



Environmental Rights Centre for Scotland

Why Scotland needs an environmental court or tribunal

October 2021



Why Scotland needs an environmental court or tribunal

Ben Christman, October 2021¹

Contents

Summary	3
1. Introduction.....	5
1.1 Purpose and structure of this report	5
1.2 Background.....	5
1.3 Forthcoming Scottish ECT consultation	6
2. Why other countries establish ECTs	7
3. Why Scotland needs an ECT	8
3.1 The costs of environmental litigation	9
3.2 Merits review in environmental litigation	13
3.3 The fragmentation of environmental disputes	15
3.4 Judicial specialisation/expertise	17
4. The arguments against an ECT	20
4.1 Certain cases are better dealt with in local sheriff courts	20
4.2 An ECT is not required for compliance with the Aarhus Convention	21
4.3 Not enough cases to justify the costs of an ECT.....	22
4.4 An ECT could increase litigation costs.....	24
5. What kind of ECT does Scotland need?	25
5.1 The form of an ECT	25
5.2 Essential design features for an ECT	26
6. Conclusion	27

¹ In-house solicitor, Environmental Rights Centre for Scotland (email - bchristman@ercs.scot). The author is grateful to his ERCS colleagues, Lloyd Austin, Colin Reid, Crispin Agnew, Mary Church, Campbell Gemmell and Alison McNab for their helpful comments on an earlier draft. Any errors in this report are the author's own.



Why Scotland needs an environmental court or tribunal

Summary

- The Scottish Government is required to consult on the establishment of an environmental court, no later than six months after new watchdog Environmental Standards Scotland publishes its first strategy. This consultation is likely to take place in late 2022 or early 2023, creating an important opportunity for reassessing how environmental disputes are dealt with in Scotland.
- This report sets out the case for establishing an environmental court or tribunal (ECT) in Scotland. It discusses the four main reasons why an ECT is needed:
 - Environmental litigation is unaffordable – a situation which is in contravention of the Aarhus Convention. An ECT could be designed to ensure litigation is affordable and to improve access to justice.
 - Certain types of environmental litigation do not allow the courts to consider whether the substance of a law has been violated. This is the subject of an outstanding ‘communication’ being considered by the Aarhus Convention Compliance Committee and it is questionable whether this situation is compliant with the Aarhus Convention. An ECT could be given the power to carry out merits review.
 - Environmental litigation is carried out in several different courts and tribunals in Scotland, resulting in a system which is fragmented and inefficient. A single ECT could achieve efficiency benefits by reducing the risk of having multiple legal proceedings arising out of the same environmental dispute by having multiple legal issues heard in the same forum, providing administrative costs savings and increasing convenience for the parties.
 - Effectively resolving environmental disputes requires legal and scientific expertise. Judges in Scotland may not be exposed to environmental disputes on a regular enough basis to allow them to develop a specialism in this area. An ECT could appoint technical or scientific members to sit alongside judges – and would allow for judges to develop specialist expertise.
- Some of the arguments against establishing an ECT in Scotland are discussed. An ECT with a comprehensive environmental jurisdiction would likely have many times the annual caseload of some of Scotland’s existing courts and tribunals - more than enough cases to justify its setup and running costs. Any fears that an ECT would inappropriately centralise such disputes can be addressed by using hearing venues across Scotland. There is little evidence to support the concern that an ECT might increase litigation costs. Establishing an ECT could be a comprehensive means of achieving compliance with the Aarhus Convention.



- This report also explores the ways in which an ECT could be established. The main options are to establish a new court, establish a new tribunal within the current system of Scottish tribunals, or to modify an existing institution (for example, by expanding the jurisdiction of the Scottish Land Court).
- In conclusion, this report calls for an ECT which would be a court or tribunal of first instance. If the ECT is a court, then there should be provision for internal appeals. If the ECT is a tribunal, appeals could be made to the Upper Tribunal for Scotland.
- It argues that an ECT should be designed to ensure that it has certain features, including that it should have:
 - A clear statement of institutional purpose to promote access to justice, democracy, the rule of law and the human right to a clean and healthy environment.
 - The ability to appoint both legal and expert members with relevant scientific and technical expertise.
 - A comprehensive environmental jurisdiction.
 - Powers to set its own rules and procedures.



1. Introduction

1.1 Purpose and structure of this report

This report sets out the case for establishing an environmental court or tribunal (ECT). It reviews the debate on whether to establish an ECT in Scotland, and addresses some of the concerns which have previously been expressed about doing so.

It first explains the background to the debate in Scotland and the context in which this now takes place, with the Scottish Government required by law to consult on this matter in the near future. Second, it discusses why so many other countries have decided to establish their own ECTs. The reasons why Scotland is in particular need of an ECT are explored in section three. Section four scrutinises and responds to the reasons given in the last consultation exercise for not establishing an ECT. The report concludes with a review of the various forms that an ECT could take, and outlines the key features which the ECT should adopt.

1.2 Background

An ECT refers to a specialised forum for the resolution of disputes relating to the environment, natural resources and land use. The question of whether to create an ECT has been discussed in Scotland since at least the 1990s.²

Around that date, the Rio Declaration recognised the importance of public participation in environmental issues, and States agreed to provide “effective access to judicial and administrative proceedings”.³ This was further elaborated in the Aarhus Convention (signed in 1998). The Convention recognised the human right to “to live in an environment adequate to his or her health and well-being” - and that in order to achieve this there was a need for access to justice to be guaranteed and for assistance to be provided to citizens to exercise their rights.⁴

² See Jeremy Rowan-Robinson, ‘Environmental Protection – The Case for a New Dispute Resolution Procedure’ 1993 JLSS 5; Holyrood Magazine, ‘Lord Advocate lends backing to environmental court’ (5 December 2014), available at https://www.holyrood.com/news/view,lord-advocate-lends-backing-to-environmental-court_14003.htm; Frances McCartney, ‘Litigation over the environment: an opportunity for change’ (Friends of the Earth Scotland, 2015); Crispin Agnew, ‘An Environmental Court for Scotland?’ 178 (2016) SPEL 133-135 and Campbell Gemmell, ‘Environmental governance beyond 2019 and the case for a Scottish environment court’ 196 (2019) SPEL 126-127.

³ UN General Assembly, ‘Rio Declaration on Environment and Development’ (1992) A/CONF.151/26 (Vol. I), Principle 10. This is echoed more recently in the UN Sustainable Development Goals, Goal 16.

⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. done at Aarhus, Denmark, on 25 June 1998, Recitals and Article 1.



Many countries have established ECTs. Two studies by George and Catherine Pring found a recent global “explosion” of ECTs.⁵ In 2009, there were over 350 ECTs in 41 different countries, this rose to 1,200 in 44 countries in 2016 and there were nearly 1500 in 2018.⁶

The [Land and Environment Court of New South Wales](#) was the world’s first ECT. It opened in 1980 as a “one-stop shop” for environmental, planning and land disputes, designed to rationalise the hearing of such cases which had been previously dealt with in a plethora of different tribunals and courts.⁷ The Court has a broad environmental jurisdiction which covers merits review,⁸ the enforcement of civil and criminal environmental laws, and an appellate function. A combination of its jurisdiction and the appointment of suitably qualified judges sitting alongside technical experts was intended to provide the specialisation which was previously lacking.

1.3 Forthcoming Scottish ECT consultation

The Scottish Government last considered the matter of whether to create an ECT in 2016-2017.⁹ The 2016 ‘Developments in environmental justice in Scotland’ consultation asked if there should be a specialist forum to hear environmental cases.¹⁰ The majority of respondents to the consultation were in favour, but the Government decided against establishing an ECT at that time as set out in its 2017 response.¹¹

The reasons given in the Scottish Government’s response included that certain cases are better dealt with in local sheriff courts, that there would not be enough cases to justify an ECT, that an ECT is not needed for Scotland to comply with the Aarhus Convention, that tribunals were at that time in the process of being devolved and that an ECT could increase litigation costs. These reasons are discussed in detail at section 4. The arguments against an ECT.

