

The clear and urgent case for a Scottish Environment Court

A position paper on why the establishment of a specialist environment court remains essential to address the continued gap in environmental governance.

Scotland needs a dedicated superior environment court to offer an appropriate judicial route to remedy for environmental matters. Such a one stop shop would address the gaps existing in environmental governance in Scotland, both pre-existing and particularly evident following the UK's exit from the European Union (EU), separation from the EU institutions, and the loss both of oversight by the EU Commission and access to the determination of the European Court of Justice. It would also help to address Scotland's failure to comply with its duties under the Aarhus Convention.

A Report for the Environmental Rights Centre for Scotland (ERCS)

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List of abbreviations and acronyms

ACCC Aarhus Convention Compliance Committee
ADR Alternative Dispute Resolution, (including, often principally, Mediation)
A2J Access to Justice
CJEU Court of Justice of the European Union
COPFS Crown Office and Procurator Fiscal Service
DPEA Scottish Government Division for Planning and Environmental Appeals
ECCLR Environment, Climate Change and Land Reform
ECT Environmental Courts and Tribunals
EEA European Environment Agency
ERCS Environmental Rights Centre for Scotland
ESS Environmental Standards Scotland
DETR (former, UK) Department for Environment Transport and the Regions
JR Judicial Review
LTS Lands Tribunal for Scotland
NSW LEC New South Wales Land and Environment Court
OEP Office for Environmental Protection
PEO Protective Expenses Orders
REUL (UK) Retained EU Law Bill
SEC (proposed) Scottish Environment Court
SELink Scottish Environment Link
SEPA Scottish Environment Protection Agency
SLC Scottish Land Court
UNEP United Nations Environment Programme

1. Executive summary

This paper responds to a brief from the Environmental Rights Centre for Scotland (ERCS) to consider the case for a Scottish Environment Court (SEC), taking account of the main issues and recent developments in order to offer an updated assessment. The main points are:

a. Scotland needs a superior court with a comprehensive jurisdiction and appropriate powers to act as a one-stop shop, supported by technical experts, not based on the parties' ability to pay but on the needs and merits of the case. If we are serious about tackling the causes and further threats of climate and ecosystem harm, and ensuring government commitments are fulfilled as well as protecting the community, the current system is plainly inadequate. The main reasons for reaching that conclusion stem from an assessment of governance issues and relevant developments in recent years.

b. The last three years since exit from the EU. The new regulatory environment since Gemell/SELink (2019)¹ has included:

- the establishment of Environmental Standards Scotland (ESS) in an oversight role,
- the commitment to merge the Scottish Land Court (SLC) and Lands Tribunal for Scotland (LTS),
- the issues set out in and arising from the UK Retained EU Law (REUL) Bill,² and
- a range of other policy and practice developments contained in UK and Scottish Environmental reforms, including two main areas: i., the development and operation of the Office for Environmental Protection (OEP, largely dealing with England and Northern Ireland matters) and the Interim Environmental Protection Assessor for Wales; and, ii., planned Scottish Government proposals for Environment Principles, Environment Governance consultations and forthcoming legislation, such as the Natural Environment Bill.

c. Barriers to Access to Justice (A2J). There is a set of relevant, persistent and systemic barriers to access to justice on environmental matters. The key issues have been outlined already in ERCS [Briefings](#) and in the representations by ERCS to ESS, including summarising the Aarhus Convention Compliance Committee's (ACCC) findings of non-compliance.

d. The Human Rights dimension. The significance of human rights issues and the ongoing journey towards an incorporated right to a healthy environment in a statutory framework,³

¹Scottish Environment Link/Gemell (2019) [Environmental Governance: effective approaches for Scotland post-Brexit](#).

² The Retained EU Law (Revocation and Reform) Bill 2022, according to the UK Government, seeks to "sunset the majority of retained EU Law so that it expires on 31st December 2023" <https://www.gov.uk/government/news/the-retained-eu-law-revocation-and-reform-bill-2022>. See also <https://www.scotlink.org/publication/submission-on-retained-eu-law-bill/>. The REUL Bill is under current UK Parliamentary scrutiny. See also <https://community.rspb.org.uk/ourwork/b/scotland/posts/retained-eu-law-bill-debate-is-an-opportunity-to-highlight-significant-risks-for-scotland-s-environment>.

³ Scottish Government (Mar 2021) [National Taskforce for Human Rights Leadership Report](#), recommendations 21 – 26.

and wider access to justice reforms anticipated from the Human Rights (Scotland) Bill,⁴ offers real and additional opportunities for positive development in the governance framework because this Bill seeks to address universal barriers to A2J.⁵ The Scottish Government's commitment to incorporate the right to a healthy environment with substantive and procedural elements is testimony to the wider acknowledgment and public demand to address the triple crisis of climate breakdown, ecological loss and pollution. Early signs have been encouraging in respect of likely inclusion and progression to the statute book. In addition, given that human rights law and environmental law are highly specialised and separate but mutually beneficial, the argument for a dedicated environmental court should be seen as strengthened because it will provide the specialism and expertise to enforce the procedural element of the right to a healthy environment whilst also enhancing environmental governance by serving as the judicial route to remedy in environmental matters.

e. Factors for success, engaging with stakeholders and the shaping of a Scottish Environment Court.⁶ The actual attributes of a successful court were well set out in 2014 by Chief Justice Preston, of the New South Wales Land and Environment Court, the first superior⁷ and longest standing such body. His success criteria serve as an excellent guide to what an appropriate Scottish Environment Court should look like. Additionally, the Prings' seminal earlier work reviewing global environmental courts and tribunals (ECTs) has more recently been revised and elevated further under the banner of UNEP.⁸ ERCS/Christman (2021) report⁹ also clearly sets out and summarises the nature and attributes of ECTs and the case for a dedicated court in Scotland. The next step is to engage with expert

⁴ <https://www.gov.scot/news/new-human-rights-bill/>.

⁵ See Taskforce Recommendations 21-26. <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2021/03/national-taskforce-human-rights-leadership-report/documents/national-taskforce-human-rights-leadership-report/national-taskforce-human-rights-leadership-report/govscot%3Adocument/national-taskforce-human-rights-leadership-report.pdf>.

⁶ The shorthand of ECT, for the range of Environment Courts and Tribunals, is now well-established and where reference is made to a generic such court this will be used. To simplify and clarify matters here, where a Scottish Environment Court is being described, that language or the abbreviation SEC will be used. Also, much as with SEPA, the noun environment is preferred over the adjective environmental.

⁷ On matters of court form and status – there has been much discussion here in Scotland and elsewhere not only of the use of the terms court or tribunal but also of status as superior, inferior or branches of either – as in Ireland where the proposed new entity is a division of the High Court - and even whether the court should be one of record or not as well as questions of routes to appeal and when merits rather than procedural aspects of cases would be considered. An explanation of the Scottish Supreme Courts is to be found at <https://www.scotcourts.gov.uk/the-courts/supreme-courts>. The ability in Scotland to hear and determine civil and criminal cases, set precedent for lower courts to follow etc lies at least at the level of the High Court (for criminal matters) and Court of Session (for civil matters) and such status, with full record of submissions, arguments and determinations available, subject to basic caveats around essential confidentiality, would be essential, following good practice advice. Consideration would need to be given to what would remain open for consideration by the Sheriff Court and whether in civil appeal matters this would become a matter for the Environment Court and/or Court of Session. Appeal beyond such a court, subject to its placing at High Court level, could be to the Court of Session and certainly onward to the UK Supreme Court under current arrangements. Advocates of the merit-based, technically aware environment court approach would not consider the Court of Session to be the best route to take, nor the related divisional model. In any event, a question would exist as to the layers needed and process and time, cost and administrative implications were there to be extra layers of procedure below or above the new environment court. A good system would likely be one as effective, clear, affordable and simple as possible, based on a *superior environment court of record* preference. McCartney (2015) and ERCS/Christman (2021) both have already set out an adequate, though non-definitive, description of original litigation and appeal jurisdictions, routes and options in Scotland. This can and should be further developed.

⁸ UNEP/Pring & Pring (2021) [Environmental Courts & Tribunals, A guide for policy makers](#).

