SCOTTISH GOVERNMENT CONSULTATION ON THE FUTURE OF THE SCOTTISH LAND COURT AND THE LANDS TRIBUNAL FOR SCOTLAND

Introduction

The Environmental Rights Centre for Scotland (ERCS) was formed in January 2020, with the mission of assisting members of the public and civil society to understand and exercise their rights in environmental law and to protect the environment.

We will do this through:

- public education to increase awareness of legal rights and remedies in environmental matters
- advice, assistance and representation to improve public participation in environmental decision-making
- advocacy in policy and law reform to improve environmental law and access to justice on the environment
- strategic public interest litigation to enforce progress on key environmental issues and tackle systemic environmental problems.

ERCS understands environmental law to include law relating to land-use planning, climate change, pollution control, environmental health, the conservation of biodiversity and cultural heritage, and the impacts of transport, energy and other sectors on the natural environment in Scotland.

ERCS was granted charitable status as a Scottish Charitable Incorporated Organisation (SC050257) on 3rd July 2020. Further information about ERCS is available at www.ercs.scot.

Summary

- ERCS supports the proposed merger, mainly because of the opportunity it provides to build a more substantial and more valuable functional asset, including through adding related and important environmental functions to the remit of the merged court.
- ERCS considers that, in order to rationalise Scotland's incoherent, inconsistent and complicated landscape of land- and environment-related appeals, the merged court should be given responsibility for handling the full range of such appeals, potentially in 3 phases:
    1. appeals currently heard by the sheriff court against decisions by environmental regulators and by access authorities (under Part I of the Land Reform (Scotland) Act 2003),
    2. appeals currently made to the Scottish Ministers against decisions by environmental regulators, and
    3. appeals currently made to the Scottish Ministers against land-use planning decisions too.
- As regards awards of adverse expenses, ERCS supports the use of qualified one-way costs shifting (introduced recently in relation to personal injury claims) in the merged court, in relation to claims covered by the Aarhus Convention, in order to help bring Scotland into compliance with international law.

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1. Please indicate your views on the proposal to amalgamate the Scottish Land Court (SLC) and the Lands Tribunal for Scotland (LTS).

☒ in favour

☐ not in favour

Please give your reasons.

ERCS supports the proposed merger, partly because it helps to rationalise the Scottish legal system, but mainly because it provides an opportunity, as mentioned at paragraph 46 of the consultation document, to add more functions to the merged body and thereby create a more coherent, valuable and substantial court entity.

In particular, ERCS would support the addition of environmental functions, as suggested in that paragraph, given the SLC's "*extensive experience of dealing with cases that touch upon environmental justice*" and the LTS's experience of dealing with claims for compensation or land valuation arising under all environmental legislation.

In considering future options, ERCS would find it very helpful to see exemplars and an analysis of the evidence on substance, scale and impact of the SLC's extensive experience as mentioned in the consultation document.

2. If there is a decision to merge the SLC and the LTS, do you consider that the merged body should be a court or a tribunal?

☒ court

☐ tribunal

Please give your reasoning.

Since before the 2015 merger of the Scottish Courts Service and the Scottish Tribunals Service, the distinction between courts and tribunals generally has become increasingly blurred. Against that background, the form of the merged body and what it is called are, for ERCS, less important than the body's functions, procedures, culture, accessibility and resultant impact.

Having said that, we consider that, as far as the general public is concerned, the concept of a court is more familiar and suggests greater status and authority than that of a tribunal, so ERCS would on balance prefer the merged body to be a court.

If a range of environmental functions is transferred to the merged court, as we propose, ERCS would like to see the merged body re-named the 'Scottish Land and Environment Court'. If that transfer is implemented in phases, as we also propose, then such a name change need not take place now, but at the point when the merged court is adjudicating more environmental cases than any other Scottish body and its name needs to accurately reflect its functions.

As suggested in our answer to question 8 below, ERCS considers that, in due course, such a court is also likely to be a more suitable forum

a) than the Court of Session for judicial review of environmental decisions and
b) than the Sheriff Court for the prosecution of environmental offences.

Such a variety of weighty jurisdictions would reside more appropriately in a court than in a tribunal, so for this further reason too, ERCS would prefer the merged body to be a court.

3. If there is a decision to merge the SLC and the LTS, do you consider that the merged body should take on more functions than those separately undertaken by the two bodies at present?

☒ yes

☐ no

If 'yes', please list the extra function(s) to be undertaken and your reasoning.

If 'no', please provide your reasoning for this view.

ERCS considers that the overall landscape of appeals relating to land and the environment in Scotland is incoherent, inconsistent and unnecessarily complicated, and that in order to rationalise this landscape, and simplify the system for users, the merged court should be given responsibility for handling the full range of such appeals – but not necessarily all at once.