The constitutional upheaval caused by Brexit has reinvigorated the debate on whether Scotland needs an ECT (and on the Scottish system of environmental governance more broadly). As a consequence, The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 requires the Scottish Government to publish a report and carry out a consultation on whether

⁵ George and Catherine Pring, ‘Greening Justice: Creating and Improving Environmental Courts and Tribunals’ (The Access Initiative, 2009) and *Environmental Courts & Tribunals: A Guide for Policy Makers* (UNEP, 2016), p1.

⁶ Don Smith, *Environmental courts and tribunals: changing environmental and natural resources law around the globe* (2018) 36(2) *Journal of Energy & Natural Resources Law* 137, p138.

⁷ Brian Preston, ‘Operating an environment court: The experience of the Land and Environment Court of New South Wales’ (2008) 25 *EPLJ* 385, p387.

⁸ Merits review is discussed at 3.2 Merits review in environmental litigation below.

⁹ It was also considered in 2006, see Scottish Executive, ‘Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland’ (Scottish Executive, 2006).

¹⁰ Scottish Government, ‘Developments in environmental justice in Scotland: A consultation’ (2016).

¹¹ Scottish Government, ‘Developments in environmental justice in Scotland: Consultation analysis and Scottish Government response’ (2017). For a critique of the consultation, see Ben Christman, ‘(Non)-developments in environmental justice in Scotland’ (2018) *Environmental Law Review* 20(2) 69.



establishing an environmental court would enhance access to justice in environmental matters and environmental governance following Brexit.¹²

The Scottish Government will have to consult on whether to establish an environmental court in Scotland within a maximum of 18 months after Environmental Standards Scotland (ESS - Scotland's new environmental oversight body) is established.¹³ The consultation is likely to take place in early 2023. This is a significant opportunity for rethinking how environmental disputes are dealt with and to address the longstanding problem of the lack of access to environmental justice in Scotland.

2. Why other countries establish ECTs

The forthcoming ECT consultation referred to above could lead to Scotland following the example of numerous other countries which have established their own ECTs. There are many explanations for the 'explosion' in the establishment of ECTs which has been seen across the world. The Prings have given the following reasons why ECTs are so popular:¹⁴

- **Expertise.** Generalist judges tend to have limited experience with the complex laws, scientific substance and the principles that make up environmental law - and in the use of highly technical expert evidence and witnesses that are often seen in environmental disputes. ECTs give judges the opportunity to develop expertise and can provide on-going training. Some ECTs also allow for the appointment of members with relevant scientific and technical expertise who sit alongside legal members.
- **Efficiency.** Moving environmental cases from generalist courts can provide the opportunity for them to be expedited where needed and generally dealt with more efficiently.
- **Visibility/commitment.** Creating an ECT can show a commitment to environmental protection and environmental justice.
- **Litigation costs and access to justice.** The costs of going to court can be a significant barrier to justice. ECTs can adopt rules and procedures that reduce costs.
- **Uniformity/predictability.** Decision-making by specialist judges can be more consistent and offers greater predictability. Predictability can benefit all of those with an interest in environmental decision-making (e.g. government, business and environmental interests).

¹² UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, Section 41.

¹³ See [Environmental Standards Scotland's website here](#). UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, Section 41(4).

¹⁴ 'Greening Justice', pp14-17. See also the discussion at 3.4.1 below on the special nature of environmental law and adjudication. It is accepted that there are many arguments against establishing an ECT, but these are capable of being overcome (see e.g. Greening Justice, pp.17-18). Some of the Scotland-specific reasons against establishing an ECT are discussed at section 4. The arguments against an ECT below.



- **Government accountability.** An ECT can provide robust oversight of the executive branch of government, and state actors may be more likely to act in a lawful manner where they understand that unlawful acts could be overseen by an ECT.
- **Creativity.** ECTs can adopt more flexible procedural rules to make court proceedings less formal and intimidating. These innovations can reduce the costs of litigation and improve public participation.
- **Alternative dispute resolution and problem solving (ADR).** ECTs can adopt ADR processes such as mediation and conciliation to create innovative solutions to resolve disputes.
- **Issue integration.** ECTs can take a more integrated approach to dealing with environmental laws, in a manner that general courts cannot. An ECT can be given the powers to review all of the permits, licences and notices that a development may need (e.g. planning consents, water and waste permits, EIAs, etc.). In the absence of an ECT, these decisions might be dealt with in different fora and lead to different outcomes.
- **Remedy integration.** ECTs can combine civil, administrative and criminal jurisdictions, which can allow judges to select the most effective remedy for a case in ways that general courts cannot.
- **Public confidence.** An ECT which is more visible, accessible and more easily monitored can increase public confidence.

The motivations for establishing ECTs in other jurisdictions are also relevant to the domestic debate. There are also a number of Scotland-specific reasons that strengthen the case for the establishment of an ECT.

3. Why Scotland needs an ECT

This section discusses why an ECT is needed in Scotland to improve access to justice. The current systems for resolving environmental disputes in Scotland are problematic for four main reasons: the costs of environmental litigation; the courts in judicial review cases and statutory planning appeals do not consider the merits of cases; the system of resolving environmental disputes is fragmented; and judges in Scotland are infrequently exposed to environmental litigation, giving them little opportunity to develop the expertise which is needed when environmental matters are taken to court.

A carefully designed ECT could allow for the resolution of environmental disputes in a more affordable manner, could change the way the courts assess the merits of cases, and having environmental disputes heard in one forum would rationalise the existing systems and also allow judges to develop their expertise.



3.1 The costs of environmental litigation

3.1.1 Costs and access to justice

The primary reason for establishing an ECT in Scotland is the prohibitively expensive nature of environmental litigation. It is impossible (or at least financially hazardous) for most members of the public and civil society organisations to take legal action to protect the environment. This is a systemic, longstanding problem.¹⁵

It is seen most starkly in judicial review proceedings.¹⁶ A person initiating a petition for judicial review faces paying for:

- Their own legal costs (which can be particularly expensive as judicial review requires the involvement of both counsel (advocates or solicitor advocates) and solicitors);¹⁷
- Court fees. The fee for a petition is £319. The fee for a hearing before a bench of one or two judges is £213 for every 30 minutes of a hearing (or part thereof);¹⁸
- The expenses of their opponent if they lose. There may also be liability for the expenses of any intervening third party litigants - such as developers.

Lord Gill explained the normal expenses rule in *Fife Council v Uprichard* as one where litigants “enter litigation with their eyes open... if they should fail, the normal consequence will be that they will be liable in expenses”.¹⁹ The consequence of this rule is that a person whose judicial review fails can face a liability of tens or hundreds of thousands of pounds.

‘Protective expenses orders’ (PEOs) have been developed in Scotland to smooth the edges of the ‘loser pays rule’. PEOs cap a litigant’s liability to their opponent if they are unsuccessful, and are designed to lessen the fear of open-ended liability for expenses.

There have been several iterations of PEO rules in Scotland. The current rules were created in 2018.²⁰ A person raising judicial review proceedings can apply for a PEO at the start of their case. The application is to be made in writing and must include certain prescribed information. If the

¹⁵ Mary Church, ‘Tipping the Scales: Complying with the Aarhus Convention on Access to Environmental Justice’ (Friends of the Earth Scotland, 2011).

¹⁶ Judicial review is a type of legal action which is raised in the Court of Session to challenge the legality of certain acts and omissions of public authorities. For a helpful overview, see Lorna Drummond, Frances McCartney and Anna Poole, *A Practical Guide to Public Law Litigation in Scotland* (W Green, 2020), pp 1-5.