⁹ See ERCS's 2021 considerations on [Why Scotland needs an environmental court or tribunal](#) and also its [Advocacy Manifesto](#).

stakeholders and agree how to operationalise the required features and over what timetable.

f. Brexit losses and expected needs. Following EU exit, the supranational Court and Commission and European Environment Agency (EEA) elements have been lost. The Scottish Government (SG) and the Scottish Parliament have established Environmental Standards Scotland and this to some extent is *en route* to providing elements of the role of the EU Commission, but it has limited powers and resources based on persuasion of authorities via Information and Compliance Notices, leading on to Improvement Reports to Government and in extremis seeking Judicial Review. There is no parliamentary commissioner or connected court process with the power to fine, direct or otherwise force the Government, its agencies or other parties to address, remedy or compensate for failures. And there is no dedicated environment court.¹⁰ Nor, as recommended were exit to occur, has there yet been any identifiable review of, or adjustment to the governance arrangements in, existing bodies in Scotland to reflect exit from the EU.¹¹ In summary, we need all three good governance tiers: independent oversight (including by Parliament), effective executive (including regulatory) controls and thirdly, robust juridical processes. Given the current status of all of these, the case for the creation of a new Court appears to remain strong.

g. And so... There emerges, from the range and strength of opinions heard and from the continuing evident governance gaps in the post-Brexit Scottish system, a strong consensus that change is needed. Governance reform, including an effective court, was seen as needed by many before and this case has been made even clearer following EU exit. The required improvements need not be complex or burdensome nor need they all be delivered in one “go”. They are however required, to provide greater environmental justice in Scotland. The time has come to move on, with some urgency, from ‘why’ to ‘how’. We need, mindful of observed good practice and tailored to Scotland’s specific culture and context, to focus on defining and agreeing the form of the court and progress with momentum to its establishment.

It is hoped that this paper will stimulate discussion of, and decision-making on, how to establish a Scottish Environment Court.

¹⁰ The continuing need has been very well articulated and contextualised already by ERCS in Ben Christman’s report “Why Scotland needs an Environmental Court or Tribunal” October 2021. <https://www.ercs.scot/wp/wp-content/uploads/2023/03/Why-Scotland-needs-an-ECT-Oct-2021.pdf>.

¹¹ Scottish Environment Link/Gemmell 2019.

2. Introduction

[1] The question of an environment court for Scotland has been under periodic consideration for over forty years. An extensive literature exists on environment courts and tribunals (ECT) and they exist in hundreds of jurisdictions worldwide.¹² This might lead the reader to reverse the question to ask, “Why does Scotland not have an environment court?”.

[2] The purpose of this report now is to recap and summarise the pre-Brexit debate on the need for improved environmental governance and an environment court. This was needed pre-Brexit but made more pressing as a consequence of Brexit. The paper will help to remind readers of the state of environmental governance pre-Brexit and judicial routes to remedy followed by review of the environmental governance landscape post-Brexit; persistent barriers to justice; new developments and opportunities – the right to a healthy environment and proposed Land Court and Lands Tribunal merger; and then end with consideration of the shape of the new Scottish Environment Court (SEC).¹³

[3] A series of studies identified the elements of environmental governance in Scotland prior to Brexit and those likely to be lost by leaving the EU.¹⁴ These losses were the supranational components: the Court of Justice of the EU and the European Commission as well as the monitoring, reporting and policy assessment work of the European Environment Agency (EEA). The studies also identified governance components internal to Scotland and the UK: the existing governance mechanisms of the various courts, the Scottish Parliament, Scottish Government and its agencies as well as the services and duties of local government and the internal and supervisory mechanisms of the various environment bodies, including boards, auditors, ombudsmen etc.¹⁵ These latter, whilst continuing, would also require some consideration in the event of Brexit progressing to ensure continued fitness for purpose. Together the changes set the scene for the potential place of an SEC.

[4] When the Scottish Government launched a consultation on necessary developments in environmental justice and the future of environmental governance in Scotland in the summer of 2016, the responses elicited were modest in number but insightful. The case for an environment court was again rehearsed and addressed from different perspectives.¹⁶ It is

¹² In 2009 George and Catherine Pring in their extensive review [Greening justice: creating and improving environmental courts and tribunals](#) identified over 350 such ECTs. The number has continued to grow! UNEP stated in 2016 that there were over 1200. The 2021 UNEP Guide to ECTs identifies 2116 in 67 countries. [Environmental Courts & Tribunals - A guide for policy makers](#).

¹³ Hereafter ECT will be used to refer to an environmental court or tribunal and the family of such entities generally, while SEC will be used for reference to the proposed Scottish Environment Court.

¹⁴ Scottish Environment Link (SELink) commissioned ‘Environmental Governance: effective approaches for Scotland post-Brexit’ (2019) after the earlier work for the then Cabinet Secretary for ECCLR in 2018. See also Crispin Agnew, ‘An Environmental Court for Scotland?’ 178 (2016) SPEL 133-135 and Campbell Gemmill, ‘Environmental governance beyond 2019 and the case for a Scottish environment court’ 196 (2019) SPEL 126-127.

¹⁵ There are many oversight bodies connected to public services in Scotland, not definitively catalogued here. Existing governance oversight related bodies in Scotland for the environment would include the Scottish Information Commissioner and the Scottish Public Services Ombudsman.

¹⁶ See footnote 24 and <https://foe.scot/wp-content/uploads/2017/08/FoES-response-to-Developments-in-Environmental-Justice-consultation-June-2016-1.pdf>.

almost then unnecessary to add, given that the evidence seems widely available and its implications appear similarly widely accepted, that crises of climate and ecosystems as well as pollution-related deterioration in environmental condition are continuing and ever more serious. Therefore, given that Climate Change/Net Zero is one of the Scottish Government's top 4 priorities, and also given the Biodiversity emergency now with new international obligations for the marine environment, for example, these contextual elements are surely an additional justification for having a dedicated court. If we are indeed really serious about and committed to these fundamental issues, do we not need to have a judicial system that supports their protection effectively?

[5] In summary, the argument was reiterated in several studies and consultations that in order to protect the environment and the citizen, all three good governance tiers are needed: independent oversight (including by Parliament), effective executive (including regulatory) controls and thirdly, robust juridical processes, and that a dedicated environment court or tribunal would effectively address the juridical route to remedy.

3. Post Brexit environmental governance

Recent change in the context surrounding the case for an Environment Court

[6] In October 2019 effective approaches to and elements of environmental governance for Scotland post-Brexit were set out. There were four key elements needed for future sound Scottish environmental governance: framing of the environmental governance system as a whole, a dedicated environment court, an independent parliamentary commissioner, and the realignment and better integration of existing components of the system. This latter had a number of components – departmental and agency mission setting, functioning, accountability and reporting as well as the range of issues around decision making and the citizen’s participation in the system from access to information to contesting of decisions.¹⁷

[7] It is clear from some visible developments in the interim¹⁸ that the good governance and successful performance of elements of the system cannot be taken for granted. It was suggested pre-Brexit that a ‘healthcheck’ of the system on exit, and consideration of improvements needed as exit impacted on the functioning of the environment in Scotland,¹⁹ should be undertaken. Not only has this not happened but with the notable exception of the establishment of Environmental Standards Scotland (ESS), meeting a limited set of the ambitions and needs for a parliamentary commission, there have been wholly inadequate steps taken to maintain integrity and effectiveness in the system especially when the identified vulnerabilities are taken into account.

[8] Nonetheless, the establishment of ESS is highly significant. Establishment has progressed well and it has met the timetable set out by Parliament for becoming established formally, taking on staff and systems to operationalise its powers and duties²⁰ and it successfully published its 2022-25 Strategic Plan.²¹ It has also begun to exercise its powers in terms of monitoring and investigating public authorities’²² compliance with environmental law and investigating environmental concerns both expressed to it and arising from its own analysis. ESS has also stated it will seek to identify and urge improvements in the law and its implementation.

¹⁷ SELink/Gemmell (2019), <https://www.scotlink.org/publication/environmental-governance-effective-approaches-for-scotland-post-brexit/>.

¹⁸ News and analytical items from The Ferret and other media in Scotland, issues concerning the governance of NatureScot/SNH Board, the criminal hacking of SEPA’s website and IT systems and loss/lack of availability of environmental data, a range of pro-development planning decisions, Aarhus Compliance failure, ERCS advice requests and cases under consideration by ERCS and ESS.

¹⁹ See footnotes 17, 1 and 11. SELink/Gemmell (2019).

²⁰ Including for example a complaints handling mechanism for systemic problems. ESS will seek to oversee the regulators and in its combined powers provides non-judicial routes to remedy. The gap remains the judicial route.

²¹ The [parliamentary approval of Environmental Standards Scotland’s \(ESS\) Strategic Plan](#) on 1 December 2022 triggered section 41 of the UK Withdrawal from the European Community (Continuity) (Scotland) Act 2021 and its duty to consult on, ‘whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance the governance arrangements’. ESS has to do this by the end of May 2023. This in turn is a driver for the production of this report.