In order to manage the transition and allow for review and reflection at each stage, ERCS supports a phased approach to transferring appeal functions to the merged court:

1. starting as soon as possible with appeals currently heard in the sheriff court against decisions by (a) environmental regulators and (b) access authorities (under Part I of the Land Reform (Scotland) Act 2003),
2. as a second step, transferring appeals currently made to the Scottish Ministers against decisions by environmental regulators and
3. as a third step, transferring appeals currently made to the Scottish Ministers against land-use planning decisions too.

ERCS would in due course expect judicial review of environmental and planning decisions to be transferred from the Court of Session to the merged court, in order to improve access to justice in environmental matters and bring Scotland finally into compliance with international law.

(a) Environmental appeals

Most types of environmental appeal are dealt with by Scottish Ministers, usually delegated to a Reporter in the Government's Planning and Environmental Appeals Department (still referred to as 'the DPEA'). These include all appeals against environmental licensing decisions by the Scottish Environment Protection Agency (SEPA), and many appeals against environmental enforcement decisions by SEPA.

However, a significant number of environmental appeal types – as listed in the indicative table in the Appendix – are dealt with in the Sheriff Court, including those against certain other SEPA enforcement decisions. And as the consultation document mentions, the Scottish Land Court (SLC) also handles a small number of environmental appeal types, and was (in 2015) the Scottish Government's most recent preferred choice for hearing appeals against SEPA decisions, in that case on SEPA's use of new civil enforcement sanctions.

In order to reach the above conclusions, ERCS has considered and analyses here what reasoning there is behind past choices of appellate body for different types of environmental decision, as follows on the next 5 pages.

Why was an environmental jurisdiction given to the Scottish Land Court?

The SLC handles environmental appeals under just four pieces of legislation:

- **Deer (Scotland) Act 1996**,
    - section 9, against statements of expenses of deer control schemes issued by Scottish Natural Heritage (SNH); and
    - (since 2011) Sch.2 para.13, against deer control schemes (or variations to them) confirmed by Scottish Ministers under section 8(6);
- **Nature Conservation (Scotland) Act 2004**,
    - section 18, against consent decisions by SNH regarding land within sites of special scientific interest (SSSIs) under section 16;
    - section 34, against land management orders made by Scottish Ministers under section 32;

- **Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2008**, reg.29, against compliance notices served by Scottish Ministers under reg.28;
- **Environmental Regulations (Enforcement Measures) (Scotland) Order 2015**,
    - Schedule 1, against fixed monetary penalties imposed by SEPA
    - Sch.2, para.8, against variable monetary penalties imposed by SEPA
    - Sch.2, para.10, against cost recovery notices served by SEPA
    - Sch.2, para.15, against non-compliance penalties imposed by SEPA
    - Sch.3, against non-compliance certificates issued by SEPA.

Until 2015, one common feature discernible within all the environmental appeal types handled by the SLC was that they were available not to applicants for licences or licence-holders, but to owners or occupiers of land, against administrative action affecting their use of that land, e.g. where SNH refused consent for land management activities that might damage a SSSI. That subject matter was well suited to the SLC's traditional jurisdiction, i.e. the settlement of disputes about crofting and agricultural land.

Affording such persons the right to appeal to a proper court may also have suggested that decisions affecting people who had not applied to a regulator for a licence, but found themselves, perhaps even unwittingly, in the regulator's sights, deserved greater judicial scrutiny or independence than the DPEA or Scottish Ministers are capable of giving.

Why was an environmental jurisdiction given to the Sheriff Court (civil, not criminal)?

From the table in the Appendix it can be seen that the first 5 listed types of appeal to the Sheriff Court have also been available to land-owners/occupiers against administrative action affecting their use of that land, e.g. where they have been served notice by SEPA or the local council requiring them to remove controlled waste deposited on their land, usually by someone else (commonly referred to as 'fly-tipping').

There appears to have been no reason, however, why such appeals by land-owners or -occupiers should go to the Sheriff Court rather than the SLC.

Some logic can also be identified in making a court the appellate body, rather than the DPEA, where Scottish Ministers are the decision-maker to be challenged, as they are – in the guise of Marine Scotland – for many decisions within Scottish inshore waters. Ministers cannot handle appeals against their own decisions (effectively marking their own homework) without falling foul of Article 6 of the European Convention on Human Rights (about which we say more below, in the context of planning appeals).

But again, there seems to be no obvious reason why such appeals should be made to the sheriff and not the SLC.

It is also difficult to understand why, under the Pollution Prevention and Control (Scotland) Regulations 2012, or indeed under the more obscure Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (Scotland) Regulations 2000, operators of industrial processes should be able to appeal against decisions made by SEPA not just to Scottish Ministers, but then a second time, again on the merits, against the appeal decision by Ministers, to the sheriff, while operators of hydro-electric dams or sewage treatment plants who have appealed against decisions by SEPA under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 would have to go to the Court of Session to challenge the appeal decision by Ministers, but only on a point of law.

