

Consultation on the Review of the Effectiveness of Environmental Governance – ERCS template response

Introduction

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 carry out advocacy in policy and law reform to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.

This is ERCS' draft template response to the Scottish Government's Consultation on the '[Review of the Effectiveness of Environmental Governance](#)' ('the Consultation'). The Consultation is accompanied by a '[Report into the Effectiveness of Governance Arrangements as required by section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#)' ('the Report').

The Report & Consultation were produced to discharge statutory duties under S41 of the UK Withdrawal from the European Union (Continuity) (Scotland) 2021 ('2021 Act'). The 2021 Act contained several provisions in response to Brexit, including the introduction of guiding principles on the environment into Scots law and the formation of Environmental Standards Scotland (ESS).

ERCS response to the consultation

Overview of Environmental Governance

1. Do you have any general comments on the scope of the review and the Scottish Government approach?

ERCS response: In short

- ERCS is very disappointed with the narrow scope of the Report and Consultation.
- The Report focuses largely on Environmental Standards Scotland (ESS) and the related provisions of the 2021 Continuity Act only.
- The Report is not a review of environmental governance and fails to discharge statutory duties under S41 of the 2021 Act.
- The Scottish Government accepts that access to justice in environmental matters is unaffordable and in contravention of the Aarhus Convention, yet it has not committed to implementing the recommendations of the Convention's governing body before a deadline of October 2024.
- The Report's conclusions appear to be pre-determined without evidencing how it has reached its conclusions.
- Overall, ERCS finds the Report to be of poor quality and weakly evidenced.

More on the ERCS response



Environmental governance is a much broader subject than has been considered in the Report. The Scottish Government's own definition of environmental governance makes this clear:

Environmental Governance is a term that can be interpreted broadly to include consideration of the administrative, regulatory and judicial structures that contribute to protection of the environment and promotion of sustainable development. (p.6)

The Report considered whether to establish an environmental court with reference only to the 'governance arrangements' established by Part 2, Chapter 2 of the 2021 Act, which established ESS as a post-Brexit scrutiny body to enforce compliance with environmental law. This is extremely narrow, failing to account for other administrative, regulatory, and judicial structures relating to environmental governance in Scotland.

The Report contains no analysis of the problems of environmental governance which exist in Scotland. The report contains no assessment of the environmental problems facing Scotland, such as the pollution of water and air and the biodiversity and climate crises. There are clear causal connections between the environmental problems in Scotland and the defects in our system of environmental governance, but the Report appears blind to these.

The Report fails to refer to or consider any of the existing literature on the topic of environmental governance in Scotland, and frequently makes claims about the positive state of environmental governance which are non-evidenced. The Report demonstrates ignorance of the literature on the subject of environmental governance in Scotland in general, but this feature is particularly stark vis-à-vis the Scottish Government's consideration of whether to establish an environmental court.

2. Do you have any further comments on wider issues of environmental governance?

ERCS response: In short

- Contrary to the Scottish Government's view, environmental governance requires considerable improvement in Scotland across many different areas:
 - Access to justice and the costs of environmental litigation
 - The enforcement of environmental law
 - The planning system
 - Wildlife crime
 - Substantive environmental problems relating to climate, biodiversity, air quality, water quality, and sewage pollution.
- Environmental governance issues have been compounded by Scotland's removal from the jurisdiction of the EU Commission, the Court of Justice of the European Union and the European Environment Agency.
- There has been no adequate replacement of EU institutions, resulting in governance gaps in monitoring, scrutiny, investigations, complaints handling and legal remedies.

More on the ERCS response

There are a number of longstanding environmental governance problems in Scotland, including but not limited to:



- The lack of access to environmental justice, largely due to the costs of litigation. Whilst the Report recognises this problem, we are concerned by the absence of any remedial proposals.
- The non-enforcement of numerous environmental laws and a lack of scrutiny of their implementation.
- The lack of genuine public participation in planning decisions, inherent bias and unfairness in the planning system and a lack of enforcement of planning controls.
- There are numerous concerns in relation to wildlife crime including that it is underreported, reports of crimes are not investigated, there are low prosecution rates and sentences for those convicted of wildlife crimes are low with limited deterrent effects.
- Substantive environmental problems including:
 - Climate change, and the repeated failure to meet annual climate targets.
 - Air pollution.
 - Water pollution.
 - Sewage sludge regulation.