²² Note that ESS’s remit concerns public authorities and does not extend to private actors. Nor is ESS a substitute for an ECT generally and once designed, the fit between the court and ESS would need to be established. There is also a question of how to address any failures of ESS, were it to act unlawfully, for example. This would likely be within the purview of an ECT to address.

[9] In addition to considering representations made to it, where shortcomings and failures are identified, ESS has a toolkit including: a) information notices, requiring a response from public bodies, b) compliance notices, requiring steps to be taken to address failures and prevent repeats, c) improvement reports where a systemic failure is identified and recommending actions to be taken by the authority and/or Scottish Government, and ultimately seeking Judicial Review (JR) where the mitigation or prevention of serious environmental harm appears to it to be needed.

[10] ESS has already initiated effort on the use of acoustic deterrent devices by fish farms and identified air quality concerns, issuing an Improvement Report to Scottish Government on failures to meet statutory nitrogen dioxide limits. Further information on completed and ongoing investigations can be found on their website.²³

[11] Most significant, other than establishment of ESS, in this context is the proposal by Scottish Government to merge the Land Court (SLC) and Lands Tribunal (LTS), already identified. The exact form this merger takes and any changes to purview or operation are as yet unspecified. This clearly needs to be addressed and in itself presents an opportunity for suitable redesign effort. The future of these two bodies has been somewhat intertwined with discussion of an environment court and their attributes and limited scopes have been discussed in previous reports already referred to. Over a number of years, consultations on the appetite and need for an environment court have been undertaken and in the last consultation which took place in 2016/17, with results published in September 2017,²⁴ the government acknowledged that 80% of respondents were in favour of a specialist court/tribunal but the question about jurisdiction and the impacts of Brexit were the reason for delaying a decision. Brexit having occurred three years ago, we await a new proposal on merger and beyond. In any case the merger will require consideration and approval in the Scottish Parliament. It might be odd were that consideration not also to address the matter of a dedicated environment court.

[12] Arguments against such a court appear largely to fall into three categories: 1. the adequacy of the status quo and thus there being no need for change; 2. insufficient case work to merit such an arrangement not least given existing court and related arrangements or, rather ironically, the opposite argument that there would be a flood of potentially trivial cases; and 3. the costs and added bureaucracy of establishing, running and servicing any new dedicated environment court.²⁵ These last concerns would perhaps be amplified by current economic pressures on the public purse and the citizenry.

²³ <https://www.environmentalstandards.scot/investigations/investigations/>.

²⁴ <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2017/09/developments-environmental-justice-scotland-analysis-response/documents/00525265-pdf/00525265-pdf/govscot%3Adocument/00525265.pdf>.

²⁵ Consideration of various ECT and other court and tribunal models, including for the Commercial Court and Housing Tribunal in Scotland and the business and property courts and the Planning Court in England as well as the 477 page 1999 report on comprehensive consideration for DETR by Malcolm Grant of an Environment Court for England and Wales, have rehearsed many of the issues to be

[13] Responses to these objections become especially clear when considering the three governance tiers of oversight, executive and judiciary outlined above. First, the loss of the Court of Justice of the EU (CJEU) and Commission has not been addressed and failures of environmental performance and governance are persistent, including access to justice being in breach of the Aarhus Convention.²⁶

[14] The various barriers to access to justice cause “the Chilling Effect” and hence we cannot know what we do not know as a result. Without addressing this there is no way to establish real demand, but absence of evidence is certainly no justification for inaction. This has been the long-standing argument articulated by the environmental NGO (eNGO) sector and the establishment of Environmental Rights Centre for Scotland has demonstrated both that there are cases to be addressed and the overall need for environmental justice. ERCS has received over 150 referrals to its free legal advice service in its first eighteen months and five representations have gone forward to Environmental Standards Scotland. Barriers to pursuing justice also appear to continue - amplified by the difficulties of accessing accurate and timely information - and this is evidence clearly supported by the UN and Aarhus Convention Compliance Committee.

[15] Concerns expressed about costs of any new institutions of course need, as with the costs in relation to already proposed potential court options, and indeed constraints on all public services, to be set against needs and benefits. These include not only any moral and strategic argument but also the future efficiency savings of reconfiguration and the societal, human rights and performance gains arising from affordable, fair, effective and timely judicial routes to remedy.

[16] Arguments for a dedicated court with a comprehensive jurisdiction are based on the clear loss of the two key EU institutional controls and the need for full compliance with the Aarhus Convention. “*Why Scotland needs an environmental court or tribunal*”²⁷ sets out the case in detail. This paper seeks to update and highlight key elements of that case. In turn, that case, for the court, is underscored by the loss of comparative environmental data across the EU, exacerbated by the decline in available and reliable Scottish data. Environmental pressures adding to the growing need for a dedicated court to consider the merits of the issues of concern seem to be growing. This is evident from and compounded by: continued lack of transparency around environmental performance at local and national level; the pressures on the environment, the prevalence of pollution and ecological loss

tackled, comparable institutions and needs and options available. There is a great deal to be gleaned from these. They neither however point to a single model nor unique benefits or risks or costs. They do suggest that there are no particular barriers to creating an ECT for Scotland, should this be decided and the powers, remit and resources, including the approach taken by the court and the skills of judges and commissioners, matter more than the precise form.

²⁶ ERCS (July 2022) [Evaluation of Scotland’s action plan on access to environmental justice](#) and ERCS (Nov 2022) [Protective Expenses Orders: access to information remains a barrier to justice](#).

²⁷ ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#) [I would urge anyone seriously wishing to consider the way ahead here, simply to read that full report. In this shorter report, the best I can hope to do is update some issues and select some key points from that work and others to articulate the case].

cases and target failures; and the level and nature of concerns expressed by the public through requests for help reaching ERCS and ESS; as well as the complaints systems of the service and regulatory bodies in Scotland.²⁸

[17] During the 2019-23 period, as previously indicated, there have been some other developments, incidents and observations of note, with the cyber-attack on SEPA and their consequent loss of functionality being one of the most significant ones. There have been media and anecdotal references to slow or poor data sharing and information responses from public bodies and criticisms around appointments – both process and results - at public bodies dealing with environmental governance matters. Additionally, the ongoing processes at UK level relating to the removal of EU laws from UK statute (see footnote 2) and likely onward flow to Scotland is troubling but not yet clear. A range of other strategic and bureaucratic developments may also have some impact in framing future governance and policy arrangements. Some policy and practice developments arising from other UK and Scottish Environmental reforms, are pertinent: the development and operation of the Office for Environmental Protection (OEP), largely dealing with England and Northern Ireland matters, and likewise the Interim Environmental Protection Assessor for Wales; and the final proposals and consequential of the Environment (Scotland) Bill. Already planned proposals for Environment Principles, Environment Governance consultations and intended legislation may also be relevant. At present, these various elements are ongoing processes, as yet incomplete.

[18] Few other changes of direct significance in terms of the institutional framework or operational processes have occurred in the last three or so years.

Observation

[19] In summary, the anticipated environmental governance needs post-Brexit were set out. An holistic governance review remains both absent and necessary. The creation of ESS and its role and operation are welcome and this strengthens governance in two of the necessary tiers but does not progress the needs of the juridical tier.

²⁸ Environmental prosecutions and sustained complaints against public bodies and transgressive owners and developers are of course ambiguous or troublesome indicators as their robustness or lack of comprehensive or reliable nature makes it hard to know when concerns and failures are not progressed to formal legal cases through resolution, prohibitive costs, difficulty of accessing professional advice and help, pursuers simply giving up and so on. “The pernicious invisibility and frustration of the ‘nearly ran’ case” to quote one interviewee.

4. Persistent barriers to justice

[20] The Aarhus Convention is built on three pillars: access to information; participation and access to justice. There are several key areas of concern in the current Scottish context, which ERCS has set out in briefings.²⁹ ‘The struggle for environmental justice in Scotland’ (in fact the subtitle of Kevin Dunion’s 2003 book “Troublemakers”) is deep-rooted and very long-standing. Barriers are, at least to those on the receiving side of environmental harm, pernicious and systemic and the academic and activist media are well filled now with relevant issues and increasing jurisprudence globally. The UK position generally on access to justice and the former’s recalcitrance were heavily criticised by the Aarhus Convention Compliance Committee. The position of the UK Government, as well as the embedded position of the devolved administrations, including the Scottish Government, seems at best inadequate and objectively certainly largely untenable.