¹⁷ A self-represented person or ‘litigant in person’ can pursue judicial review proceedings without legal representation but given the highly formalised process, the legal complexity involved, the risk of liability for adverse expenses and the likely imbalance in arms with respect to their opponent(s) this is likely to be unsuitable.

¹⁸ The Court of Session etc. Fees Order 2018 (SSI 2018/83), Schedule 3. The hearing fee does not apply to the first 30 minutes of the hearing of a motion. Discussed in Ben Christman and Malcolm Combe, ‘Funding Civil Justice in Scotland: Full Cost Recovery, at What Cost to Justice?’ (2020) 24(1) *Edinburgh Law Review* 49.

¹⁹ [2011] CSIH 77, para 14.

²⁰ Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018 (SSI 2018/348).



judge decides that the proceedings would be ‘prohibitively expensive’ for the person applying for the PEO, (s)he can award a PEO.

PEOs must contain two caps. One limits the applicant’s liability in expenses to the respondent to £5,000, and the other limits the respondent’s liability in expenses to the applicant to the sum of £30,000. These are the default PEO caps – they may be raised or lowered ‘on cause shown’.

The PEO rules are ineffective in providing access to justice. They are not automatically granted and some litigants have had difficulty in persuading the courts to grant a PEO.²¹ Where a PEO is granted, they address the uncertainty of litigation costs, but do little to improve overall affordability. Liability for £5,000 is unaffordable for many who are considering legal action in Scotland.

More fundamentally however, a PEO does not make a PEO holder’s own legal costs any more affordable. Legal representation for judicial review can be highly costly, as demonstrated in several cases:

- In *McGinty*, the petitioner’s expenses were estimated as being ‘in the region of £80,000’;²²
- In *Sustainable Shetland*, proceedings in the Outer House cost £92,000 (on the basis of counsel and instructing solicitors charging restricted fees);²³
- In *The John Muir Trust*, the expenses for two PEO hearings and hearings in the Inner and Outer Houses were ‘just under £150,000’.²⁴

This would be less of a problem if legal aid was available in environmental litigation. Unfortunately, there are significant barriers to accessing legal aid in environmental matters.²⁵ Civil legal aid is available only to ‘persons’. This rule makes environmental NGOs and incorporated or unincorporated community groups ineligible.²⁶

²¹ See e.g. Helen McDade, ‘Are Protective Expenses Orders delivering access to justice in Scotland?’ (2017) 100 UKELA Elaw 22.

²² *McGinty Petitioner* [2010] CSOH 5, para 5.

²³ Sustainable Shetland, ‘Comments to DEFRA on the Aarhus National Implementation Report by Sustainable Shetland principally in relation to Article 9(4) and paras 106-117 of the Draft Report’ (2013), available at <http://www.sustainableshetland.org/docs/aarhus-submission-25-10-13-final.pdf>.

²⁴ Helen McDade, ‘Are Protective Expenses Orders delivering access to justice in Scotland?’ (2017) 100 *Ukela elaw* 22, p 25.

²⁵ See Scottish Environment LINK, ‘Response to the Legal Aid Review’ (2017), available at <http://www.scotlink.org/public-documents/%E2%80%A2legal-aid-review-response-may/> and Frances McCartney, ‘Public interest and legal aid’ (2010) 37 *Scots Law Times* 201.

²⁶ See the Scottish Legal Aid Board’s guidance on this subject here - <https://www.slab.org.uk/guidance/applications-by-corporate-or-unincorporated-bodies-and-sole-traders/> and the definition of ‘person’ at S41 of the Legal Aid (Scotland) Act 1986.



Individuals applying for legal aid also face difficulties. The Civil Legal Aid (Scotland) Regulations 2002 limit any grant of legal aid where a person applying has a ‘joint interest’ in the matter with others.²⁷ In those circumstances, legal aid is not to be granted if the Scottish Legal Aid Board is satisfied that either a legal aid applicant would not be seriously prejudiced or it would be reasonable for the other persons concerned to pay the expenses being sought.

It is likely that in most environmental litigation there will be a number of individuals with similar concerns about the issue in dispute (e.g. in the case of a large development in a conservation area, or air pollution in a city). A person seeking to undertake environmental litigation is prone to have a ‘joint interest’ with others, because as Lord Hope pointed out in *Walton v Scottish Ministers*, “the quality of the natural environment is of legitimate concern to everyone”.²⁸

The problems discussed above have resulted in several findings that Scotland is non-compliant with the Aarhus Convention with respect to its requirements on access to environmental justice. In nine consecutive decisions of the Aarhus Convention Compliance Committee (ACCC) and the Meeting of the Parties, the Scottish civil justice system has been found to fail to meet the requirements of Articles 9(4), 9(5) and 3(1) of the Convention.²⁹

The first of those findings was made in 2014, and the most recent in July 2021. The main source of non-compliance is the failure to meet the Article 9(4) requirement, which broadly requires that access to environmental justice must be “not prohibitively expensive”.

The Scottish Government has not undertaken a holistic review of the barriers posed by the costs of environmental litigation at any point. At the time of writing, there is no plan to address the non-compliance which has been identified by the ACCC.

In summary, environmental litigation in the Court of Session is unaffordable. Some steps have been taken to implement the Aarhus Convention in Scotland’s requirements on access to justice, but

²⁷ Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494), Regulation 15.

²⁸ [2012] UKSC 44, para 152. It is understood that the Scottish Government plans to carry out legal aid reform in the near future.

²⁹ ACCC, ‘Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention’ (ECE/MP.PP/2014/23), Meeting of the Parties, ‘Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention’ (ECE/MP.PP/2014/2/Add.1), ACCC, ‘First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention’ (2015), ACCC, ‘Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention’ (2017), ACCC, ‘Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention’ (ECE/MP.PP/2017/46), Meeting of the Parties, ‘Decision VI/8k, Compliance by United Kingdom with its obligations under the Convention’ (ECE/MP.PP/2017/2/Add.1), ACCC, ‘First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention’ (2019), ACCC, ‘Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention’ (2020), ACCC, ‘Committee’s report to the Meeting of the Parties on decision VI/8k’ (Parts I & 2) (2021).



they have been inadequate. It is not only the risk of adverse liability for expenses which deters people from going to court over the environment, but the costs of environmental litigation as a whole (including the cost of legal representation).

3.1.2 How an ECT could reduce litigation costs

An ECT which was designed to ensure affordability could provide a comprehensive response to address the problems associated with the costs of environmental litigation.

In terms of court fees, an ECT which charged minor fees (or ideally none whatsoever) would make litigation more affordable. Similarly, removing the need for the involvement of counsel in litigation by default could improve affordability.

However, the most significant change that would make litigation more affordable would be to replace the 'loser pays rule' with a different approach to the allocation of legal expenses at the end of a case.

In most tribunals in Scotland, the general rule vis-à-vis expenses is that each party bears their own expenses at the end of a case (absent extenuating circumstances such as unreasonable behaviour by one of the parties).³⁰ In personal injury litigation in Scotland, the expenses rules have recently been changed to provide for 'qualified one way costs shifting' (QOCS) in favour of people raising personal injury claims.³¹ QOCS removes the risk that a pursuer may incur substantial liability for the defender's legal expenses if the claim is eventually unsuccessful (subject to certain exceptions). If an ECT was to introduce either, or some combination of both of these expenses rules, it could dramatically improve access to justice.

One of the often repeated arguments against reducing litigation costs is that it will 'open the floodgates' to litigation with little merit. Frances McCartney explained why this concern is unfounded:

*Taking legal action will always have a cost – time, money and effort. Even with the risk of an adverse award of expenses removed, litigation is likely still to be a stressful and unpleasant process. Few groups or persons are likely to actively seek litigation, and even larger NGOs will have pressures of competing resources.*³²

³⁰ E.g. The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328), Rule 40.