The same inconsistency is apparent between the ways that 'appropriate persons' served with remediation notices under the contaminated land regime in Part IIA of the Environmental Protection Act 1990 have different appeal routes and rights, depending on whether the particular cause of contamination is such that the land in question must be classified as a 'special site' and handled by SEPA rather than the local authority. An appeal against a local authority notice can be made to the sheriff, with a further appeal available, even on the merits, to the Sheriff Appeal Court, whereas an appeal against a notice served by SEPA must be made to the Scottish Ministers, with no further right of appeal except by petitioning the Court of Session for judicial review on a point of law only.

For reasons of consistency and clarity, therefore, ERCS considers that all the types of environmental appeal listed in the table in the Appendix, or otherwise handled by the sheriff, should be transferred to the merged court as soon as possible.

Why were appeals under SEPA's new enforcement framework given to the SLC?

In its 2014 consultation on new enforcement measures for SEPA and the 'Relevant Offences Order'[1], the Scottish Government signalled a new direction for the SLC, albeit perhaps intended as a temporary one, as the consultation document suggested, "*with the wider tribunals landscape in Scotland still taking shape*" and the idea of an environmental tribunal in Scotland appearing to be on the then administration's agenda.

This consultation proposed giving SEPA a new suite of enforcement tools, referred to as civil sanctions, including fixed monetary penalties, variable monetary penalties and enforcement undertakings, bringing Scotland's environmental regulator more into line with those in progressive jurisdictions elsewhere that had benefited from a broader toolkit for some time.

On the subject of appeals, the Scottish Government stated:

> *"Appeals against decisions to grant or refuse permits, conditions or enforcement made by SEPA are currently heard by the Scottish Ministers and normally adjudicated on by Reporters in the Directorate for Planning and Environmental Appeals. There are five to ten appeals per year in relation to regulatory decisions made by SEPA.*
>
> *"Through the previous consultation and workshop, stakeholders raised concerns around the need for a consistent, transparent, proportionate and independent appeal route for the people affected by the new enforcement measures.*
>
> *"65% of respondees to the previous consultation wanted additional safeguards, with the appeals route being the key concern. …"*

Noting that respondents "*offered views on the three main routes of appeal: to the Scottish Ministers, through the judicial system or through a separate tribunals process*", the Scottish Government recognised here that most of their stakeholders needed extra reassurance

1 https://consult.gov.scot/environment-forestry/environmental-enforcement-framework/supporting_documents/00455143.pdf

about the prospect of SEPA issuing monetary penalties, and implied that the DPEA appeal route would not be "*a consistent, transparent, proportionate and independent appeal route for the people affected by the new enforcement measures*".

The 2014 consultation continued, hinting at plans for a new environmental tribunal:

> *"The Regulatory Reform (Scotland) Act 2014, like other environmental legislation, makes provision for a route of appeal. With the wider tribunals landscape in Scotland still taking shape, we have previously indicated that the precise appeal route for the new enforcement measures will be set in the Order. These will provide for appeals on grounds that:*
>
> - *the decision was based on an error of fact;*
> - *the decision was wrong in law;*
> - *in the case of a VMP, that the amount of the penalty was unreasonable; or*
> - *that the decision was unreasonable for any other reason.*
>
> *"The broad nature of the grounds means that these appeals may require expert evidence from SEPA and the appellant. ...*
>
> *"In considering the above, the Scottish Government's preferred route for hearing such appeals is through the Scottish Land Court (SLC), a specialist court which could apply its expertise to hearing these types of cases and provide access to justice for appellants. The SLC's primary jurisdiction is in crofting and agricultural holdings disputes, but it also deals with appeals from the Scottish Ministers in relation to rural payments (subsidies from the European Union) and some appeals under the nature conservation legislation and in relation to nitrate vulnerable zones. It is based in Edinburgh but holds hearings throughout Scotland. If the SLC errs on a point of law then there is a further appeal to the Court of Session.*
>
> *"Its Chairman has the status of a judge of the Court of Session, and its Deputy Chairman is a sheriff, so it has the necessary expertise to handle disputes involving questions of law. Its other members are experts in land use and valuation, and the Court is used to dealing with cases involving the assessment of expert evidence in relation to such matters."*

The proposals were duly implemented by way of the Environmental Regulations (Enforcement Measures) (Scotland) Order 2015, and the SLC has already heard some appeals against the new SEPA enforcement measures.

ERCS would again find it helpful to see an analysis of the evidence on substance, scale and impact of the SLC's more recent appellate experience, in this context.