[21] Access to information is commonly the outer shell and entry point of access to justice. Both suffer from the same failings. There seem to be several dimensions and types of barrier or impediment here:

- Competence of the government, departments and agencies and local government,
- The incoherence of the system and time taken and expertise needed to navigate (including it seems how relevant data are held and shared and rendered accessible),
- Legal and other limits on the scope for, and nature of, redress,
- Asymmetries of power and resources,
- Information access for the citizen – what can be seen and how long it takes to get what may be needed/wanted,
- Complaints systems – again, accessibility, defining scope, time taken, actual outcome, and
- Costs of contesting.

[22] Objective sources and analyses are hard to come by. Nonetheless, it is clear that making a data request, trying to find out about ownership or responsibility, legality and compliance, or simply “what has gone on”, whether an incident, repeated pollution, poor management practices etc., can be difficult, time consuming and is frequently unsatisfactory and or unsuccessful. Holding poor or uncommunicative operators, landowners and regulatory or implementing authorities to account beyond basic information access is evidently much harder still.

[23] The cost of undertaking litigation is one of the greatest barriers to environmental justice. The question of costs and access to justice is again well set out in ERCS/Christman

²⁹ <https://www.ercs.scot/our-work/aarhus-convention/>. Also relevant is the recent open session of the ACC Committee’s 77th meeting (13-16 December 2022) with the UK to discuss their plan of action on decision VII/8s submitted on 1 July 2022 which they deem as ‘only partially appropriate’.

(2021) at section 3.1³⁰ and need not be repeated here. The matter of Protective Expenses Orders (PEOs) is instructive to consider. Obtaining even rather basic information about PEOs, number and value, intended to reduce the costs of litigation for anyone with a legitimate claim, even using direct requests and Freedom of Information legislation, has proven difficult to get.³¹ The system appears opaque and ineffective, and if recovering simple data from the Scottish Courts and Tribunals Service is anything to go by, incredibly slow and unhelpful. The point however is that we don't even know how they fit into the picture of cases taken or prevented and how access is affected. If intended to soften somewhat the reality of "loser pays", PEOs make at best an unpredictable and modest contribution. When costs are considered, especially in JR cases, deciding to progress takes nerve and resources. Such costs are likely of the order of tens of thousands to hundreds of thousands pounds subject to complexity, duration, expertise needed etc. Additionally, PEO caps in practice are uncertain but liable to address only a fractional percentage of the total, even with minima applied of £5000 exposure to others' costs, this would be too high for many, especially when it does nothing to address the applicant's own costs! And finally, as legal aid is typically not available, taking cases in this setting seems very unlikely irrespective of merit, will or importance.

[24] There are many other barriers to access and again these are better addressed at length in other existing work including that mentioned above. These barriers have to a greater extent been lowered or removed with the establishment and involvement of environment courts, in the New Zealand and some Australian jurisdictions. If access is eased and costs better managed as well as there being an early focus on full or even partial resolution, this surely has to be a good thing. It is at this point that it seems relevant to refer to Judge Newhook's reporting that in the New Zealand Environment Court "mediation is conducted very early in the life of most cases and results in resolution of approximately 75% of all cases filed in the court".³² How access is achieved, how it is funded and how it is enabled and supported remain serious questions to be addressed by and in the establishment of a specialist environment court.

³⁰ See Footnotes 9 and 10 etc.

³¹ <https://www.ercs.scot/news/new-briefing-protective-expenses-orders-access-to-information-remains-a-barrier-to-justice/>.

³² "The constitution, work, powers and practices of the Environment Court of New Zealand". Paper August 2019, to be incorporated in forthcoming publication in press. See also <https://www.environmentcourt.govt.nz/decisions-publications/speeches-papers/>. The Court's cost regime as well as its general and detailed rules, as set out in its Practice Note, are also highly instructive: <https://www.environmentcourt.govt.nz/about/practice-note/>.

Observation

[25] In 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK was and remains in breach of Article 9(4) of the Convention's access to justice requirements³³ and a set of recommendations to achieve compliance by October 2024.³⁴ As well as reform of the level of expenses, a specialist environmental court with a comprehensive jurisdiction could secure full compliance with the Aarhus Convention's access to justice requirements.

³³ ACCC (Aug 2021) [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I*](#), and [Part II*](#).

³⁴ MoP (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#). For more information read ERCS (July 2022) [Evaluation of Scotland's action plan on access to environmental justice](#).

5. New developments and opportunities

A Human Rights approach

[26] The incorporation of a right to a healthy environment (HRHE) as part of the Human Rights (Scotland) Act is a major development in relation to both environmental and human rights.

[27] Linking the previous section with this, the Aarhus Convention – in operation now for over 21 years, requires signatories to grant the public certain rights. These rights concern access to information, public engagement and participation, and access to justice, in public decision-making processes which may relate to the local, national and transboundary environment. The Convention focuses on interactions between the public and public authorities. In the context of Scotland’s environmental governance system and the three tiers required, it becomes clear why environmental justice is likely to be best served by an Environment Court sitting at the top of the system. Without the court, it is hard to see how a “constitutional principle of fairness” might be expressed, defended or tested.

[28] Building on the work of the National Taskforce for Human Rights Leadership,³⁵ ERCS has clearly articulated its position in relation to the substantive and procedural elements of the HRHE.³⁶ The recommendations which ERCS has set out, and the ongoing discussions with the Civil Society Working Group on Incorporation,³⁷ Scottish Government and Parliamentarians and advisors, seek to deliver not only a clearly defined right, with segmented components of the right along the lines of the UN’s special rapporteurs’ proposals, but one which is enforceable.

Observation

[29] At present,³⁸ it is anticipated, with a certain degree of confidence, that the Human Rights Bill will secure a range of access to justice benefits and improvements, in relation to legal aid, standing of parties (who can seek to pursue a case) and merits review/the Wednesbury standard.³⁹ For this to be meaningful there needs to be a means by, or forum in which these issues or their case consequences can be effectively pursued. A dedicated

³⁵ See National Taskforce Leadership Report 'Annex D: Explanatory Note on Right to a Healthy Environment' (pp.74-85).

³⁶ <https://www.ercs.scot/wp/wp-content/uploads/2021/12/Advocacy-Manifesto-Dec-2021.pdf> Following UN (Human Rights Council) approaches and detailing the dimensions of the HRHE in procedural and substantive terms, much work has been undertaken by a range of parties in Scotland over the last few years, including collaborations with the UN Special Rapporteurs. <https://www.ercs.scot/enforceable-human-right-to-a-healthy-environment/>.

³⁷ Useful discussion with the Scottish Human Rights Commission, who are a part of the working group, took place in preparing this paper.

³⁸ The HRHE issue and the HR Bill are currently under consideration by the Scottish Parliament. Mindful of course too that political matters rarely stand still for long and the change of leadership of the Scottish Government in February/March 2023 may yet impact upon developments here.

³⁹ Often quoted, especially in the JR context, 1948 precedent relating to “reasonableness” – the principle is applied that a court may interfere in a case where a normal person’s view would be that “the Decision on a competent matter is so unreasonable that no reasonable authority could ever come to it”.

environment court enshrining these and other rights-based reforms would be better able to implement them and secure compliance with the Aarhus Convention.

[30] An SEC would be the most effective judicial route to remedy for breaches in existing environment and related planning law.⁴⁰ Depending on the development of the Human Rights (Scotland) Bill and the routes to remedy identified, the SEC would of course be able to defer to another court or refer matters better handled elsewhere to an appropriate such body. Otherwise, where the rights issue and a matter of the environment court's existing purview aligned, it could well, especially with a commissioner and/or judge with appropriate rights knowledge and experience, address that matter.

⁴⁰ Whilst these two domains seem clear, there is also now climate law and related policy commitments, targets etc. both in Scotland and in international treaty contexts. The existing HRHE structure doesn't fully embrace climate justice and rights emanating from that issue but it seems likely that this too will need to be addressed.

6. The shape of a new Scottish Environment Court (SEC)

Factors for success, engaging stakeholders and shaping the Scottish Environment Court

Factors for success

[31] The Prings (see Footnote 8) set out, in their extensive global academic review, the reasons other jurisdictions established an ECT and the eleven main reasons they identified were set out again by Ben Christman in ERCS's report.⁴¹ These were in summary: expertise, efficiency, visibility, litigation costs, predictability, accountability, creativity, use of Alternative Dispute Resolution (ADR)/problem solving, issue integration, remedy integration and public confidence. These all appear to be relevant to the Scottish context. The attributes of a successful court, set out by Brian Preston SC,⁴² from an experienced practitioner's perspective, follow closely related lines.