These problems have been compounded by issues relating to the UK's departure from the EU. Brexit resulted in Scotland's removal from the jurisdiction of the EU Commission, the Court of Justice of the European Union and the European Environment Agency. There has been no adequate replacement of those institutions.

The Scottish Government's 2018 ['Environmental Governance in Scotland on the UK's withdrawal from the EU'](#) report identified that gaps would arise post-Brexit in the following areas:

- Monitoring, measuring and reporting;
- Scrutiny and investigation;
- Considering complaints;
- Seeking solutions;
- Powers to refer a public body to a court;
- Powers to order interim measures;
- Powers to require ministers or a public body to comply and to impose sanctions.

Professor Campbell Gemmill considered the above in his 2019 report ['Environmental Governance: effective approaches for Scotland post-Brexit'](#). His recommendations included that:

- There should be an independent dedicated parliamentary commissioner for the environment.
- There should be an environment court.
- There should be a feasibility study or options appraisal to recommend proposals as part of a coherent package on environmental governance.

Lloyd Austin's 2022 report ['Scotland's environmental ambitions: From rhetoric to reality revisited in detail'](#) found a clear gap between environmental rhetoric and the outcomes which are delivered in Scotland. His report followed a 2011 [report](#) by Tamsin Bailey which reached a similar conclusion.



Austin's report found that a number of environmental governance problems remain entrenched in Scotland, including:

- Limitations on scrutiny, audit and challenges to decision-makers to ensure accountability.
- The vague and non-binding nature of many statutory targets, duties and powers.
- The need for improved political will and a voice for the environment within government.
- The need for economic transformation to ensure that environmental limits are respected.
- The lack of funding for environmental initiatives.

A genuine review of environmental governance would have (a) considered the above literature and (b) proposed solutions to the many problems which have been identified. This review did neither.

Environmental Governance Post-Brexit

Chapter three of the [report](#) provides an overview of environmental governance following the exit of the UK from the EU, covering issues such as environmental law, existing governance arrangements, [the role of Environmental Standards Scotland](#) and how this compares to governance within the EU.

1. Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?

ERCS response: In short

- The Report provides a positive appraisal of ESS without providing any analysis or evidence of its casework and whether this has demonstrated a positive impact reducing substantive environmental problems in Scotland.
- The ability of citizens to raise individual instances of non-compliance with environmental law was lost post-Brexit, and the Scottish Government has provided no replacement for this.
- This chapter is of very limited assistance in considering what impact ESS has had on resolving environmental governance problems resulting from Brexit.
- ERCS disputes the conclusion in chapter three that “... *the provisions of the Continuity Act establishing ESS and providing for its powers and functions have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU.*” (p.25).

More on the ERCS response

Chapter three largely discusses the work of ESS, yet it does not analyse the work of ESS in any detail. It contains no analysis of any enforcement casework which has been carried out by ESS. It offers a positive assessment of ESS' work, but the claims are unsupported by evidence.

The only example of ESS' work which is dealt with in any depth is that of ESS' air quality investigation. ERCS is broadly supportive of ESS' air quality investigation. However, this section of the Report does not assess the real-life impact of ESS' work on air quality (i.e. whether ESS' intervention in this area has had any measurable impact on air quality in Scotland).



Chapter three of the Report states on p.20 that, *“There are positive indications from these outcomes that the flexibility built into the provisions, and the encouragement for ESS and public authorities to cooperate to resolve issues informally, is working effectively... there is a broad appreciation of their independence and integrity, and a view that they have started their work in a positive and effective manner”*. This assessment is not evidenced.