³¹ Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021 (SSI 2021/226).

³² F McCartney, 'Litigation over the environment: an opportunity for change' (Friends of the Earth Scotland, 2015), p 61. K Scott has also noted that the notion of, "the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom", in 'Standing in the Supreme Court - A Functional Analysis' 86 Harvard Law Review 645 (1973).



3.2 Merits review in environmental litigation

3.2.1 The absence of merits review in judicial review and statutory planning appeals

‘Merits review’ refers to a process where a person can challenge a decision, act or omission if the substance of the law has been violated (also referred to as ‘substantive legality’). Merits review is contrasted with ‘procedural review’ – which refers to a process where a person can challenge a decision, act or omission if procedures set out in law have been violated. Certain legal challenges can involve either merits review or procedural review grounds, or a mix of the two.

Article 9 of the Aarhus Convention requires Parties to ensure that members of the public have access to an independent review procedure to challenge the substantive and procedural legality of certain decisions, acts and omissions.³³ The scope of what members of the public should be able to have reviewed is broad. Article 9(3) includes, “acts and omissions by private persons and public authorities which contravene provisions of... national law relating to the environment”.³⁴

In Scotland, the main mechanism for challenging decisions relating to the environment is judicial review. The grounds for judicial review are well understood to not include full merits review. Lord Hope explained the role of judicial review vis-à-vis merits review in *West v Secretary of State for Scotland*:

*Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.*³⁵

The only review of the merits of a decision which the courts can engage in is to consider whether a decision was ‘*Wednesbury* unreasonable’.³⁶ The *Wednesbury* unreasonableness test is also referred to as irrationality, absurdity or perversity. It is a high very test to meet.³⁷ Sir Crispin Agnew has argued that the *Wednesbury* approach does not adequately protect the environment, because most decision makers may lack the expertise to make decisions relating to difficult environmental science - and the substance of their decisions effectively cannot be challenged.³⁸

³³ Articles 9(2) and 9(3). See Jonas Ebbesson et al, ‘The Aarhus Convention: an Implementation Guide’ (2nd Edition, UNECE, 2014), pp 193-199.

³⁴ Article 9(3).

³⁵ *West v Secretary of State for Scotland* 1992 SC 385, p 413.

³⁶ Derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

³⁷ Lorna Drummond, Frances McCartney and Anna Poole, *A Practical Guide to Public Law Litigation in Scotland* (W Green, 2020), pp 63-65.

³⁸ Crispin Agnew, ‘Does *Wednesbury* Protect the Environment?’ (2018) 104 UKELA elaw 26.



Similarly to judicial review, the statutory appeals process for challenging certain planning decisions in the Court of Session also does not allow for full merits review.³⁹ Neil Collar has commented that in general for a member of the public looking to challenge planning decisions in court, their right of challenge “only extends to the legality of the decision, and not its planning merits”.⁴⁰ He has also noted that members of the public “have no opportunity to challenge the planning merits of a grant of planning permission or the adoption of a development plan”.⁴¹

The ACCC has considered the UK’s arrangements for the provision of substantive review in two different communications relating to the UK. In communication ACCC/C/2008/33, although it declined to make a finding of non-compliance on this point, the Committee was “not convinced that the Party concerned... meets the standards for review required by the Convention as regards substantive legality”.⁴²

In ACCC/C/2013/90, the ACCC found that the failure by the High Court of Northern Ireland to undertake its own assessment of whether particular legal tests relating to an environmental impact assessment were adhered to, amounted to non-compliance with the Article 9(2) requirement to provide for a review of the substantive legality of those decisions.⁴³

The absence of merits review in Scotland (and across the UK more widely) is currently the subject of a ‘communication’ to the ACCC which was made in 2017.⁴⁴ The ACCC has not yet made findings on the question of whether there is provision for an adequate review of the substantive legality as required by Article 9.

In summary, it is questionable whether the absence of merits review in judicial review and in planning statutory appeals meets the requirements of the Aarhus Convention and this matter is currently under consideration by the ACCC.

3.2.2 How an ECT could include Merits review

An ECT could be given statutory powers to carry out merits review of acts and omissions by private persons and public authorities which contravene national environmental laws. An ECT could use

³⁹ See e.g. the comments of the Court of Session in *Sally Carroll v Scottish Borders Council* [2015] CSIH 73, at paragraph 54 that, “...the planning merits of this proposal, and issues of planning judgment, are not matters for this court... We are concerned with legal validity and procedural regularity, not planning judgment.”

⁴⁰ *Planning* (4th Edition, 2016), p 337.

⁴¹ *Planning* (4th Edition, 2016), p 339.

⁴² ACCC, ‘Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (ECE/MP.PP/C.1/2010/6/Add.3), paragraph 125.

⁴³ ACCC, ‘Findings and recommendations with regard to communication ACCC/C/2013/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland’ (advance unedited findings dated 26 July 2021), paragraphs 115-141.

⁴⁴ See communication ACCC/C/2017/156 United Kingdom. The background documentation for this communication is available at https://unece.org/env/pp/cc/accc.c.2017.156_united-kingdom.



both legal members and expert members with relevant scientific and technical expertise to enable it to review such matters.

An example of how this could work comes from the planning appeals system in Scotland. For national and major developments, a developer has a right of appeal to the Scottish Ministers in certain circumstances.⁴⁵ Appeals to the Scottish Ministers are handled by the Directorate for Planning and Environmental Appeals (DPEA). For certain local developments, a developer has a right of appeal to the ‘Local Review Body’ (LRB) in certain circumstances.⁴⁶ Appeals to the LRB and the DPEA are full merits reviews.⁴⁷ An ECT could take a similar approach to appeals to the LRB and DPEA.

3.3 The fragmentation of environmental disputes

3.3.1 Where environmental litigation takes place in Scotland

McCartney’s 2015 ‘Litigation over the environment’ report found that:

...the hearing of administrative appeals and planning and environmental matters is separated over a number of courts and tribunals in Scotland...The expansion of the various jurisdictions appears to have been done on a case-by-case basis, and without an overall strategy in mind. It is not clear why the jurisdictions have necessarily been assigned to each body.⁴⁸

This analysis remains applicable in 2021. The following is a non-exhaustive list of examples of the different fora where environmental litigation and litigation-type appeals are carried out in Scotland:

- The Court of Session hears petitions for judicial review in environmental and planning matters, and certain statutory appeals.⁴⁹

⁴⁵ Town and Country Planning (Scotland) Act 1997 (TCPA), Section 47.

⁴⁶ TCPA 1997, Section 43A(8)

⁴⁷ For the LRB’s approach, the Court of Session in *Sally Carroll v Scottish Borders Council* [2015] CSIH 73, noted at paragraph 55(6) that an LRB, “must approach the matter “de novo”... What is required is that the LRB should apply its collective mind afresh to the materials which were before the appointed person, together with any further materials or information properly before it. It is not merely considering whether the appointed person’s decision was reasonable in Wednesbury terms, but rather it is looking at the materials afresh”. TCPA 1997, Section 48(1), provides that the DPEA may deal with the appeal as if it was an application that had been made in the first instance.

⁴⁸ ‘Litigation over the environment: an opportunity for change’, p43.

⁴⁹ E.g. Section 238 of the Town and Country Planning (Scotland) Act 1997 provides for challenges to strategic development and local development plans (see more broadly the list of planning-related statutory appeals in Neil Collar, *Planning* (4th Edn, W Green, 2016), pp272-273)).