[32] A fuller consideration of Judge Preston's articulation of what good needs to look like is set out in Annex 1 and this is also part of what was addressed in ERCS's Roundtable event on an environment court in February 2023, a note of which is also contained in Annex 2.

[33] Returning to the matter of the role of the court and its ways of working to address matters raised with it, some other matters are important to consider. The judge as investigator and an inquisitorial approach is a cultural norm in some jurisdictions, for example in France, Italy and several Latin American jurisdictions. If the judge is expert and a party raises issues with the court, the issues of law do not need to be explained and the court may then focus more quickly and directly on investigating the concerns of the applicant and the issues in dispute.

[34] In summary then, a Scottish Environment Court would ideally:

- be broad in jurisdiction,
- deal with all relevant areas of environmental law, from pollution, natural heritage/biodiversity, climate, planning, inshore marine, land management and readily identifiable closely allied space,
- have environmentally literate judges and supporting commissioners,
- seek to resolve and determine cases quickly, cheaply and effectively - and where appropriate force compliance with the law - pre-trial between parties seeking to pursue, bringing and defending a case or where the issue is as yet not tested,
- do this using mediation and dispute resolution processes as appropriate,

⁴¹ Op cit. In 2021; footnotes 9, 10, 27, etc.

⁴² Preston, Brian Characteristics of Successful Environmental Courts and Tribunals (2014) Journal of Environmental Law 365, based on a lecture given in July 2013. The Hon Justice BJ Preston was at the time Chief Judge of the Land and Environment Court of New South Wales.

- seek via appropriate precognition⁴³ to address issues and minimise the costs for the parties and the reclaimer (appellant) in an appeal, as well as itself in the processes,
- operate in first instance and appeal mode,
- be as mobile as necessary, conducting hearings remotely and in person around Scotland
- take a broad and coherent view of relevant law and issues across Scotland,
- be wide-ranging, focussed on solutions and prepared to innovate, and
- contribute to a developing jurisprudence.

Ultimately, by addressing and fulfilling these ideal attributes it would make the most important contribution yet to an improvement overall in environmental governance in Scotland.

Engaging stakeholders

[35] How a court becomes effective in relating to the community at large can take a range of forms – visibility, clear and simple processes, no or low cost access, a reputation for helpfulness and speedy, fair resolutions and so on. A reputation based on successfully fulfilling the attributes outlined of a successful ECT elsewhere, would surely be a reasonable position to aim for. Much indeed like the positive attributes of a respected and successful court overall. In the environment and Scottish context, a few more points and nuances may be worthy of consideration.

[36] In meeting some of the characteristics outlined above, a substantial set of questions merits consideration. Is the court informed about land use, climate change and environment issues relating to the concerns and interests of the population at hand? Is the historical context clear and understood? Are relevant data available? Is there adequate and appropriate expertise on hand? Does the court enjoy a reputation as fair and just, free from alignment only to traditional or large and absent owners, big business, deep-pocketed developers and owners etc.? Is it biased towards the NGO bodies or lobbyists and influenced by vocal media or partial reporting? Is it in summary, objective and unbiased whilst aware of the details of the law, the historical, technical and scientific issues and relevant precedent and able to hand down judgement visibly fairly?

[37] Further, is the Court only accessible via presence and agents in Edinburgh? Can it be accessed and seen in action across the country? How long does it take for advice to be received and decisions to be taken and communicated? Once a case is taken, how long does it then take to reach judgement? Is that judgement then final and definitive? How clear are

⁴³ Somewhat related to minimising costs and delays by deft analysis, mediation and triage of cases, Chief Justice Bergin of the NSW Supreme Court in 2011 analysed the issues around expert witnesses and panel use prior to trial as well as in trial and commended their use to ascertain early the merits of challenging cases, not least in the Land and Environment Court. He also referred to the UK's Supreme Court's approach to removing immunity from experts, <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin060511.pdf>.

time and cost and risk issues at the outset? Do the officers of the court and legal and administrative players in the system communicate clearly and effectively? Would appeal in the ECT be final or would this still lead to the Court of Session? And so on.

What then would the new court look like and need?

[38] One might hope having made the decision to progress, there might be the desire to follow such expert guidance as given by seasoned, thoughtful practitioners and specialists as the Prings, Justice Preston, Judges Newhook, Molesworth and Trenorden and other experts interviewed for this and previous reports.⁴⁴ The expertise of case-takers and informed observers to the Scottish Courts also have valuable insights into the challenges faced in the current system and what “better” would look like.⁴⁵

[39] The goal for Scotland surely would be to deliver good practice, fit for purpose in the Scottish context. That might be a small, streamlined professional court well served by a staff commission or ESS, responsive to parliament and civil society as well as possessed of appropriate expertise. The service provided into the court would ensure appropriate, proportionate, and professional triage and case making including seeking appropriate resolution where possible pre-court. It would build on the work already done by other/lower courts, by ESS and by ERCS among others, particularly given the experience and content of assembled issues and cases already explored and pursued.

[40] In respect of costs of establishing and running a court, establishing the Commercial Court or Housing Tribunal or ESS as well as the costs of the NSW LEC and other courts can serve as a guide. Two critical issues also need to be taken into account: the costs and effectiveness of the existing tribunal and court as well as the cases which may begin or progress through existing court systems via Sheriff etc... and secondly the costs of not setting up a court, placed largely as they are currently on the public who may suffer at the hands of various bureaucracies and developers and land-owners. The place of legal aid reforms needs also to be addressed. And this will all make most sense in policy terms if costs in social and broad economic terms across portfolios are taken into account.

Observation

[41] General opinion seems clear that environmental governance in Scotland is inadequate, the institutional framework has serious gaps and weaknesses and there are serious barriers to public interest litigation and access to justice for citizens. Opinion is settled on the existing system being unfair, slow, hard to access, expensive and loaded against and on the loser and simply, often (usually) avoided because of the perception, indeed fear, and reality of costs, power imbalance, poor likelihood of successful outcome, time, impact on pursuer etc.

⁴⁴ In addition to the ECT Judges, lawyers and specialists interviewed for the 2019 study, including Judges Brian Preston (NSW LEC) and Simon Molesworth (NSW LEC and Victoria State Land Tribunal), and judges in Belgium and Sweden, I discussed these issues again for this work with Judge Christine Trenorden from the South Australian Environment, Resources and Development Court, Judge Laurie Newhook of the New Zealand Environment Court, Jamie Whittle, Partner of R&R Urquhart and others who did not wish specifically to be identified.

⁴⁵ Thanks go to Jamie Whittle and Sir Crispin Agnew as well as to Professor Colin Reid and all those who participated in ERCS's ECT Workshop (see Annex 2) or contributed their insights directly, including advocates, barristers/KCs and academics as well as policy and legal practitioners.

[42] Establishing an SEC will go some way to addressing the known gaps in and simplifying judicial routes to remedy and bolster the non-judicial administrative ones now supplemented by ESS.

[43] Costs could also be offset of course by integrating and using the resources of the existing Land Court and Tribunal and their deployment within the revised structure of the somewhat larger, and in remit/scope broader, court.

[44] It is also worth mentioning that while we are “out of Europe” in the sense of no longer being an EU member or subject to the jurisdiction of the CJEU and Commission,⁴⁶ the Scottish Government has made commitments to keeping pace with the EU in a range of policy areas. These may of course be affected in due course by the UK Government’s approach to Retained EU Law, raised previously (see Footnote 2). This will require surveillance and consideration of environmental policy, practice and standards issues emanating from the EU and, were these to be used in giving effect to legislation and policy in Scotland, these would be areas of specialist legal and scientific consideration for Scottish courts.

The benefits a Court with good characteristics would confer

[45] In addition to the clear, general, headline value in ECTs of dedicated expertise and focus and the provision of supportive resolution-based services, a few other areas of benefit are apparent. One benefit would of course be to be joining a worldwide community of peers already possessing an ECT.

[46] At present, the barriers to access to justice are many. To take just one where change within the context of a new ECT would be beneficial, there are time limits of three months on Judicial Review cases and six weeks for planning appeals. These time limits and any scheduling and costs issues entailed in securing professional time to prepare necessary appeal cases have proved to be prohibitive, preventing further contest. More generous time limits or easier expert consideration and court facilitation should seek to address this constraint and restore some balance back towards the petitioner.

[47] At present, costs in the form of expenses follow success in the Scottish Land Court. Here, as in the New Zealand Court for example, absence of counsel can mean reduced costs and, in the latter case, where mediation is directly and freely provided by the Court, the risks to the pursuer are lower. Where appeals can also take place within the (proposed Scottish) court’s domain, costs can also be better limited and the consideration, virtually by definition, would be expert, based on content not just on process and with a degree both of informality and flexibility, with the aim of achieving resolution.