Environmental jurisdiction of the Scottish Ministers/DPEA

ERCS supports the Government's reasoning for choosing the SLT as appellate body in 2015, but considers that appeals against not just SEPA's new enforcement measures, but all types of environmental appeal may equally "*require expert evidence from SEPA and the appellant*", including those currently dealt with by the DPEA on behalf of the Scottish Ministers; that the DPEA cannot offer "*a consistent, transparent, proportionate and independent appeal route*"; that "*a specialist court … could apply its expertise to hearing these types of cases and provide access to justice*"; and therefore that responsibility for all types of environmental appeal should be transferred from the DPEA to the merged court.

Moreover, giving certain appellants, but not all, the right to appeal to a court suggests that decisions affecting land-owners or -occupiers, or at least people who have not applied to a regulator for a licence but find themselves in the regulator's sights, deserve proper judicial scrutiny or independence that the DPEA or Scottish Ministers are not capable of giving.

ERCS considers that commercial operators who require an environmental licence to carry on their business deserve as much judicial scrutiny and independence, when it comes to appeals, as landowners and -occupiers who do not require a licence, and that this distinction, if it ever existed, is outdated.

By creating an 'Integrated Appeals Framework' for all SEPA decisions – to accompany the Integrated Authorisations Framework which SEPA is in the process of rolling out – and giving that jurisdiction to the merged court, at step 2 of the proposed phased approach, the environmental appeals landscape can be tidied up, and made more coherent, rational and equitable.

(b) Appeals under Part I of the Land Reform (Scotland) Act 2003

A land-owner on whom a notice under section 14 of the 2003 Act has been served, requiring them to remove any signs, obstructions or dangerous impediments from land where access rights can be exercised, may appeal against the notice to the sheriff. Also, the sheriff can be

asked, under section 28 of that Act, to make various types of declaration about the exercise of access rights[2].

Both types of case arise fairly rarely, so it is unlikely that a sheriff in one of the six sheriffdoms, who deals with all sorts of civil and criminal business in the court and is inevitably a generalist rather than a specialist, is going to hear more than one section 14 appeal in their career. A single, specialist court is much more likely to develop some expertise in these land-related jurisdictions, so ERCS considers that both should be transferred to the merged court, along with the sheriff's jurisdiction for environmental appeals as set out above, as soon as possible (step 1 of the proposed phased approach).

(c) Planning appeals

Environmental and planning decisions are, in legal terms, administrative or quasi-judicial determinations by executive bodies of people's (and companies') civil rights, and therefore, like proper judicial procedures they engage Article 6 of the European Convention on Human Rights, which provides that, in the determination of a person's civil rights and obligations (or of any criminal charge against them), "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

When the Human Rights Act 1998 incorporated Article 6 into UK law, legitimate questions were asked about the independence and impartiality of the DPEA as a planning decision-maker being so close to, indeed part of, the policy-making Scottish Executive (as it then was). These were answered, in Scotland, by the case of *County Properties*[3] – in which the Inner House held that "*the powers of the court [through judicial review] to deal with genuinely justiciable issues arising in the administrative procedures are sufficient to ensure compatibility*" with Article 6. But there remains, as McCartney[4] says, *"scope for increasing*

[2] This is not strictly speaking a type of appeal, but it is a jurisdiction that belongs to the sheriff in the same way that certain appeals do.
[3] *County Properties v. Scottish Ministers*, 2002 SC 79 at 87 (para.18)
[4] 'Litigation over the environment: an opportunity for change', Friends of the Earth Scotland, 2015

public confidence around such planning decisions", and questions about the independence of planning decision-makers in Scotland did not end with *County Properties*[5].

The important distinction between environmental and planning appeals is democratic accountability. The main environmental regulators in Scotland are non-departmental public bodies (NDPBs), whereas planning authorities are local councils, and planning decisions are in theory made – whether at first instance or on appeal – by politicians who can be voted out. In practice, of course, most planning decisions are delegated to planning professionals, whether officers at local authority level, or Reporters in the DPEA.

Moving the DPEA's functions to the merged court would certainly increase public confidence in planning decision-making. McCartney deals with the point about democratic accountability as follows: "*For cases where it was felt that there should still be 'political accountability' and Ministers should make the final decision, … the [ECT] could be given similar jurisdiction [as the DPEA has] to inquire into a proposal and make recommendations*."

Public trust in the planning system was already low before the latest planning reforms[6]. In spite of widespread calls from community groups and others for a community right of appeal, the Scottish Government decided early on in the reform process to rule that out, and continued to do so in the face of well-supported opposition amendments, even at Stage 3 of the Planning etc. (Scotland) Bill's passage through Parliament. This was the second time that a Scottish ruling party had, in opposition, supported calls for such an improvement to planning procedures, but once in government, had seemingly bowed to the lobbying of the housing and broader development industry, changed its mind and resisted such change. Not surprisingly, there is no evidence that public confidence has recovered to any extent.