- Sheriff courts have broad criminal jurisdiction relating to the environment,⁵⁰ in addition to a civil jurisdiction which includes statutory nuisance litigation and land access rights appeals.⁵¹
- The Scottish Land Court hears appeals concerning deer control schemes, nature conservation, nitrate vulnerable zones and fixed monetary penalties issued by SEPA.⁵²
- The Department for Planning and Environmental Appeals has jurisdiction in planning appeals and various other environmental appeals (such as high hedge notification appeals, appeals against various licensing and permitting decisions made by SEPA and forestry-related appeals).⁵³
- The Lands Tribunal for Scotland has jurisdiction to hear claims relating to coal mining subsidence.⁵⁴
- The Scottish Information Commissioner has jurisdiction in appeals relating to the handling of environmental information requests.⁵⁵

The means of dealing with environmental disputes has developed in an ad hoc manner, resulting in a system which is fragmented, inefficient and appears irrational. McCartney concluded that, “Scotland has an incoherent system for determining environmental disputes”.⁵⁶ Practitioners and litigants are left with a confusing variety of institutional cultures and procedural rules to familiarise themselves with. Some of the above appeal regimes allow for appeals on the merits, whereas others allow only for appeals on questions of law.⁵⁷

3.3.2 How an ECT could rationalise environmental disputes

Paul Stein has explained that drawing together a fragmented system into one ECT jurisdiction can create many efficiency benefits.⁵⁸ An ECT can avoid the problems of having multiple legal proceedings arising out of the same environmental dispute by having multiple legal issues heard in

⁵⁰ For example, Wildlife and Countryside Act 1981, Sections 20-21. The Pollution Prevention and Control (Scotland) Regulations 2012, Regulation 67.

⁵¹ Environmental Protection Act 1990, Ss 80 and 82. Land Reform (Scotland) Act 2003, Sections 14 and 28.

⁵² Deer (Scotland) Act 1996, Section 9 and Schedule 2, paragraph 13. Nature Conservation (Scotland) Act 2004, Sections 18 and 34. Nitrate Vulnerable Zones (Scotland) Regulations 2008, Regulation 29. The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, Regulation 7.

⁵³ High Hedge (Scotland) Act 2013, S12. The Pollution Prevention and Control (Scotland) Regulations 2012, Regulation 58. The Water Environment (Controlled Activities) (Scotland) Regulations 2011, Regulation 50. The Felling (Scotland) Regulations 2019, Regulations 13-16.

⁵⁴ Coal Mining Subsidence Act 1991, Sections 6 and 40.

⁵⁵ The Environmental Information (Scotland) Regulations 2004, Regulation 17.

⁵⁶ ‘Litigation over the environment: an opportunity for change’, p 61.

⁵⁷ Appeals to the Department for Planning and Environmental Appeals allow for appeals on the merits, whereas judicial review does not. Discussed above at section 3.2 Merits review in environmental litigation

⁵⁸ Paul Stein, ‘A Specialist Environmental Court: An Australian Experience’, in *Public Interest Perspectives in Environmental Law* (Robinson & Dunkley eds., 1995).



the same forum, can provide greater convenience to the parties and a single, combined jurisdiction can provide administrative costs savings compared to having multiple fora.

Brian Preston has argued that rationalising environmental disputes can also improve the quality of decision-making.⁵⁹ Having a single ‘one-stop-shop’-type ECT which deals with environmental disputes can further increase the awareness of the government, business, members of the public and civil society of environmental law, policy and issues. In Preston’s view, this “...facilitates increased recourse to, and enforcement of, environmental law. This improves good governance, a critical element in achieving ecologically sustainable development.”⁶⁰

The current disjointed system does not serve the public interest. Drawing the above disparate jurisdictions into one rationalised ECT would allow for such disputes to be dealt with more efficiently and would create broader public benefits.

3.4 Judicial specialisation/expertise

3.4.1 How frequently do judges hear environmental cases?

Environmental law has several features which mark the field as distinct from other areas of law, and which create an argument that some form of specialist treatment is required in adjudication.

Ceri Warnock has explained that these distinct features include the dynamic nature of ecosystems, the unavoidable scientific uncertainty which is at the heart of such disputes, the need for courts to assess the risks of particular actions, the polycentric nature of environmental problems and the different types of impacts (e.g. physical, economic, socio-cultural) which can transcend traditional bi-party disputes.⁶¹ Similarly, McCartney noted that the interaction of international and European laws and principles and imbalances in resources between the parties often feature.⁶²

Environmental litigation requires judges who understand the complex web of national, regional and international laws and principles which make up environmental law (and their associated policies). Added to their legal complexity, some degree of scientific/technical literacy is needed in order to be able to effectively deal with the nature of environmental disputes, as is familiarity with the often

⁵⁹ Brian Preston, ‘Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study’, 29 *Pace Environmental Law Review* 396, p 425.

⁶⁰ *Ibid*, p425.

⁶¹ Ceri Warnock, *Environmental Courts and Tribunals: Powers Integrity and the Search for Legitimacy* (Hart, 2020).

⁶² ‘Litigation over the environment: an opportunity for change’, pp 10-11. Disputes involving environmental principles may increase in Scotland following the inclusion of certain environmental principles in Section 13 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, and the attendant duties in the Act for various public authorities to have due regard to them while exercising certain functions.



highly technical expert evidence that can be associated with such litigation.⁶³ For these reasons, generalist judges may be ill-suited to most environmental disputes.⁶⁴

As discussed in section 3.3, environmental disputes are heard in many different fora in Scotland. One of the outcomes of this is that judges in Scotland are rarely exposed to environmental cases and may be unable to develop the necessary expertise to deal with such cases efficiently and effectively.

Judicial review is an example of the infrequent exposure of judges to environmental litigation. 16 'environmental' judicial review petitions were initiated in the Court of Session over the past 10 years (for which the relevant statistics have been published), equating to 1.6 cases per year.⁶⁵ 24 'senators' currently serve as judges in the Outer House.⁶⁶

On the assumptions that (a) each environmental judicial review petition which has been initiated will result in a full hearing (cases can, and often settle before this stage) and (b) such cases are equally distributed amongst the senators; an Outer House judge can expect to hear an environmental judicial review case once every 15 years.⁶⁷

The infrequent exposure of judges to environmental litigation may present a problem at sheriff court level also. The Scottish Government has recognised this with respect to 'right to roam' cases. A recent consultation document explained that the current arrangements whereby such cases are heard in sheriff courts across Scotland, "mean that individual sheriffs are unlikely to gain extensive expertise in the determination of such case and there is, consequently, a risk of lack of consistency of approach".⁶⁸

The Scottish Government's view was echoed in the consultation response from Ramblers Scotland, which explained that:

It is our understanding that there have been very few cases relating to Part 1 of the Land Reform Act 2003 since it was passed with fewer than ten cases being decided, most between 2006-2009 and then two in more recent years... They took place in a range of sheriffdoms

⁶³ 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study', pp 425-426.

⁶⁴ See 'Greening Justice', p14 and p18 and 'Environmental Courts & Tribunals: A Guide for Policy Makers', p IX.

⁶⁵ Scottish Government, 'Civil Justice Statistics in Scotland 2019-20' (Scottish Government, 2021), p62. The term 'environmental' is not defined in this publication.

⁶⁶ See the list of senators here - <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice/supreme-courts-list>.

⁶⁷ If 'planning permission' judicial review petitions are included, then the frequency of senators' exposure to both environmental and planning permission judicial review cases is increased to once every ~2.7 years. There were 73 petitions for planning permission initiated over the same period - Scottish Government, 'Civil Justice Statistics in Scotland 2019-20' (Scottish Government, 2021), p62.

⁶⁸ Scottish Government, 'The Scottish Land Court and the Lands Tribunal for Scotland: A consultation on the future of the Land Court and the Lands Tribunal' (Scottish Government, 2020), paragraph 50.