⁴⁶ Noting there is also current UK discussion of leaving the ECHR.

[48] The tendency over the years for additional responsibilities and areas of jurisdictions to be “bolted on” to Sheriff Courts, as well as the challenge of their giving due expert attention to environmental cases also seems to be not only a concern, but an area that could be alleviated by taking environmental cases in a dedicated SEC. Reducing Sheriff Court workload and business time might be seen as welcome as would the inevitable improvement in consistency and coherence for environmental cases.

[49] Difficulties of potential prosecutions appearing legitimate but such breaches not being taken by SEPA or the Crown Office and Procurator Fiscal Service (COPFS) might also be better addressed by an open SEC. The reason for taking or not taking a case could be more visible and explanation given. Where the number of cases taken or approaches made to the court were to be logged, the cases progressing to settlement or disposal would also be visible and hence the “demand” and the “value” of the court’s various efforts might also be more visible.⁴⁷ It would certainly be a recommendation that such performance data be collected and reported.

[50] ESS at present cannot deal with individual decisions. This is different from OEP’s role in England. This seems a major omission in ESS’s powers. A suitably framed SEC could and should deal with individual cases.

Observation

[51] There is clearly some debate about the policy locus and primacy of an ECT and particularly a Scottish court. Those engaged in the ERCS Workshop in February were split on the merits here with some at least fearing the politicisation of the court or its *inappropriately* straying into legislative or executive territory. This seemed most to exercise some participants in relation to planning issues where extensive and expensive processes are currently entailed around cases considered by the DPEA (The Planning and Appeals Division of Scottish Government) and local review body planning appeals. On the other hand,⁴⁸ where a case or a set of cases and their judgements address a policy issue, it would surely be odd for this not to be pursued. And where it is the policy itself, say on planning policy, air quality or transport issues or the nature of land access or water quality standards etc., that is being shown to have failed or to be in breach of other law or congruent with the law but with damaging environmental or community consequences, it would also be odd not to conclude so and communicate this. In the case of planning matters, distancing such matters from government and removing them from the risk of political interpretation would perhaps be seen widely as a good thing.

⁴⁷ It is notable that in New Zealand, Judge Newhook observes, p9, point 37, “A very small proportion of the cases filed in the court, less than 5%, are ever the subject of a full hearing on the merits. Most cases are settled during the process of mediation, or by direct negotiation amongst the parties...”.

⁴⁸ Again, too, looking to New Zealand and Australian environment courts as largely accessible entities, it appears that not only are policy matters tested there as appropriate with the relevant parties engaged in presenting evidence on policy to the court but issues of non-congruence have resulted in amendments to legislation. The independence of the court in these jurisdictions and as sought for Scotland would remain crucial. How opinion is acted upon beyond the direct determination of the court would be for government and parliament.

[52] It is perhaps worth saying too that it is entirely legitimate for courts to make merits decisions vis-à-vis administrative decisions - it happens in other areas such as social security and immigration/asylum appeals, and criticisms of the legitimacy of courts are misplaced or misunderstand the nature of those decisions.⁴⁹

[53] A legislative or policy response to an SEC determination would of course be for others. Equally, as happens with the Scottish Land Court at present or indeed the High Court in other matters, the SEC could and would defer to another body as appropriate to the issue at hand. It would be easy to imagine that a well- run court would have enough core business upon which to focus.

[54] Principally, the benefit appears to be that Scotland, in creating a dedicated Scottish Environment Court, would address a key governance gap and possess a service that would treat matters of environmental justice professionally and seriously, giving confidence that citizens had an expressible right to pursue offenders, failures and disputes through an accessible, fair, affordable and effective route.

⁴⁹ Ceri Warnock's 2022 book 'ECTs: powers, integrity and the search for legitimacy' discusses criticisms of the NSW LEC's merits jurisdiction. She makes the point that planning decisions are administrative decisions constrained by statute law - they are not legislative or 'political decisions'. She refers to the 2001 Cripps review of the NSW LEC which considered the merits review jurisdiction of that court and recommended it be retained - see http://www.lawlink.nsw.gov.au/report%5Cldp_reports.nsf/pages/lec-working-6.4.

7. Conclusions and next steps

Conclusions

[55] The case for a 'new' dedicated environment court with an institutional purpose to promote access to justice, democracy, the rule of law and the human right to a healthy environment has already been made. Repeatedly. It has again been refreshed by reference to clear need and growing numbers and models worldwide and by gaps and failures identified at home. And, if we are serious about tackling the climate and ecosystem emergencies and meeting Net Zero and pollution targets, there is a clear and urgent need for a judicial system that is fit for these purposes, supporting the necessary protections effectively.

[56] The Scottish Government has already committed to merging the existing Scottish Land Court and Lands Tribunal for Scotland. Brexit has occurred and its impacts are all too clear. Jurisdiction appears to be a matter for judgement, leadership and decision. It need not be final. Many engaged in the discussions around this study appear to believe strongly that it is better to begin, indeed that it is urgent that we do so, than that we obsess on the ideal definitive arrangements or delay until the mythic perfect beast becomes clear. It should be an institution that is alive and responsive to the needs and priorities identified.

[57] It is important to acknowledge that we have both a depleted and an enhanced regulatory framework with Environmental Standards Scotland now existing, despite the loss of the European Commission and the Court of Justice of the EU. There is also again the commitment to merge the Scottish Land Court and Lands Tribunal for Scotland. Continued budget and service restraint and UK pressures to weaken the legal framework, regulatory and human rights oversight also place further pressures on the nature, scale and quality of governance.

[58] There is recognition of the persistent and systemic barriers to access to justice on environmental matters and Scotland's non-compliance with the access to justice requirements of the Aarhus Convention and its action plan to address this. It is also clear that there are opportunities with the incorporation of the right to a healthy environment and wider access to justice reforms anticipated from the Human Rights (Scotland) Bill – particularly in relation to non-judicial and judicial routes to remedy. A Scottish Environment Court would strengthen the substantive and procedural rights to a healthy environment.

[59] There are also threats embedded again in any attempt to fuzzy the important differences between human rights law and environment law and the rights conferred alongside these. At best, a good connection will deliver a high degree of complementarity and enhanced protections. At worst, neither domain might be well-served and overlaps, gaps and confusion could be increased. Nor should their complexity and importance be

allowed, through progressing them separately or worse still in series rather than parallel, to delay progressing one or the other. This is a time for boldness in ensuring a good fit, but both need to be developed to meet their specific and separate objectives.

[60] The key features of a dedicated institution are evident and while there is not, as other jurisdictions show, a single correct answer, the case for a Scottish Environment Court seems clear. Now the focus ought to be on how to implement and the timetable for this. Additionally, it is important to note that “sizing” the court is not straightforward. The chilling effect has meant that only truly in the last couple of years have we begun to see, at least in part through free service provision,⁵⁰ just what full range of needs and cases might exist. It is now somewhat clearer, however, that the New Zealand and some Australian models do have very direct relevance and attraction as guides.

[61] The importance of addressing relatively small matters of importance to citizens and local communities fairly, cheaply and swiftly is a clear and important objective best served by a supportive, investigative and solutions-oriented commission process using mediation and suitable dispute resolution approaches, where appropriate, ideally under the aegis of a widely constituted comprehensive environment court. Larger and more egregious breaches of law and permits etc. may require a different toolkit. The criminal as well as civil law are likely to be required, again with suitable support, but taking cases and operating in the combined space of the Sheriff Court and High Court/Court of Session. JR matters, appealing lower court and planning decisions, have been clear enough as requiring substantial change for decades. The need to give primacy to environmental matters, and merits-review generally, does not always naturally fit within existing processes and court structures. Cases and matters that appear to be on the edges of an existing court’s scope or outside a judge’s experience or requiring technical and scientific consideration simply cannot be given the serious attention they deserve, and the interested parties should not pay for the privilege of educating the court or being given an inadequate hearing.

[62] Some positive observations about the Scottish Land Court and a (very) few others suggest there are some lessons usefully to be learned there. Nonetheless the former’s fitness to handle technical environment law in all its forms is not identified by any observer.

