

The clear and urgent case for a Scottish Environment Court

Briefing, May 2023

In anticipation of the Scottish Government’s consultation on access to justice on environmental matters and the establishment of an environmental court, this briefing summarises how a dedicated Scottish Environment Court would increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.

Overview

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

The publication of Environmental Standards Scotland’s Strategic Plan¹ triggered the Scottish Government’s duty under section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 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.’²

This briefing outlines the reasons why Scotland needs a dedicated environment court, summarising arguments made in two reports commissioned by ERCS: *Why Scotland Needs an Environmental Court or Tribunal* (Christman, 2021) and *The Clear and Urgent Case for a Scottish Environment Court* (Gemmell, 2023).³ Our arguments centre on the well-documented barriers to access to justice on the environment,⁴ and also highlight the value of a dedicated Scottish Environment Court (SEC) in delivering an enforceable human right to a healthy environment.

Background

The question of whether to establish a dedicated SEC has been under periodic consideration for over forty years with the last government consultation in 2016.⁵ There is extensive literature on environmental courts and tribunals, and they exist in hundreds of jurisdictions worldwide.⁶ Hence, we might want to reverse the question to ask, ‘Why does Scotland not have an environment court?’.

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.⁷ Following Brexit, the supranational Court of Justice of the EU, the European Commission, and the reporting work of the European Environment Agency



have been lost. Environmental Standards Scotland was established to provide elements of the role of the European Commission but it has limited powers: based on persuasion of authorities via information and compliance notices, leading on to improvement reports to government, or seeking judicial review as a last resort.

However, there is currently no parliamentary commissioner or connected court process with the power to fine or direct the Government or other parties to address or compensate for failures. This is exacerbated by the loss of comparative environmental data across the EU, the decline in available and reliable Scottish data, and the continued lack of transparency of environmental performance at local and national levels.⁸

Arguments for an environment court

Increasing access to justice

There are persistent and systemic barriers to access to justice. In 2021, the governing institutions of the UNECE Convention on access to information, public participation in decision-making, and access to justice in environmental matters (the Aarhus Convention) made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention's access to justice requirements, which specify that court procedures must be 'fair, equitable, timely, and not prohibitively expensive.' The UK is now required to progress an action plan to achieve full compliance by 1 October 2024.⁹

There is also a lack of merits review in judicial review and in planning statutory appeals which means that only the procedural legality of decisions can be considered. If we are serious about holding public bodies and polluters to account, the current system is plainly inadequate. Scotland needs a superior court with a comprehensive jurisdiction not based on the parties' ability to pay but on the needs and merits of the case.

Addressing a fragmented system

Environmental litigation is carried out in several different courts and tribunals in Scotland, resulting in a system which is fragmented and inefficient. Forums include the Court of Session, Sheriff Courts, Scottish Land Court, the Department for Planning and Environmental Appeals, Lands Tribunal for Scotland, and the Scottish Information Commissioner. A dedicated SEC with a comprehensive jurisdiction would effectively provide a one-stop shop for judicial routes to remedy and achieve efficiency benefits.¹⁰

Developing expertise

Environmental litigation requires judges who understand the complex web of national, regional and international laws and principles which make up environmental law. Added to their legal complexity, some degree of scientific/technical literacy is needed to be able to effectively deal with the nature of environmental disputes, as is familiarity with the often highly technical expert evidence that can be associated with such litigation.¹¹ For these reasons, generalist judges may be



ill-suited to most environmental disputes.¹² A dedicated SEC could appoint technical or scientific members to sit alongside judges and would allow judges to develop specialist expertise.

A flexible approach

Environmental courts or tribunals can combine civil, administrative, and criminal jurisdictions which can allow judges to select the most effective remedy for a case in ways that general courts cannot.

A dedicated SEC could also include the option of alternative dispute resolution (ADR). Some of the most successful and effective environmental courts or tribunals in the world have recognised that the complex nature of environmental disputes may be served well by the flexibility of ADR.