*around the country and as a result there is little opportunity for individual sheriffs to gain understanding of, or expertise in, this legislation. As noted in the consultation document this lack of regular experience in this sphere of legislation can lead to the risk of an approach which lacks consistency.*⁶⁹

The benefits of judicial specialisation are recognised in many other areas of law in Scotland. Specialised courts and tribunals exist to deal with disputes relating to employment, social security, immigration and asylum, the welfare of children, land, tax, mental health, pensions, health and education, charity regulation, parking and bus lanes and housing. There is even a specialist court for applications for coats of arms.⁷⁰

Campbell Gemmell has described the concept of an ECT as, “neither a new nor a particularly radical or challenging idea”.⁷¹ His comment was made with reference to the popularity of ECTs worldwide, but seems particularly pertinent to Scotland in the context of the enthusiasm for specialisation seen in the Scottish justice system.

3.4.2 How an ECT could improve judicial specialisation/expertise

In keeping with Scotland’s other specialised fora, a Scottish ECT would allow for the development of useful expertise amongst its appointed judges. This could be enhanced by the ECT providing specialist continuing professional development to its judges, and the ECT could also appoint technical experts to sit alongside the judges (something which happens in other specialist fora in Scotland) to advise them and facilitate interdisciplinary decision-making.

More specialised judges could deal more efficiently with environmental disputes and reach decisions more quickly.⁷² A specialised Scottish ECT could result in costs savings to the parties to litigation and to the public expenditure more broadly.

⁶⁹ Ramblers Scotland, ‘Response to the consultation on the future of the Land Court and the Lands Tribunal’ (Ramblers Scotland, 2020), pp 1-2.

⁷⁰ Those courts and tribunals are: [The Employment Tribunal](#), [The First-tier Tribunal \(Social Entitlement Chamber\)](#), [The First Tier Tribunal for Scotland \(Social Security Chamber\)](#), [The First-tier Tribunal \(Immigration and Asylum\)](#), [Children’s Hearings Scotland](#), [The Scottish Land Court](#), [The Lands Tribunal for Scotland](#), [The First Tier Tribunal for Scotland Tax Chamber](#), [The Council Tax Reduction Review Panel](#), [The Mental Health Tribunal for Scotland](#), [The Pensions Appeal Tribunal Scotland](#), [The First Tier Tribunal for Scotland Health and Education Chamber](#), [The First Tier Tribunal for Scotland General Regulatory Chamber](#), [The First Tier Tribunal for Scotland \(Housing and Property Chamber\)](#) and the [Court of the Lord Lyon](#).

⁷¹ C Gemmell, ‘Environmental governance beyond 2019 and the case for a Scottish environment court’, op cit, and ‘Environmental Governance: effective approaches for Scotland post-Brexit’ (Scottish Environment LINK, 2019), p44.

⁷² Greening Justice, p14.



4. The arguments against an ECT

In its 2017 consultation response, the Scottish Government gave several reasons for refusing to establish an ECT in 2017. The main reasons articulated against the establishment of an ECT are considered below.

4.1 Certain cases are better dealt with in local sheriff courts

The Scottish Government suggested that cases involving wildlife and environmental crime “are best heard in a local sheriff court rather than a centralised specialist court”.⁷³ Similar comments were made regarding nuisance actions.⁷⁴ Although no reasons were given for this, it was perhaps considered that, because such disputes have a close connection to certain locations, then they should be dealt with in a court which is as close to the ‘locus’ of the dispute as possible. This could also be more convenient for the parties in terms of travelling to attend any hearings and so that the decision-maker may be familiar with the local geography to assist their determination of the dispute.

However, there is little (if any) distinction between the disputes referred to above, which are currently heard in sheriff courts, and other matters which are dealt with in the Court of Session, the Scottish Land Court and the DPEA. All of the latter fora are ‘centralised’ in that they are based in one location, yet they hear disputes with geographical loci which are dispersed across Scotland.⁷⁵

In addition the relatively recent closures of several sheriff courts have made it difficult to accurately describe some sheriff courts as being ‘local’.⁷⁶ For example, Haddington Sheriff Court was closed in January 2015, and sheriff court litigation arising from East Lothian now takes place in a different local authority, at Edinburgh Sheriff Court.⁷⁷

There are advantages of adopting a non-centralised approach to hearings. An ECT could be set up in a way to accommodate a non-centralised approach. For example, an ECT might use a central office and locate its administration there, but carry out its hearings in different venues across Scotland.

The First-Tier Tribunal for Scotland Housing and Property Chamber offers a useful example of a non-centralised approach to hearings. The Tribunal is based in the Glasgow Tribunals Centre, but it

⁷³ ‘Developments in environmental justice in Scotland: Consultation analysis and Scottish Government response’, paragraph 83.

⁷⁴ The response states that, “Clearly, it is not appropriate for nuisance actions to be heard in a centralised specialist environmental court. Such cases should be heard at a local court” - *ibid*, paragraph 88.

⁷⁵ Both the SLC and the DPEA hold hearings across Scotland to hear different disputes.

⁷⁶ See BBC News, ‘[Plans to close 10 sheriff courts approved by Scottish government](#)’ (19 April 2013).

⁷⁷ See Scottish Legal News, ‘[Haddington Sheriff Court closure ‘clearly a mistake’](#)’ (8 November 2016).



carries out hearings across Scotland for the convenience of the parties. Hearings are arranged by the tribunal in 71 venues across Scotland.⁷⁸

Considering that there are only 39 remaining Sheriff Courts in Scotland, it could be argued that if an ECT was to adopt the same approach as the Housing and Property Chamber, it would provide justice in a more localised manner than through the continued use of sheriff courts. The use of remote hearings by phone or online could also be adopted by an ECT to further reduce any problems of centralisation (subject to their suitability for particular litigants and any accessibility issues this might raise).

4.2 An ECT is not required for compliance with the Aarhus Convention

Despite the UK having ratified the Convention in 2005, the Scottish civil justice system does not meet the requirements of the Aarhus Convention vis-à-vis access to justice. Findings of non-compliance have been made in nine consecutive decisions of the ACCC and the Meeting of the Parties.⁷⁹

Successive, minor reforms to the system of protective expenses orders have failed to change the prohibitively expensive nature of environmental litigation in Scotland, in contravention of Article 9(4). In addition to the problems caused by the costs of litigation, the question of whether the absence of merits review in Scotland is compliant with Article 9 of the Convention is under consideration by the ACCC.⁸⁰

⁷⁸ President of Scottish Tribunals, 'Annual Report' (2021), p25. The Scottish Land Court and the Lands Tribunal adopt a similar approach, see <http://www.scottish-land-court.org.uk/using/hearings> and <http://www.lands-tribunal-scotland.org.uk/using/guidance-note-for-hearings>.

⁷⁹ Discussed above at 3.1.1 Costs and access to justice.

⁸⁰ See communication ACCC/C/2017/156 United Kingdom. Discussed above at 3.2.1 The absence of merits review in judicial review and statutory planning appeals.



The Scottish Government's current view is that it is compliant.⁸¹ It has so far not acknowledged the findings of the ACCC or presented any plans to address the various matters which have been identified by the ACCC.⁸²

While it may technically be possible to adapt the current system in a way which would ensure compliance, a new ECT which is designed according to the principles of the Convention with the aim of securing access to justice would provide a more comprehensive solution and a means of also addressing the other problems associated with the status quo.

4.3 Not enough cases to justify the costs of an ECT

The Scottish Government suggested that there would be insufficient criminal and civil cases to justify the setup and running costs of an ECT.⁸³ However, it did not indicate the annual caseload threshold at which point an ECT would be perceived to be economically viable, nor did it give any indication that it knew the annual number of environmental cases which are currently heard in Scotland.