[5] See e.g. Prof. Colin T Reid, 'Judicial review not always a guarantee of a fair trial', (2007) 119 SPEL 113
[6] https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2017/05/barriers-to-community-engagement-in-planning-research/documents/barriers-community-engagement-planning-research-study-pdf/barriers-community-engagement-planning-research-study-pdf/govscot%3Adocument/Barriers%2Bto%2Bcommunity%2Bengagement%2Bin%2Bplanning%2B-%2Ba%2Bresearch%2Bstudy.pdf

ERCS would argue that the compelling case made throughout the reform process for such a change continues to exist: that the mere availability of such a mechanism to the public would drive up the quality and consistency of planning decisions, and restore the primacy of the development plan in what should be, but palpably is not, a 'plan-led system'. This transformation could be achieved without the need for more than a handful of appeals to be successfully made. Many opponents of such a right, possibly including the Government, have cited concerns that 'the floodgates' to large numbers of legal challenges would open, but produced no evidence that this will happen.

Even without introducing a community right of appeal at this point, the Government could take a big step towards restoring trust in the system by moving the entire staff and functions of the DPEA into the merged court, so that appeals by applicants and developers can be determined by an independent and impartial body, and one seen to be such. ERCS would strongly support such a move, as step 3 of the proposed phased approach.

4. a. Please indicate your views on the proposal that the other legal member of the Lands Tribunal could be entitled to be appointed to hear a case from which the Chair and the Deputy Chair of the Land Court have had to recuse themselves.

☒ agree

☐ disagree

b. Please indicate your views on the proposal that the Deputy Chair of the Land Court could be entitled to be appointed to hear a case from which the President and the other legal member of the Lands Tribunal have had to recuse themselves.

☒ agree

☐ disagree

Please give your reasons.

ERCS agrees, but only as a short- to medium-term solution.

For ERCS and, we would suggest, for many, the important principle is that the merged court is, and can be clearly seen to be, fully impartial and independent. The fact that such questions around conflicts of interest arise at all suggests that the current judicial appointments system, at least in respect of the two bodies under consideration, would benefit from at least fishing in a wider pool of talent, in order to promote increased diversity, or even from a review of eligibility and selection criteria to avoid such conflicts. If such an approach risks diluting the expertise of the current members of the SLC and the LTS in relevant land matters, the need for expert input into judicial decision-making can and, in ERCS's view, should be satisfied by appointing specialist assessors to assist the merged court, as currently happens in the SLC.

5. Do you consider it necessary to continue to have a Gaelic speaker as one of the members of the Land Court?

☐ yes

☒ no

Please give your reasons.

ERCS understands the historical and cultural context of the requirement for a Gaelic speaker as a member of the SLC rooted in the times where crofters and others involved in some cases might not have spoken English. Given the resurgence of Gaelic but also the diversity of contemporary Scotland, a case could likely be made for a number of languages to be accessible if not actually directly represented.

ERCS considers that the court should meet the needs of modern Scottish society and, in accordance with good human rights practice, have access to and, where appropriate, representation of languages and cultures reflecting the whole breadth of the Scottish population and cases coming forward.

6. Do you consider that the Lands Tribunal power to award expenses under section 103 of the Title Condition (Scotland) Act 2003 should be amended so that expenses are not as tied to the success of an application as they are at present?

☒ yes

☐ no

Please give your reasons.

In principle, access to justice in many areas of the law would benefit from such a change.

As the consultation document openly states at paragraph 4 in relation to both the Land Court and the Lands Tribunal,

> "*the Scottish Government, as respondent, is in a position to deploy considerable legal firepower, in the form of counsel, sometimes senior counsel, in addition to its own in-house solicitors, all funded at public expense*".

In the context of judicial review, which is the only legal mechanism currently available (although largely inaccessible) to those wishing to challenge environmental or planning decisions in the Court of Session, such firepower is available not just to the Government, but to all decision-makers, whether NDPBs or local authorities.

Moreover, many parties with an interest in challenging or defending the decisions of the government and regulators that are subject to judicial review, whether large land-owners or commercial operators, have deep enough pockets to fund such a case either as petitioners or as interested parties.

The same cannot be said of many private individuals, community groups or of the vast majority of environmental campaigners and organisations who might have good grounds to challenge such decisions.

It is clear to ERCS that the risk of being found liable in "*very considerable expenses*" incurred by not just one, but two or more, opposing parties is the major deterrent for those wishing

to challenge environmental or planning decisions in the public interest. For that reason, it is also in breach of international law.

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters requires state parties to ensure under Article 9(3), that "*members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*", and under Article 9(4) that those procedures are "*fair, equitable, timely and* ***not prohibitively expensive***" (emphasis added).