[63] Matters currently handled in Sheriff Court could be refined, both in process terms and in the way they might be supported, including through further support approaches. But this seems an unsatisfactory compromise and does not address the range of civil and criminal issues that appear to be needed. Also, whilst an extensively reformed Land Court could offer elements of a worthy ECT, and may even be an early and worthy staging-post *en route* to a

⁵⁰ ...and the valiant creditable efforts of some individual companies and specialists largely operating on a pro bono basis. Regarding case numbers, in 2018 the NZ Environment Court took on 830 new cases resolving 380 of them in year. In 2020 the figure for new cases was 501 and 502 were determined. Backlog and new and determined cases are published annually but lag by c 2 years. The NSW LEC’s latest 2021 Annual Report shows 583 judgements. The case numbers from Japan and India to Canada and the US suggest many variables and ECT case numbers from high tens to tens of thousands. Likely appropriate comparisons appear closer to the 200-600 mark.

properly constituted Scottish Environment Court, sitting in the current structure, and requiring appeal routes to the prohibitively expensive and not always either speedy or merit-focussed Court of Session or indeed the Supreme Court, is a setting that does not automatically appear to serve environmental justice any better than the *status quo*. But the case for a partially peripatetic dedicated court with clear powers and expertise, supported by experienced environmentally literate judges and commissioners, appears plain and compelling.

[64] It isn't hard to acknowledge the difficult public policy, economic, public funding and costs of living constraints. Indeed, partly, some of these pressures and their impact is exactly why the need for an appropriately constructed court is so important and necessary. These are all reasons for getting it right, as much as is possible given the constraints, not for inaction or further delay.

[65] Scotland needs a superior court with a comprehensive jurisdiction and appropriate powers to act as a one-stop shop, supported by technical experts, not based on the parties' ability to pay but on the needs and merits of the case. If we are serious about tackling the causes and further threats of climate and ecosystem harm, and fulfilling government commitments as well as protecting the community, the current system is plainly inadequate. The environmental governance landscape emerging since Brexit requires bolstering, using the opportunity presented by the current reconfiguration within the courts and tribunals service and potential reforms inherent in fulfilling human rights obligations. The time has now come to move on, with some urgency, from 'why' to 'how'; to define the best current form of the court and progress to its establishment.

[66] For now, an interim conclusion has to be therefore that there is the need for a 'new' dedicated institution.

Next steps

[67] Progress now starts from the current commitment to merging the Scottish Land Court and Lands Tribunal for Scotland. This offers an initial opportunity to make the existing bodies more useful and coherent, save resources and increase efficiency by undertaking additional remodelling to fulfil the recommended key features for a specialist environmental court with a suitable purview. Absorbing the relevant scope of these two entities into a new body could be viewed as an end in itself, but this would be to miss the opportunity to do better: to build a body with a stronger, fuller remit to meet the needs and challenges already identified.

[68] If this merger *is* an end point in itself, then a whole new separate body is still needed to tackle environment governance gaps and failures and this would then more explicitly risk duplication of administration, costs and even potentially remit and operations. This approach would also risk further confusion in the public mind.

[69] A new Scottish Environment Court will require set up and bedding in time and undoubtedly, as with environment courts elsewhere, periodic performance based review.

[70] There would be merit in dialogue and exchange with judges and commissioners from other jurisdictions as part of learning and adoption of good practice. Further expert input should also come from those aware of the status quo here and hence able to offer views on shaping local learning and other expertise to future Scottish needs. It should also be stressed that the review, and where necessary, reform, of existing governance and performance elements, across the Scottish system as a whole, using a range of expertise, not only remains necessary but is essential if the establishment and operation of the Court, and for that matter ESS, is to be successful.

[71] Finally, it is extremely difficult, following extensive discussion, reconsideration of the case made in 2021 by ERCS/Christman, and closer examination of some of the most comparable and effective ECTs, to disagree with the concluding assessment⁵¹ of Sir Malcolm Grant in his DETR report, previously cited, addressing the way forward for England and Wales in 1999. Non-structural and incremental options are possible and may well merit further consideration. To achieve the deeper necessary systemic change and the positive benefits of the best of models elsewhere which would address weaknesses, gaps and ongoing failures in environmental justice, in this case in Scotland, only more radical change, establishing a genuine environment court, seems likely to deliver.

[72] A Court as envisaged and practised by the best does not guarantee justice but without one, all environmental governance system components are weaker and justice itself is weakened by its absence.

⁵¹ Chapter 15 page 440 “We have in this chapter rehearsed the argument that may be made for an environmental court for England and Wales, and explored alternative, incremental, ways in which those objectives might be achieved through non-structural changes. We have concluded that non-structural change is capable of overcoming some current problems, notably in relation to magistrates’ court practice in sentencing. But to achieve the more fundamental reforms that have been discussed throughout the Report, and to achieve the benefits which we believe have been achieved (albeit unevenly) in the Australasian models, it is necessary to envisage more radical changes”.

Annex 1

Preston's 12 characteristics

In this annex, the 12 characteristics Justice Preston set out are examined - some of which are interconnected - with, where necessary, Scottish contextualisation.

i. Status and Authority. Preston is at pains to observe that ECTs take many forms and the form is in itself not necessarily the best determinant of its being a "successful ECT". But status and authority include a set of basic requirements – centred on the actual empowered ability to resolve disputes. The comprehensive nature of the jurisdiction, recognition by government, democratic opposition, community and stakeholders, and acceptance of the court being the appropriate and legitimate forum to address disputes and identified failures all lie at the heart of success. He is less clear on the issue of investigative approaches, and this is an area of some difference across jurisdictions, in part cultural and sometimes simply rooted in the legal system and traditional approach to justice.

ii. Independent from Government and Impartial. Triangulation of the space between political/legislative and executive/administrative branches of government, the population at large, the establishment as it might be perceived, the media, major landowners etc. is a challenge. Being and being seen to be impartial and operating without fear or favour is a high objective and as Lord Bingham stated the court should be "independent of anybody or anything which might lead them to decide issues coming before them on anything other than the... merits of the case."⁵² The institutional arrangements applied, the recruitment of judges and staff, certification or other training and qualification approaches as well as open process of operation can all support the reality and the perception of fairness and independence. Guidance on best practice is widely available and both failed and captive tribunals are also recorded in the literature by the Prings, Judge Preston and others.

iii. Comprehensive and Centralised Jurisdiction. Preston identifies key components here of coverage, effectiveness and enforceability. The first set of elements of coverage contains: a. "the ability to hear, determine and dispose of matters and disputes arising under all environmental laws enacted in the country; b. right of action – civil actions are directed at enforcing compliance with the law by public and private actors and to restrain and remedy non-compliance (civil enforcement), obtaining compensation for loss or damage through a breach of duties (damages actions), to review the legality of administrative decisions and conduct (judicial review) and to review the merits of administrative decisions on a rehearing (merits review); c. Criminal actions are based on the objective to prosecute and punish offenders against the law. Additionally, the laws involved must involve coverage and be enforceable by government, citizens and other stakeholders." In NSW he lists the areas of environment law but clearly these would need to be defined in the Scottish situation.

⁵² Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 91-92.

A comprehensive approach to jurisdiction for successful ECTs means administrative, civil and criminal enforcement of the law is in scope. He sees the full suite of powers being a critical part of arguments for efficacy and deterrence. Additionally, both the range of substantive matters and types of case should be addressed including via trial, review and appeal.

Preston also considers centralisation, integration and rationalisation to matter. These are set out in some detail but largely relate to consistency, economies of scale, achieving a one-stop shop model, avoiding duplication or parallel cases on the same or related disputes or failures use of expertise and delivery of an effective problem-solving approach.

It should be understood that centralisation as described here is about a coherent corporate or territory-wide approach and consistent application of process across the jurisdiction. It is not about an automatically centralised location for the court. The appropriate use of local hearings, site visits etc is inherent in the approach. It is evident even more so in the New Zealand case that a peripatetic nature is beneficial. And it is notable that that dimension shared by the existing Scottish Land Court is seen as one of its strengths.

iv. Judges and Members are knowledgeable and competent – Preston refers to judges who are “environmentally literate”⁵³. In that Court separate chambers deal with different subject areas and each is supported by commission staff with direct technical skill and experience to draw on as cases are investigated, shaped, tested and where necessary taken to determination⁵⁴. This seems to connect also therefore with vi. as well as ix. and x. Interestingly 10 environmental judges are established as the court of New Zealand and supported by 10 permanent environment commissioners and five part time deputies. In other jurisdictions, the court officers or the case- or presiding judge may determine the expertise needed and this is then engaged contractually or accessed from a roster of accredited and approved experts. ‘Commissioners’ as ‘internal experts’ are also common to the Swedish environment courts as well as the Environment, Resources and Development (ERD) Court of South Australia and several others. The use of expert inputs, including language and cultural dimensions is also something shared by the New Zealand Environment Court and the Scottish Land Court, albeit that status and jurisdiction are vastly different.

v. Operate a multi-door Court (House)

Specialisation, technical court personnel and centralisation make ADR a ready way of working, even if the services and the court moves around. The value of ADR is clear and has been articulated in some detail for Planning and other domains by CORE Solutions and others and relevant guidance is still accessible on the Scottish Government website in that context.⁵⁵ The place of mediation is also set out plainly in the workings of the New Zealand Environment Court. But it is now common in many courts. It is of course not the only tool of

⁵³ Preston states “Environmental issues and the legal and policy responses to them demand special knowledge and expertise. In order to be competent, judges and other ECT members need to be educated about and attuned to environmental issues and the legal and policy responses – they need to be environmentally literate.” P17, section 4.

