-application requirements with qualification.

We agree that a multistage consultation process may be appropriate for some network projects, and we support the proposal for an 'acceptance stage' for applications.

The proposed 'duty to consult' is not sufficiently robust to ensure that communities affected by electricity infrastructure developments will have the opportunity to participate in decision-making at an early stage.

The proposed duty to consult will require that developers:

- consult with planning authorities and community councils;
- prepare a 'statement of community consultation' in advance which sets out how any proposed public consultation will be carried out;
- hold two engagement events for members of the public where they can examine preliminary information, engage with the applicants and make comments on the proposals; and
- submit a pre-application consultation report.

The proposed duty to consult does not require applicants to consider the views of members of the public which are expressed during the consultation – or to reflect them in the application. This risks creating a tokenistic and tick-box process.

In its current form, the duty to consult is unlikely to lead to meaningful consultation.

Without any obligation to consider or reflect the view of those expressed during the consultation this proposal may leave affected communities feeling more frustrated than the status quo.

For pre-application consultation to be meaningful, we recommend that developers are required to:

- have regard to the views expressed during the consultation;
- clearly demonstrate how the views of those consulted have influenced their application; and
- to submit all consultation correspondence received along with their application.

3. Statutory appeals and judicial proceedings

The UK and Scottish Governments propose to introduce a statutory right of appeal for 'persons aggrieved' against onshore consenting decisions.

This statutory right of appeal would replace recourse to judicial review.

The main consequence of this change would be a reduction in the time limit for starting legal action against onshore consenting decisions.

At present, those decisions are challenged via judicial review, which must be started within 3 months of the date of an onshore consent decision. If the proposals are implemented, the time limit for starting legal action would be reduced to within 6 weeks of the date of a decision.

The UK and Scottish Governments are proposing to reduce the time limits for legal challenges against onshore consent decisions by more than 50%.

One of the reasons given for this proposed change is the inconsistency between the time limits for raising challenges against onshore and offshore consents (for the latter it is currently six weeks within the date of the consent decision).

The other means of resolving this inconsistency would be to revoke the statutory appeal provisions in relation to offshore consents (and thereby revert to judicial review). That option was not discussed in the consultation document.

We oppose the proposal to reduce the time limits for taking legal challenges against onshore electricity infrastructure consent decisions for several reasons:

- It will severely restrict access to justice;
- The case for change is flawed;
- The proposal is likely to have limited impact on reducing delays; and
- The proposal may lead to the inefficient use of judicial resources.

3.1 A six-week time limit will severely restrict access to justice

This proposal will severely limit the rights of members of the public to access justice in environmental matters.

Our view is that most civil society organisations and members of the public will struggle to meet a six-week time limit for initiating legal challenges against onshore electricity consents.

The consultation document fails to recognise the significant impact it will have on access to justice.

An individual considering a challenge against electricity consents must generally take several steps before going to court.

They must first be aware of a consent decision. In our experience, those affected by onshore electricity consents are not always aware of decisions timeously. A six-week time limit may be insufficient for those affected to identify that consent has been granted.

They will then need to obtain legal advice on whether there is any basis for a legal challenge and the process and practicalities of going to court.

Having obtained advice, if they wish to go to court, they will need to secure adequate funding and instruct legal representatives to prepare and lodge the papers timeously.

Each of these steps takes time. The introduction of a six-week time limit will make it very difficult for most members of the public to challenge onshore electricity consent decisions.

Further, the significant costs of litigation for those challenging onshore consents are not recognised in the consultation. They are a consideration which must be taken into account in the context of this proposal.

Legal challenges such as these which are heard in the Court of Session are unaffordable for most members of the public. Access to justice is already highly restricted in this area. Reducing time limits will create an additional barrier to accessing justice. Reducing time limits will make it even more difficult for members of the public to make suitable funding arrangements to support a legal challenge.

3.2 The case for change is flawed

The consultation document contains several questionable claims to support the case for reducing the time limit to six weeks.

At page 32 of the consultation document it is stated that:

Available data shows that, where challenges were brought against section 36 consents for onshore wind in Scotland using the Judicial Review process, the majority were lodged after 90 days. The current 3-month time limit for initiating a challenge delays the development of infrastructure. A 6-week timescale and statutory appeal is allowed for challenging planning appeal decisions in the Inner House of the Court of Session in Scotland under Section 239 of the Town and Country Planning (Scotland) Act 1997. There have been 30 such challenges since 2020 and all have been lodged within 6 weeks.

A 6-week period for challenging consenting decisions under the Electricity Act 1989 in Scotland would allow for sufficient time to initiate a challenge and would not disproportionately delay infrastructure development…

The paragraphs quoted above make two factual claims which support the proposal to reduce the time limit to six weeks (the three-month judicial review time limit causes delays and a six-week time limit will allow sufficient time to initiate challenges). Both claims are problematic for several reasons.