It took Scotland until 2013 to introduce rules providing for Protective Expenses Orders for some environmental appeals and judicial reviews in the Court of Session. The availability of Protective Expenses Orders (PEOs) can mitigate exposure to adverse expenses for the few litigants who have been granted such an order, but – despite two further rounds of adjustments to the PEO rules in efforts to achieve compliance with Article 9(4) – the Aarhus Convention Compliance Committee[7] has repeatedly determined, most recently in March 2020, that Scotland remains non-compliant. It is clear that the PEO system is fundamentally flawed as a mechanism of promoting access to justice in environmental cases – especially with multiple opponents.

By contrast, the DPEA makes adverse award expenses only against a party who has behaved unreasonably during the course of an appeal it is handling. This is a much fairer and less threatening basis on which to award expenses in cases where members of the public seek, in terms of Article 9(3) of the Aarhus Convention, "*to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*" – what ERCS refers to as 'Aarhus' claims.

[7] https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_the_Party_concerned/Second_progress_report/Second_progress_review_on_VI.8k_UK_adopted.pdf

ERCS welcomes the recent introduction of qualified one-way costs shifting (QOCS) in personal injury actions, by section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Given the obvious similarities in terms of inequality of arms between personal injury actions and Aarhus claims – which have the added quality of often being pursued in the public interest – ERCS considers that Scotland's continuing non-compliance with the Aarhus Convention would quickly be rectified by the use of QOCS in Aarhus claims.

7. Do you think that the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice?

☒ yes

☐ no

If your answer is "yes", please indicate:

- why (e.g., from your personal experience of the system or some other reason); and
- what, if anything, do you think should be done about it (e.g. abolish the power or introduce a ceiling on awards of expenses in such cases).

In principle, yes. Please see our answer to question 6.

8. Please provide any further comments on any matters relevant to this consultation.

(a) Scotland is still not complying with the Aarhus Convention

The UK is a signatory to the Aarhus Convention, meaning that it will continue to be bound by its obligations under international law after withdrawal from the EU even if it is no longer bound by the two Directives which implement it. The Scottish Government, which has devolved responsibility to fulfil these obligations within Scotland, has further committed to keeping pace with EU standards following Brexit, meaning it should continue to be bound by the two implementing Directives (as set out below) as well.

Article 1 sets out the objective of the Convention, made in 1998:

> *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."*

The right of access to environmental information was fully and accurately adopted into European Union (EU) law by Directive 2003/4/EC on Public Access to Environmental Information, and duly transposed into Scots law by the Environmental information (Scotland) Regulations 2004.

The rights of public participation in environmental decision-making and of access to justice in environmental matters were adopted by the EU, in relation only to the Environmental Impact Assessment Directive and the Integrated Pollution Prevention and Control Directive, through Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, and duly transposed into Scots law, in an equally limited way, by various statutory instruments.

The Aarhus Convention Compliance Committee has repeatedly found Scotland to be non-compliant with Article 9 provisions on access to justice. This has been the case for 6 years, most recently determined in March 2020[8].

ERCS considers Scotland's ongoing non-compliance with international law to be unacceptable, and that it is only possible for Scottish Ministers to entertain such a stance because the ACCC does not have the power the European Commission has to institute infringement proceedings against member states before a court of law and hold them accountable.

ERCS considers, like the ACCC in respect of the UK as a whole[9], that Scotland specifically is failing to fulfil its obligations under Article 3(1) of the Convention, which provides as follows:

> *"Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."*

There is also a communication before the ACCC on the failure of the UK, including Scotland, to fulfil its obligations under Article 9(2) of the Convention to provide access to procedures for challenging the "*substantive and procedural legality*" of relevant decisions[10].

We consider that the best measure the Scottish Government could take to establish the required "*clear, transparent and consistent framework*" and comply with its international law obligations would be to legislate for a Scottish environmental court (or tribunal), ensuring at the same time that all the other requirements of the Convention are satisfied.

[8] *Ibid*.
[9] *Ibid.* para.156
[10] https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2017156-united-kingdom.html

(b) The need for and benefits of an environmental court or tribunal in Scotland

Without doubt the Scottish Government is aware of the need for an environmental court or tribunal (ECT) in Scotland. In its 2011 manifesto for the Scottish parliamentary elections, which it won, the Scottish National Party undertook to consult on options for an ECT. The Tribunals (Scotland) Act 2014 established a statutory framework for tribunals, the above-mentioned 2014 consultation on new enforcement measures for SEPA hinted at the establishment of an environmental tribunal, and it was widely anticipated that the promised consultation, which by then was considered imminent, would be the first step in its creation.