The Prings' view is that 100 cases initiated per year are required to justify a standalone ECT.⁸⁴ McCartney pointed out that there are tribunals in Scotland with lower annual numbers.⁸⁵ Low annual caseloads have not been a barrier to the establishment of other specialised fora in Scotland. The most recent published statistics show that four tribunal-type bodies have annual caseloads of below 100 per year:

⁸¹ This was most recently detailed in a 2019 letter from Humza Yousaf MSP (as the then Cabinet Secretary for Justice) to the Scottish Parliament's Equalities and Human Rights Committee (which was then considering a petition on Aarhus non-compliance. Letter from Humza Yousaf MSP to the Equalities and Human Rights Committee' - https://archive2021.parliament.scot/S5_Equal_Opps/ScotGov_responce_petition1372.pdf. The letter explained that, "The Scottish Government is confident that it is compliant with the requirement of the Aarhus Convention in respect of maintaining access to justice in environmental cases. It is supported in this view that the infraction case initiated by the European Commission in relation to the UK's transposition of Articles 3(&) and 4(4) of the EU's Public participation Directive (PPD) has now been closed." This position has been deconstructed in detail elsewhere (see letter from Mary Church to the Equalities and Human Rights Committee, 25 September 2019 - available at <https://foe.scot/wp-content/uploads/2020/03/FoES-letter-to-Equalities-and-Human-Rights-Committee-re-Petition-1372-25-September-2019-Final.pdf>). The closure of infraction proceedings has a limited bearing on this issue.

⁸² However, In March 2021, the Scottish Government-appointed 'National Taskforce for Human Rights Leadership' published a report with recommendations on establishing a new human rights statutory framework in Scotland. The report recommended that statutory framework should include "the right to a healthy environment with substantive and procedural elements". National Taskforce for Human Rights Leadership, 'National Taskforce for Human Rights Leadership Report' (Scottish Government, 2021), p 27.

⁸³ Developments in environmental justice in Scotland: Consultation analysis and Scottish Government response', paras 83 and 93.

⁸⁴ 'Greening Justice', p33.

⁸⁵ 'Litigation over the environment: an opportunity for change', p35.



- The First-Tier Tribunal for Scotland General Regulatory Chamber received 1 appeal.⁸⁶
- The First-Tier Tribunal for Scotland Tax Chamber received 24 appeals.⁸⁷
- The Council Tax Reduction Review Panel received 61 applications.⁸⁸
- The First-Tier Tribunal for Scotland Social Security Chamber received 67 appeals.⁸⁹

There is limited public data on environmental litigation in Scotland. However, enough data exists to predict that an ECT with a broad environmental jurisdiction could have an annual caseload of at least several hundred cases:

- In the past 10 years, 16 ‘environmental’ and 73 ‘planning permission’ judicial review petitions initiated in the Court of Session (~9 per year).⁹⁰
- The most recent DPEA statistics show that the DPEA received 3070 appeals between 2015 to 2020 (614 per year).⁹¹
- For wildlife crime between 2014-2015 and 2018-2019, criminal proceedings were raised in 141 cases (~28 cases per year).⁹²
- For environmental crime between 2013-2014 to 2015-2016, criminal proceedings were raised in 69 cases (23 per year).⁹³
- The Scottish Information Commissioner received 258 environmental information appeals between 2017-2018 and 2019-2020 (86 appeals per year).⁹⁴

The argument that there would not be enough cases to justify the cost of an ECT does not appear to be supported by the evidence.

⁸⁶ President of Scottish Tribunals, ‘Annual Report’ (2021), p100. This figure covers the period 1 April 2019 to 31 Mar 2020. This figure covers the period 1 April 2019 to 31 Mar 2020.

⁸⁷ Ibid, p100. This figure covers the period 1 April 2019 to 31 Mar 2020.

⁸⁸ Scottish Courts and Tribunals Service, ‘Council Tax Reduction Review Panel Annual Report’, 2017/2018 and 2018/2019’ (SCTS, 2019), p6. This figure covers the period April 2018 to March 2019.

⁸⁹ Ibid.

⁹⁰ Scottish Government, ‘Civil Justice Statistics in Scotland 2019-20’ (Scottish Government, 2021), p62. The term ‘environmental’ is not defined in this publication. This figure does not include other environmental litigation in the Court of Session, such as statutory appeals.

⁹¹ Scottish Government, ‘Planning and Environmental Appeals Division (DPEA) Annual Review 2019-20’ (Scottish Government, 2020), p24.

⁹² Scottish Government, ‘2019 Annual Report: Wildlife Crime in Scotland’ (Scottish Government, 2020), p13.

⁹³ SEPA, ‘Enforcement report 2016-2017’ (SEPA, 2017), p32.

⁹⁴ Scottish Information Commissioner, ‘Scottish Information Commissioner Annual Report and Accounts 2019-20: Freedom of information in a changing environment’ (SIC, 2020), p13.



It should also be pointed out that the barriers to access to environmental justice in civil litigation which exist in Scotland prevent environmental cases ever reaching the courts.⁹⁵ Regarding criminal litigation, defects in the investigation and prosecution of wildlife crime have been reported which also reduce the number of court cases.⁹⁶ We could reasonably expect to see an initial increase in environmental litigation in an ECT which is designed to promote access to justice.

The debate regarding caseload could be largely circumvented if an ECT was established by adapting an existing court or tribunal. For example, Agnew has argued that the jurisdiction of the Scottish Land Court (SLC) should be expanded and that the Court should be renamed the 'Scottish Land and Environment Court'.⁹⁷ A pre-existing court or tribunal will presumably already have an adequate caseload.

4.4 An ECT could increase litigation costs

The Scottish Government's 2017 response raised concerns around the risk of an ECT increasing litigation costs. It stated that the introduction of a specialist environmental court at sheriff court level to hear cases might not result in significant reductions in the cost of litigation as parties might continue to use counsel (and be liable for adverse expenses).⁹⁸

However, in sheriff court litigation, no party is liable in expenses for the other party's use of counsel unless sanction has been obtained from the court in advance (an application must be made to the court on this matter).⁹⁹ In other words, the use of counsel has to be justified and approved by a judge before there can be any liability in expenses for counsel's fees; it is not automatic. The use of counsel is not understood to be typical in sheriff court litigation.

Furthermore, this concern presupposes that the current expenses rules in sheriff court litigation would remain unchanged. If establishing an ECT involves adapting existing institutions such as the sheriff courts, there would need to be consideration of whether existing procedural rules are appropriate or need amended.

The Scottish Government also pointed out that litigation costs might increase if a lower court of first instance is introduced, because such a change has the potential (in cases which are appealed

⁹⁵ See section 3.1.1 Costs and access to justice above.

⁹⁶ Ruth Tingay, 'Natural Injustice – Paper I: A review of the enforcement of wildlife protection legislation in Scotland' (Scottish Environment LINK, 2015).

⁹⁷ Discussed at section 5.1 The form of an ECT below.

⁹⁸ Developments in environmental justice in Scotland: Consultation analysis and Scottish Government response', para 92.

⁹⁹ Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75), Rules 4.3 and 5.4. Courts Reform (Scotland) Act 2014, Section 108.



all of the way to the UK Supreme Court), “to add two further appeal stages, firstly to the Sheriff Appeal Court and secondly, to the Inner House of the Court of Session”.¹⁰⁰

It is unclear how this proposed change would add two further appeal stages. The only additional appeal stage envisaged in this example is the appeal from a sheriff court to the Sheriff Appeal Court. More broadly, this concern only arises if an ECT is to be a specialist sheriff court, and it would also depend on the arrangements in the court rules for the allocation of litigation expenses and any applicable court fees.

There is no obvious inherent characteristic of an ECT that would cause litigation costs to increase. One of the main arguments for establishing an ECT is to provide access to justice by making environmental litigation more affordable. An ECT should be designed to reduce litigation costs – both in terms of the costs of litigation for parties involved and for public expenditure.