First, we are concerned by the absence of evidence provided to support the claims made in favour of the introduction of a six-week time limit. The 'available data' which are referred to in the above paragraphs has not been published.

Similarly, the '30 such challenges' referred to in the above paragraphs are not identified.

No case citations are provided to support any of the factual claims made in the above quotation.

This evidence should have been made available in order for this proposal to be properly considered by consultees. Without this evidence consultees are unable to scrutinise the factual claims made in support of the reduction of the time limit.

Second, the consultation document concludes that the introduction of a six-week time limit "would allow for sufficient time to initiate a challenge…". We disagree with this highly dubious conclusion. This conclusion is not supported by any reasoning or evidence.

As explained above, our view is that most civil society organisations and members of the public will struggle to meet a six-week time limit for initiating legal challenges against onshore electricity consents.

Third, the consultation document contains no analysis of the cases referred to in the paragraphs quoted above.

There is no consideration of the types of litigants in the cases referred to – for example, whether most of those taking legal action are electricity infrastructure developers challenging the refusal of consents. There is no consideration of whether any groups are underrepresented in those cases. No attempt is made in the consultation document to ask what impact a six-week time limit has had on access to justice in planning litigation – or in relation to litigation concerning offshore electricity infrastructure consenting decisions. There is no reflection on the impact of a six-week time limit on access to justice relative to the judicial review time limit.

Analysis of these matters is critical to properly understand the impact that a six-week time limit will have on access to justice.

Fourth, it appears that the purpose of the claim that there have been 30 challenges lodged within 6 weeks in planning litigation since 2020 is to infer that the six-week limit provides sufficient time to start a legal challenge.

Assuming the number is correct, 30 challenges over a five-year period is weak evidence to support the claim that a six-week time limit allows sufficient time to time to start a legal challenge. Six cases per year in the context of a planning system where the latest annual planning applications statistics show 22,565 local development planning applications across Scotland in 2023/24[1] is not indicative of a system which facilitates access to justice.

Fifth, we are concerned by the inconsistency between the claims that, in judicial review challenges against onshore electricity consents, "the majority were lodged after 90 days. The current 3-month time limit for initiating a challenge delays the development of infrastructure". Those two sentences do not sit well together and raise questions over the data which supports them.

Section 27A(1)(b) of the Court of Session Act 1988 gives the Court of Session discretion to extend the three-month judicial review time limit to "such longer period as the Court considers equitable having regard to all the circumstances". However, in practice, the three-month time limit has been observed strictly by the Court and there have been few exceptions granted to the standard three-month time limit.

The three-month time limit was introduced in Scotland via Section 89 of the Courts Reform (Scotland) Act 2014. Prior to the entry of that provision into force on 22 September 2015, there was no statutory time limit in Scotland for judicial review. The rule which applied before that date was that a petition for judicial review had to be brought without 'mora, taciturny and acquiescence'.

We are concerned that the claim made in the consultation that the majority of judicial review challenges were lodged after 90 days may be based on data which includes judicial review petitions lodged prior to 22 September 2015 – and therefore uses cases which were subject to a different time limit to support the argument that the current three-month time limit causes delays beyond 90 days.

[1] Scottish Government, 'Planning Applications Statistics 2023/2024: Annual and Quarterly (October 2023 to March 2024)' (2024), p4.

The use of any such cases in that way would significantly undermine any claims about the effects of the current judicial review time limit. Any petitions lodged prior to 22 September 2015 are irrelevant when considering the effects of the current statutory time limit.

3.3 Limited impact of the proposal on reducing delays

One of the justifications given in the consultation document for reducing the time limit to six weeks is to avoid delays to the development of infrastructure. The document explains that a shorter period for bringing a challenge would reduce the time of uncertainty that a challenge will be brought, and the consequences for a project being paused.

Our view is that any reduction in delays to the development of infrastructure would be limited. The consultation document states that processing consents can take up to four years.[2] In the context of a lengthy process, the reduction of time limits from three months to six weeks would not have a significant impact on reducing delays.

3.4 Inefficient use of judicial resources

The proposals in this consultation are made with a view to making decisions and processing applications more efficiently. The proposal to have legal challenges against onshore consents heard by statutory appeal in the Inner House of the Court of Session could result in an inefficient use of judicial resources.

Cases heard in the Inner House are normally heard by three judges, whereas those heard in the Outer House are normally heard by a single judge.

If the proposal is implemented and a similar number of cases are challenged (as the consultation document appears to suggest will happen), then the first stage of legal challenges against onshore consents will require three times the judicial resources relative to the status quo.

This proposal could impose a substantial burden on the judicial resources of the Court of Session. This implication has not been considered.

[2] Page 2.