In April 2015, Friends of the Earth Scotland (FoES) "warmly" welcomed the Government's commitment to consult on options for an ECT "this year". Their policy briefing[11] stated:

> *"The creation of an ECT provides the perfect opportunity to take a more holistic approach to compliance with the Aarhus Convention… . Building on recent civil court and tribunal system reforms, a new ECT could not only provide better access to justice for citizens concerned with protecting the environment, but a speedier, more cost-effective system, and a more level-playing field for developers and operators."*

ERCS agrees with this and, emphasising the benefits for all stakeholders, with the further detail FoES set out in their briefing as follows:

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

[11] https://foe.scot/resource/ectpolicybrief/

When it materialised in March 2016, a few weeks before the closure of parliament for the following election (which the SNP also won), the consultation paper[12] was greeted with disappointment because of its lack of options and its limited scope, not only by Friends of the Earth Scotland, but also by the UK Environmental Law Association (which said that "*it addresses only a narrow range of the environmental matters within the 'justice system'*"), the Law Society of Scotland, and many other commentators.

Although that opportunity to legislate for a new ECT was lost, ERCS considers a bespoke environmental court the best option for improving access to justice on the environment in Scotland, not only because of the practicalities of bringing together under one roof the disparate judicial functions involved in different types of environmental disputes, but also because, as one eminent QC and environmental law expert wrote at the time[13]:

> *"The principal advantages of an environmental court are that the judges and expert members develop expertise in the complex interrelationship of the law and science of environmental protection. …. This, together with judicial training in environmental law, makes for a more efficient and quicker resolution of environmental disputes. Judicial expertise will produce a greater consistency in decisions."*

(c) The Brexit 'judicial' governance gap

All this remains true, and is today brought into sharper focus by Brexit and the loss of supranational oversight and enforcement by the EU institutions of EU environmental law and principles, which underpin the majority of UK and Scottish environmental law.

The UK Withdrawal from the European Union (Continuity) (Scotland) Bill, as introduced to Parliament earlier this year, provides for environmental principles similar to those of EU law and for an oversight body called Environmental Standards Scotland, which can fulfil some but not all of the functions of the European Commission. What is completely absent from the proposed governance arrangements is a substitute for the Court of Justice of the EU.

[12] https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice
[13] Sir Crispin Agnew of Lochnaw Bt QC, 'An Environmental Court for Scotland?', (2016) 178 SPEL 133

As another commentator wrote last year, in response to repeated assertions by those opposed to an environmental court in Scotland that hardly any Scotland-specific cases have ever led to the Commission starting infringement proceedings against the UK[14]:

> *"It is less visible but patently true that many relevant issues have led to European Commission concern and consideration over the last 40 years. Important examination of complaints and data, and requests for clarification and reaction to matters raised with and by the Commission staff have helped solve problems, resolve complaints or highlight need and priorities for further active intervention across the range of environment subjects, from habitats and designation issues to large combustion plants, bathing waters and sites under development pressure. It is this role of external oversight, seeking problem clarification and, where the problem is confirmed, early resolution that is in my view the most vital missing part of the currently anticipated post-Brexit arrangements."*

Given that ESS has now been proposed for that role, ERCS considers that it is the enforcement role of the court, as a threatened 'big stick' hanging over and keeping in line those who would consider non-compliance an acceptable option, that is now the most vital missing component in those arrangements. (This is a similar argument to the one ERCS deploys above to support a community right of appeal – as a threat hanging over planning authorities to drive up the consistency and quality of their decision-making, hopefully never to be wielded.)

The Continuity Bill provides for ESS to conduct judicial review proceedings, in time-honoured fashion, at the Court of Session, on a point of law, but this is no substitute for the comprehensive and substantive review provided by the office of the Advocate General and the CJEU. The unwillingness of the Court of Session to consider the merits of cases brought before it is likely to constitute a further breach of Article 9 of the Aarhus Convention, but such arguments have not to date been fully tested before the ACCC.

[14] Prof. Campbell Gemmell, 'Environmental Governance beyond 2019 and the Case for a Scottish Environmental Court', (2019) 196 SPEL 126

(d) The way ahead

As the Bill is still at Stage 1, it represents a new opportunity for the Government to solve the twin problems of Aarhus non-compliance and the Brexit judicial governance gap at once, by legislating for an environmental court that is capable of handling:

A. all environmental, access and planning appeals, as recommended above;
B. in defined circumstances, **a community right of appeal**;
C. judicial review of environmental and planning decisions, in the few circumstances where that would remain necessary if a community right of appeal were introduced;
D. statutory nuisance actions under Part III of the Environmental Protection Act 1990;
E. common law claims in nuisance or delict (known as 'toxic torts'); and
F. criminal prosecutions of environmental offences, with the power to remit serious cases to the sheriff or the High Court for sentencing.

Alternatively, the proposals that are the subject of this consultation represent an opportunity to take the first of several steps, as listed above, towards that ultimate aim.

