July 2015

Briefing

# The Right to Participate

Communities have a right to be heard in decision-making. These rights are in law, and have come from international Conventions as well as Parliament.

The Aarhus Convention [1], adopted in Aarhus, Denmark in 1998 is a genuinely radical attempt to secure people's rights in relation to environmental decision-making. It recognises that "*adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself*" and "*that every person has the right to live in an environment adequate to his or her health and well-being, an the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations*".

It sets out details on access to information – the right to know; public participation – the right to participate; and access to justice – the right to challenge.These rights are enshrined in the UK in Freedom of Information law, in planning law, and in judicial review and legal case law, and come mainly from European Union law.

**Access to information**

The 'right to know' laws that came into effect in January 2005 give us rights to have access to information held by public authorities. However, in most cases the system requires public authorities to make a decision about whether the public interest in secrecy outweighs the public interest in disclosing the information requested (although after, notionally, applying a presumption in favour of disclosure). Many public authorities find that to be extremely culturally challenging - the culture of secrecy is long standing and very strong – with the result that important requests for information are refused when they should not be. Such refusals then spend several years working their way through the appeals system until information is ultimately ordered to be released. In many contexts, particularly the environmental context, time is of the essence in terms of access to information.

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**Planning and the right to participate in environmental decision making**

The land-use planning system encapsulates one of the most important rights to participate in environmental decision-making in this country - by providing a right to object and be heard in a planning inquiry on a local plan [2] [3]. Land-use planning shapes the way we live and the way that the UK looks now. It shapes the future of our streets and countryside. Decisions around what happens where and how should be based in the planning system, which is a public system, rather than being solely up to the person who owns the land (in effect a private interest). Our opportunity to participate - for instance on planning applications provides us with the ability to comment on all sorts

of place-shaping policies – housing, transport, green space, transport, and energy. But the planning system is being stripped away by the Government, risking our rights to participate.

**Supreme court ruling and consultation**

Public bodies and Government departments may be subject to duties to consult on their proposals, eg: whether to take a decision in particular case or adopt a policy or some guidance. Since 1985, what 'fair consultation' looks like is set out in the 'Sedley' or 'Gunning' principles and afterwards approved by other court cases. These are that consultation must, in order to be considered fair: "*take place when the proposal is still at a formative stage; that sufficient reasons for the proposal be put forward to allow for intelligent consideration and response; that adequate time be given for that consideration and response; and that responses be conscientiously taken into account*" [4].

Last year, the Supreme Court went a step further in a council tax case, first it appears by approving the 'Gunning principles' for the first time at this level, and extending the interpretation of fairness to include consultation on alternatives. Lord Wilson in his leading judgement [5] said that:

"*Those whom Haringey were primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey's proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England) Haringey had concluded that they were unacceptable".*

He went on to say:

"*Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options*."

The Court therefore found that because the options before the council were not properly communicated to the affected residents as part of the consultation, who were also the most disadvantaged in the Borough, this rendered the consultation unlawful because unfair [6].

In practice therefore, there may be more consultation cases where other options must be set out as well as the preferred option, and the reasons for rejecting the alternatives. The duty to consult on options is contested in English law, thus whilst is welcome that the Haringey case was decided in favour of the claimant, it is worth bearing in mind that typically, this argument is difficult to win in the English courts.

This is also the approach of the European Directive on Strategic Environmental Assessment, which applies to plans (for instance Local Plans) which requires the authority to look at reasonable alternative options.

**Access to justice**

The UK is required by the Aarhus Convention to put in place access to justice provisions for environmental matters that are "fair, equitable, timely and not prohibitively expensive." Changes to protective cost orders (limiting the amount a community needs to pay to bring a case) has meant

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that these are now set at more affordable levels and are limited. However, the Government has recently changed the timings on planning judicial review to only six weeks for bringing a case (normally it is 3 months).

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**The way ahead**

Public participation has intrinsic value as a key civil right and is an element of a vibrant, open and a democracy that values people's input. Participation improves the quality and efficiency of decision-making by using local knowledge and avoiding unnecessary and costly conflict. This is particularly important in planning decisions which have to mediate a range of competing interests and aspirations.

There are a number of challenges to public participation - particularly the culture of public authorities, people and communities being seen unfairly as causes of delay. And there is also the confusion between 'involving' and 'consulting' - involving is a two-way conversation, whereas consultation tends to be 'one-way'. The Government is busily removing planning applications - one of the main forms of public consultation and democratic accountability on development by proposing zones for development, where the developer decides.

We need to think about public participation as devolving power and strengthening democracy - communities have to have a stake in the process which cannot be taken away on a whim. We also need to be honest about what the options are - we need realistic expectations of what we can achieve. It's also not about giving powerful vested interests more of a say, but those who will be affected. We need a sense of shared responsibility and honesty, so that we can do what is best for the community. But there are barriers to being involved - cost, time, and the problem of not being listened to.

Resolving the challenges that surround people's role in making decisions requires action at two levels. We need more devolution of power to local level, because this is where people can most easily be involved. This means protecting and strengthening laws around the planning system, information and conusltation, reversing the current bonfire of public participation opportunities and norms. We need instead better laws and policies to strengthen people's involvement in decision-making that affects them, which will then strengthen democracy.

## References

[1] Aarhus Convention www.unece.org/env/pp/welcome.html

[2] Planning Practice Guidance (England only) planningguidance.planningportal.gov.uk

[3] Legislation www.legislation.gov.uk (Town and Country Planning Act 1990, Planning and Compulsory Purchase Act 2004, Planning Act 2008, Town and Country Planning Development Management Order 2010, Freedom of Information Act 2000, Environmental Information Regulations 2004)

[4] UK Constitutional Law Association http://ukconstitutionallaw.org/2015/03/16/richard-clayton-qc-fairness-consultation-and-the-supreme-court-there-is-sometimes-an-alternative/

[5] Moseley, R (on the application of) v London Borough of Haringey [2014] UKSC 56 (29 October 2014) http://www.bailii.org/uk/cases/UKSC/2014/56.html

[6] Supreme Court endorses basic requirements of a “fair” consultation exercise for the first time http://www.out-law.com/en/articles/2014/november/supreme-court-endorses-basic-requirements-of-a-fair-consultation-exercise-for-the-first-time/

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