In Australia, such courts have successfully adopted less adversarial and more informal alternatives to trials, such as mediation, conciliation, and neutral evaluation. For example, in the Planning & Environment Court of Queensland, ADR processes are introduced early in each case, and 60-70% of all cases are now settled in this way.¹³ An SEC could adopt a similar process for more effective, timely and affordable remedies.

An enforceable right to a healthy environment

The Scottish Government's commitment to incorporate the right to a healthy environment with substantive and procedural elements follows growing public demands to address the triple crisis of climate breakdown, biodiversity loss and pollution. The Human Rights (Scotland) Bill, we hope, will address the broad access to justice reforms required within a human rights statutory framework.¹⁴

In addition, given that human rights law and environmental law are separate but mutually beneficial, the argument for a dedicated SEC is 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.

Conclusion

Scotland's legal system is not fit for purpose: it is complex, intimidating, and expensive. The case for a dedicated SEC 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.

Scotland needs an environment court with a comprehensive jurisdiction to offer an appropriate judicial route to remedy for environmental matters, make environmental litigation affordable, and ensure access to justice is based on the needs and merits of the case, not on the parties' ability to pay.

An SEC should be designed to achieve full compliance with the Aarhus Convention ensuring that access to justice is accessible, affordable, fair, timely and effective. Such a one-stop shop would address many of the gaps in environmental governance in Scotland, particularly following the UK's



exit from the EU and the loss of oversight which was provided by the EU Commission and access to the European Court of Justice.

The time has come to move on, with some urgency from ‘why’ to ‘how’ to establish a Scottish Environment Court with the appropriate features adapted to Scotland’s distinct legal and political system.

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¹ Environmental Standards Scotland (Nov 2022) [Strategic Plan 2022 - 25](#).

² <https://www.legislation.gov.uk/asp/2021/4/contents/enacted>.

³ See ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#) and ERCS/Gemmell (Feb 2023) [The Clear and Urgent Case for a Scottish Environment Court](#).

⁴ See ERCS (Nov 2021) [Recommendation for a Plan of Action on Judicial Expenses](#), ERCS (Dec 21) [An Enforceable human right to a healthy environment: Advocacy Manifesto](#), ERCS (July 2022) [Evaluation of the UK Action Plan on access to environmental justice](#), ERCS (Nov 2022) [Access to information remains a barrier to justice](#).

⁵ Scottish Government (Sep 2017) [Developments in environmental justice in Scotland: analysis and response](#).

⁶ Pring & Pring (2009) [Greening justice: creating and improving environmental courts and tribunals](#) identified over 350 environmental court or tribunals, UNEP/ Pring & Pring (2016) [Environmental Courts & Tribunals – A guide for policy makers](#) states there were over 1200 and the latest review UNEP/Pring & Pring (2021) [Environmental Courts & Tribunals - A guide for policy makers](#) identifies 2116 in 67 countries.

⁷ Scottish Environment Link/Gemmell (2019) [Environmental Governance: effective approaches for Scotland post-Brexit](#) and Agnew (2016) [An Environmental Court for Scotland?](#), pp 133-135.

⁸ ERCS/Gemmell (Feb 2023) [The Clear and Urgent Case for a Scottish Environment Court](#). p11, footnote 28.

⁹ MoP (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#), see ERCS (July 2022) [Evaluation of UK Action Plan on Access to Environmental Justice](#).

¹⁰ Improved case management and processes by witness sources, court officers, commissioners and expert judges, as well as effective use of data management and ICT would all contribute to greater accessibility and credibility in terms of being a serious court engaged in achieving clear solutions effectively.

¹¹ Preston (Jan 2012) [Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study](#), pp 425-426.

¹² See Pring & Pring (2009) [Greening justice: creating and improving environmental courts and tribunals](#), p14 and p18 and ‘[Environmental Courts & Tribunals: A Guide for Policy Makers](#)’, p IX.

¹³ Preston (2014) [Characteristics of Successful Environmental Courts and Tribunals](#).

¹⁴ Scottish Government (Mar 2021) [National Taskforce for Human Rights Leadership Report](#), recommendations 21 – 26.