The first commentator cited above[15] supported this very approach in the aftermath of the abortive 2016 consultation on an environmental court for Scotland:

> *"Scotland should have a dedicated Scottish Land and Environmental Court based on the Scottish Land Court ('SLC') covering the full range of environmental, land and planning jurisdictions."*

He described the SLC in detail and expressed the view that:

> "*It is the SLC's structure and procedures that make it an ideal model for an environmental court."*

As regards the remit of his proposed Scottish Land and Environment Court, he finished by stating:

> *"Statutory provision will require to be made to bring all environmental jurisdictions into the jurisdiction of the SLC and to rationalise the appeal processes. It will have to make provision for all appeals from first instance environmental and development decision-makers' decisions to the SLC, which could then be heard by the Divisional*

[15] Sir Crispin Agnew of Lochnaw Bt QC, 'An Environmental Court for Scotland?', (2016) 178 SPEL 133

Court holding an 'inquiry' or, if appropriate, be judicial review appeals on points of law only. These would include appeals which currently go to the Scottish Ministers, the Court of Session or the Sheriff Court.

"The DPEA should be brought into the SLC where the expert Reporters can form the initial expert members of the court in their various fields.

"A Scottish Land and Environmental Court could have jurisdiction to deal with private environmental law cases, such as nuisance and air, light and water pollution as these cases come within the Aarhus Convention or statutory nuisance cases brought under ss 79-83 of the Environmental Protection Act 1990 which currently go to the Sheriff Court.

"If the DPEA and Land Tribunal are absorbed into the SLC this should not require any additional resources, because it would handle environmental cases and judicial review cases currently being handled by the Court of Session or Sheriff Court."

ERCS supports this statement in its entirety.

Appendix - Environmental appeals to the sheriff

Statutory provision and decision subject to appeal	***Decision-making authority***	***Appeal against decision to***	***Further unrestricted right of statutory appeal to***
Wildlife and Countryside Act 1981, s.14H, by owner/ occupier against invasive non-native species control order	'relevant body' (Scottish Ministers, SNH, SEPA)	Sheriff	Sheriff Appeal Court
Environmental Protection Act 1990, ss.46(7)/47(7) by occupier against household/ commercial waste receptacle notice	'waste collection authority' (local authority)	Sheriff	Sheriff Appeal Court
Environmental Protection Act 1990, s.59(2), by occupier against waste removal notice	'waste collection authority' (local authority) or 'waste regulation authority' (SEPA)	Sheriff	Sheriff Appeal Court
Environmental Protection Act 1990, s.78L, by appropriate person against contaminated land remediation notice	local authority	Sheriff	Sheriff Appeal Court
	SEPA (in relation to 'special sites')	Scottish Ministers	[*judicial review, Court of Session*]
Environmental Protection Act 1990, s.80(3), by owner/ occupier against nuisance abatement notice	local authority	Sheriff	Sheriff Appeal Court
The Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (Scotland) Regulations 2000, reg.8, against refusal or cancellation of registration	SEPA	Scottish Ministers	sheriff (with third statutory appeal to Sheriff Appeal Court)

Statutory provision and decision subject to appeal	***Decision-making authority***	***Appeal against decision to***	***Further unrestricted right of statutory appeal to***
The Pollution Prevention and Control (Scotland) Regulations 2012, reg.58, against permitting and enforcement decisions	SEPA	Scottish Ministers	sheriff (with third statutory appeal to Sheriff Appeal Court)
The Pollution Prevention and Control (Scotland) Regulations 2012, reg.66(6), against refusal of commercial confidentiality	SEPA	Scottish Ministers	sheriff (with third statutory appeal to Sheriff Appeal Court)
The Transfrontier Shipment of Waste Regulations 2007, Sch.5, para.4	SEPA authorised person	Sheriff	Sheriff Appeal Court
The Environmental Liability (Scotland) Regulations 2009, reg.13	'competent authority' (Scottish Ministers, SNH, SEPA)	Sheriff	Sheriff Appeal Court
Marine (Scotland) Act 2010, ss 38, 47, 49, 61 against licensing decisions, monetary penalties and notices	Scottish Ministers (a.k.a. Marine Scotland)	Sheriff	Sheriff Appeal Court
The Ozone-Depleting Substances Regulations 2015, reg.17, against enforcement notice	authorised person of 'enforcing authority' (Scottish Ministers, local authority, SEPA)	Sheriff	Sheriff Appeal Court
The Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017, reg.41/43, against stop/ reinstatement notice	Scottish Ministers	sheriff	Sheriff Appeal Court
UK Withdrawal from the European Union (Continuity) (Scotland) Bill, as introduced, s.32, against compliance notice	Environmental Standards Scotland	sheriff	Sheriff Appeal Court