5. What kind of ECT does Scotland need?

5.1 The form of an ECT

Proponents of an ECT have reached different conclusions on what form it should take. Agnew has argued that the jurisdiction of the Scottish Land Court (SLC) should be expanded to include DPEA planning appeals, judicial review and other environmental litigation. Under his proposal, the SLC would become a ‘Scottish Land and Environment Court’.¹⁰¹

The merits of his proposal include that the SLC starts with a pre-existing environmental jurisdiction, the SLC has recognised legal status and authority, it already employs experts in their fields who sit alongside legal members to assist decision-making in a way which is typical of ECTs in other countries and that the adoption of an existing court would not require additional resources.

Gemmell has expressed a preference for a new environmental court rather than any modification of an existing institution.¹⁰² His view is that, “the radical approach seems the better opportunity to set matters more plainly right from the outset, deliberately independent of the status quo”¹⁰³ – and that establishing a new court would confront the resistance to change which is critical for an ECT’s success. Establishing a new environmental court would allow the opportunity to design the court and its procedures from first principles in a way that the modification of an existing body may not.

In keeping with the aim of her 2015 report - which was to consider the main options to pursue compliance with the Aarhus Convention - McCartney did not favour one particular option. She

¹⁰⁰ ‘Developments in environmental justice in Scotland: Consultation analysis and Scottish Government response’, para 92.

¹⁰¹ ‘An Environmental Court for Scotland?’, op cit.

¹⁰² C Gemmell, ‘Environmental governance beyond 2019 and the case for a Scottish environment court’, op cit, and ‘Environmental Governance: effective approaches for Scotland post-Brexit’ (Scottish Environment LINK, 2019).

¹⁰³ ‘Environmental Governance: effective approaches for Scotland post-Brexit’, p46.



considered the two options discussed above, and also noted that there were “strong arguments for a wholesale creation of a new tribunal”.¹⁰⁴ A new ‘First-Tier Environment Tribunal Chamber’ would have a clear appeals route to the Upper Tribunal for Scotland, and would offer the same advantage as described by Gemmell in terms of deliberate independence from the status quo.

Tribunals in Scotland tend to have a more inquisitorial role (as opposed to the adversarial nature of courts), the majority in Scotland adopt expenses rules whereby each party pays their own expenses unless one of the parties has acted ‘unreasonably’ during the litigation (as opposed to the traditional expenses rule in Scotland of ‘the loser pays’) and they generally present a less formal way of resolving disputes in an environment which is more user friendly and less intimidating for party litigants than courts. These features can reduce litigation costs and are of particular assistance to unrepresented parties.

5.2 Essential design features for an ECT

An ECT could be established in several different ways, each with its own benefits. At this time, ERCS does not take a position on whether it should be a court or tribunal, whether an existing institution should be adopted or a new forum is required.

However, certain features are essential. ERCS’ view is that it should be a court or tribunal of first instance (i.e. not a body which hears appeals arising from the decisions of another court or tribunal). If the ECT is a court, then there should also be provision for internal appeals within the ECT, on a similar basis to the process which is used by the Scottish Land Court.¹⁰⁵ If a tribunal is preferred, then appeals could be made to the Upper Tribunal for Scotland.

The design of an ECT must address the reasons for establishing an ECT as discussed in section 3. An ECT should have the following key features:¹⁰⁶

- A clear institutional purpose to promote access to justice, democracy, the rule of law and the human right to a healthy environment.
- It should provide access to justice in a manner which ensures full compliance with the access to justice requirements of the Aarhus Convention.
- It should deal with cases in a way which is fair, efficient and affordable.

¹⁰⁴ ‘Litigation over the environment: an opportunity for change’, p39.

¹⁰⁵ The Rules of the Scottish Land Court Order 2014 (SSI 2014/229), rules 64-73. There will also need to be some consideration regarding further appeals after the exhaustion of the internal appeal process in the ECT (e.g. an appeal to the Court of Session similar to the provision for appeals in the Scottish Land Court Act 1993, Section 1(7)).

¹⁰⁶ Adapted from ‘Environmental Courts & Tribunals: A Guide for Policy Makers’ (op cit), p71-72 and Brian Preston, ‘Characteristics of Successful Environmental Courts and Tribunals’ (2014) *Journal of Environmental* 26(3) 365.



- It should be independent of the executive branch of government in terms of the appointment of its members, their tenure and its funding.
- It should be adequately resourced.
- It should have the ability to appoint both legal and expert members with relevant scientific and technical expertise. Its members must have the ability to instruct independent reports where necessary.
- It should have the power to set its own rules and procedures.
- It should have a comprehensive environmental jurisdiction covering the full range of environmental and planning laws across civil and administrative cases – and the power to carry out merits review. Full consideration should be given to the inclusion of a criminal jurisdiction also.¹⁰⁷
- There should be provision for the referral of environmental claims raised in other courts to the ECT.
- It should be run transparently. As much information about the operation of the ECT, including its policies, procedures and decisions should be made publicly available.¹⁰⁸
- It should be accessible and designed to be used by non-legally qualified persons.

6. Conclusion

The Scottish Government is expected to consult on the establishment of an environmental court in late 2022 or early 2023. This report has reviewed the debate and sets out why that consultation should result in a decision to establish an ECT.

There are four main reasons why an ECT is needed. First, going to court over the environment is prohibitively expensive in Scotland. It is near impossible for most individuals and civil society organisations to take legal action to protect the environment. From 2014 onwards, the supervisory bodies of the Aarhus Convention have found this situation to be non-compliant with the requirements of the Convention on nine different occasions, yet there are no plans at present to address this. An ECT which is carefully designed with affordability and access to justice in mind, could resolve this longstanding problem.

Second, the courts do not carry out merits review in certain types of litigation. There are good reasons to suspect that this feature is also non-compliant with the Aarhus Convention (the ACCC is

¹⁰⁷ This report mainly focusses on civil and administrative law. A full consideration of whether a criminal jurisdiction should be included is beyond the scope of this report.

¹⁰⁸ See e.g. the website of the Land and Environment Court of New South Wales - <https://www.lec.nsw.gov.au/>.



currently considering this matter but has not yet made any findings). An ECT empowered to carry out merits review would remove this problem.

Third, the current system of resolving environmental disputes across various different courts and tribunals is fragmented and inefficient. An ECT could result in a more efficient way of resolving these disputes in a way which is more convenient to the parties.

Fourth, environmental disputes are different from other types of legal disputes in several different ways. They can involve consideration of a complicated mix of international, regional and domestic laws, policies and principles. Judges require some degree of scientific/technical literacy, the ability to cope with scientific uncertainty, the ability to assess risk and to deal with significant imbalances in resources between the parties. Dealing with such cases may better suit a specialist rather than a generalist judge. An ECT could allow for judges to develop the necessary expertise to deal with such cases effectively, and to sit alongside scientific or technical members to support their decision-making.

In terms of the arguments that were used against establishing an ECT during the last consultation exercise in 2017, this report has addressed the main arguments. For example, the concern that an ECT would inappropriately centralise environmental disputes which are better dealt with in local sheriff courts can be addressed by using hearing venues across Scotland. This is a typical practice of various courts and tribunals in Scotland. There is little evidence to support the concern that an ECT would increase litigation costs. This report has argued that an ECT should be carefully designed to reduce the costs of litigation.

An ECT could be established in many different ways. This report is neutral on whether an ECT should be created by establishing a new court/tribunal or by the modification of an existing institution. What is important, is that an ECT is designed according to certain features.

The design of an ECT must address the reasons set out in this report as to why an ECT is needed. The key features include that it should have a clear statement of institutional purpose, the ability to appoint members with relevant scientific and technical expertise to sit alongside judges, a comprehensive jurisdiction in environmental matters and the autonomy to pass its own rules and procedures. In doing so, ERCS believes that the establishment of an environmental court or tribunal would significantly reduce the barriers to accessing justice on the environment and advance the human right to a healthy environment.