⁵⁴ It has of course taken over 30 years to reach this level of maturity and capability.

⁵⁵ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2009/03/guide-use-mediation-planning-system-scotland/documents/0078790-pdf/0078790-pdf/govscot%3Adocument/0078790.pdf> CORE Solutions, established by John Sturrock KC was instrumental in progressing and setting up early ADR/Mediation services in Scotland as well as training and supporting mediators and was contracted to produce the guide for Scottish Government. Jamie Whittle was a contributor to this guide. See also <http://core-solutions.com/core/assets/Image/Articles%20and%20Resources/CORE%20Thinking%20Differently.pdf> Sir Crispin Agnew also contributed here.

value. Courts with investigative powers and approaches, directly from the judge or on their behalf via empowered commissioners, appear to be of particular value to the citizen, especially if they bring other disadvantages to the case in terms of resources, education or standing. The point is to have different, tailored routes to justice.

vi. Provides Access to scientific and technical expertise. Given the volume and complexity of environmental law and the technical issues that may be under consideration, scientific as well as legal expertise and relevant prior casework and precedent may be relevant and necessary. Preston highlights that most successful courts make intelligent use of internal or external experts. The costs to parties, especially where in public interest litigation a plaintiff would otherwise face difficulty in accessing or affording expertise, is again clearly an important matter. It is also important to minimise the potential for partisan and biased evidence from any party's engaged expert. A generally trained and experienced judge or support team may have the time and potential to be briefed on such issues but in a merits context, should one or other side in the case bring forth highly detailed or specific technical information or complex jurisprudence, would an inexpert team be able to assess this in reasonable time and affordably and fairly especially if there were to be asymmetry in the parties to the case.

vii. Facilitates access to Justice. This means both access to specifically environmental justice in substance terms but also in relation to practice and procedure. This could relate to access to information, public participation in process, a liberal approach to standing and representation, the approach taken to costs, including for all parties to a case and especially matters of what he calls "inequality of arms" where the deep pockets of some parties and the nature of their available expertise might confer real and psychological advantage. Also, rather to state the obvious, but clearly an important point, robust access to justice around the environment means that environmental issues themselves are taken appropriately seriously by the court and he cites examples of where that has and has not been the case.

viii. Achieves Just, Quick and Cheap resolution of Disputes. This is the now traditional and simple observation that 'justice delayed is justice denied', but goes further into the basis of delivering solutions and seeking to avoid unfairness, delay and cost by processing efficiently, assessing and preparing cases using specialised and expert inputs, and seeking to resolve simply, early and quickly. Case management and processes⁵⁶ well understood, by expert witness sources, court officers, commissioners and expert judges, as well as effective use of data management, IT and communication technology, all contribute to a tighter management of cases, and greater accessibility and credibility in terms of being a serious court engaged in achieving clear solutions effectively. Rather than deal with process details here, useful information is accessible for example via the NSW LEC Court and the NZ Court websites.

ix. Responsive to Environmental Problems and relevant. Connected to vii., the successful ECT which has expert resource and an appropriate ethos is able to assess the environmental problem, failure or dispute but it is also better able to consider relevant remedy and redress on the basis of understanding the issue, cause or impacts etc. He also highlights that this level of engagement with the issues also allows the court to take a

⁵⁶ See Preston Footnote 42 and Newhook Footnotes 32 and 47.

holistic view and to play a fuller role in influencing “the broader schema of environmental governance”. He sees this as an important part of a range of policy areas confronting society, not least in relation to climate change impacts. The history of environmental prosecutions in Scotland, including culpable incidents and permit breaches, when taken at all, often then rested upon the knowledge and attitude of specific Sheriffs. As with points above, a centralised system with technical appreciation of environmental issues would be much less subject to such quixotic variables.

x. Develops Environmental Jurisprudence. A dedicated court with the right jurisdiction, status, knowledge etc would naturally handle more cases and develop a volume of types of cases. It would come to understand the geography and issues of its jurisdiction and amass its own decisions on substance, procedure and aspects of justice including restorative actions. By experience and profile, it would also be better placed to interact with related court peers worldwide. Ultimately this jurisprudence also contributes to better overall environmental governance.

xi. Sound Underlying Ethos and Mission. That last reference to locus in relation to governance is also reflected in his view that the nature of environmental law gives a unifying mission, quoting Lord Woolf who said, “the primary focus of environmental law is not the protection of private rights but on the protection of the environment for the public in general”⁵⁷. Many successful courts, argues Preston, have clear stated missions or statements of purpose to help guide day to day operations. Such statements may also help establish performance criteria allowing everyone to assess the contribution and effectiveness of the court.

xii. Flexible, Innovative and Provides Value adding function. The successful ECT through its work will serve a useful function in general not least through the resolution of disputes or the determination of failures and necessary responses. But it also helps uphold and explain the law and can play a role in refining and improving the law over time. It may formulate and apply principles, especially in merit review appeals. It may innovate in practice and procedure. Whilst some existing, especially larger courts can become conservative and somewhat inert he argues, successful ECTs are often more fleet and flexible. Developing practice notes and guidance can also be of great benefit to policy makers, mediators, regulators (to improve their own decision making and customer or case handling) and new case management and lower courts. He also cites that in cases of especially difficult proof of causation for example the innovative court can seek to achieve simplified remedy and adjust the burden of proof or process to deliver a plainly natural justice. Rigid procedure-bound and inexpert courts would be unlikely to consider such a way of working.

⁵⁷ Sir Harry Woolf, ‘Are the Judiciary Environmentally Myopic?’ (1992) 4 JEL 1, 4.

Annex 2

ERCS: How an environmental court could enhance Scotland's governance arrangements - Roundtable 2 February 2023

A roundtable event – along Chatham House lines - was held by ERCS on 2nd February 2023. The headlines of this report were shared and discussed and participants were asked to consider specific aspects of court and governance development. The main points were captured and have informed this report.

The questions considered were:

1. What would a specialist environmental court need to look like and what are the challenges to its establishment?
2. What should the practical and legal fit be between a specialist environmental court, ESS and the other existing institutions and agencies in Scotland?
3. What should the consultation on environmental governance and establishing an environmental court contain? On what subjects should it seek inputs and further clarity?

List of participants

Sir Crispin Agnew, retired KC
Lloyd Austin, environmental governance consultant/ ERCS chair
Tom Ballantine, ERCS trustee
Janine Ballantyne, National Trust for Scotland
Mike Blair, Gillespie MacAndrew law firm
Barbara Bolton, Just Rights Scotland
Neil Collar, Brodies law firm
Carol Day, Leigh Day law firm
Anna Dews, Lifescape Project law firm
Kevin Dunion, former SIC and Director of FoES
Gavin Elliot, Centre for Environmental Justice Ireland
Amanda Foster, Human Rights Consortium Scotland
Darren Garraghan, Scottish Government
Campbell Gemmell, Environmental governance consultant/ ERCS trustee
Maurice Golden, MSP - researcher
Katy Hindmarsh-Clark, Scottish Government
John Henderson
Stephen Hockman KC
Mark Lazarowicz, Advocate
Beryl Leatherland, LINK Fellow
Peter Luff, Scottish Government
George Lewes, Liam McArthur MSP researcher
Jamie McGrandles, ESS

Lucy Miller, Human Rights Consortium Scotland
Luke Padfield
Prof Colin Reid, University of Dundee
Linsey Reynolds, Amnesty
Prof Annalisa Savaresi, ESS Board/ Stirling University
David Scott, University of Glasgow
Pat Scrutton, SNAP
Aedán Smith, RSPB Scotland/ ERCS trustee
Charles Stewart-Roper, Scottish Government
Rosie Sutherland, RSPB Head of environmental law
Clare Symonds, Planning Democracy/ ERCS trustee
Luis Felipe Yanes, Scottish Human Rights Commission