Chapter three explains that *“ESS has taken a constructive approach to receiving representations, providing advice and support to those who need help in setting out their concerns, and helping people to identify the appropriate route to redirect concerns that are not within ESS’s own remit”* (p.22). This assessment is not evidenced – there is no breakdown of the total number of representations received by ESS, from whom, how many were redirected and how many were accepted, closed and with what outcomes.

ESS’ website indicates that ESS has received 36 ‘representations’. Of those 36 representations, 19 (53%) have been closed by ESS with no further action being taken. Of the representations which were closed, reasons include the phrase ‘alternative remedy available’ (used 12 times), and several representations are listed as ‘did not meet ESS criteria’ or ‘relating to individual regulatory decisions.’ These figures indicate that ESS was unable to deal with half the representations it has received, which undermines the Scottish Government’s position that ESS is an additional route to seek justice.

ESS is only of assistance to individuals and groups where it can be evidenced that there is some form of systemic failure to comply with environmental law. Demonstrating a systemic failure is often a complex and resource-intensive task. Most individuals and groups have limited capacity to gather sufficient evidence to demonstrate the existence of a systemic failure.

The work which is required to evidence a systemic failure to comply with environmental law is significant for a professional organisation. It is not realistic to expect members of the public or civil society groups to have the resources to produce a representation which would fall within ESS’ remit.

Limitations on ESS’ remit also includes its inability to work in certain subject areas, which further constrain any ability ESS may have to improve access to justice in environmental matters. Disclosure of, or access to, information, national defence or civil emergency and finance or budgets are all excluded from its remit.

With respect to the exclusion of individual cases from ESS’ remit, the Report notes that the Scottish Government’s view is that this exclusion remains appropriate and that *“...it is not ESS’s role to act as a point of appeal for individual planning and consenting decisions”* (p.24). The Scottish Government’s position on this matter leaves a gap for individual cases. Individual cases can have severe environmental impacts and can be an early warning of systemic problems. Individual cases are also important collectively: the environment dies by a thousand individual cases. The ability of citizens to raise individual instances of non-compliance with environmental law was lost post-Brexit. The Scottish Government has provided no replacement for this. This problem has been left entirely unaddressed.



We dispute the conclusion in chapter three that “... *the provisions of the Continuity Act establishing ESS and providing for its powers and functions have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU.*” (p.25). Environment governance was neither effective nor appropriate prior to Brexit. If anything, it has deteriorated post-Brexit. The provisions of the Continuity Act were insufficient to replace the institutions which were lost post-Brexit.

2. Do you have any further comments on the existing environmental governance arrangements?

ERCS response: In short

No (as we have given a detailed response in question 1).

3. Do you have any further information or evidence on the issues presented in chapter three?

ERCS response: In short

- ERCS is broadly supportive of ESS’s work. Since its establishment in 2021 it has undertaken some valuable work within its relatively narrow remit.
- However, ERCS has often found ESS slow to act and appears reluctant to use its statutory powers to enforce environmental laws and regulations.
- While ESS appears to have adequate fact-finding and scientific expertise to fulfil its statutory role, there remains no clear judicial route to remedy.

More on the ERCS response

ESS is a relatively new public body which has shown some initial signs that it may be effective within the confines of its relatively narrow remit. The example of ESS’ intervention against Marine Scotland’s failure to address the unlicensed use of ‘acoustic deterrent devices’ on fish farms appears to be one where ESS has achieved a positive outcome.

However, ERCS’s experience to date suggests that ESS are slow to act on representations, even when presented with clear breaches of environmental law, and appears reluctant to use its formal statutory powers to enforce environmental laws. ERCS is unaware of ESS issuing any compliance notices or raising judicial review proceedings.

Access to Justice on Environmental Matters

Chapter four of the [report](#) covers evidence around access to justice on environmental matters in Scotland, presents stakeholders’ input and the Scottish Government position on ensuring that there is effective access to justice on environmental matters in Scotland.

1. Do you have any comments on the content of chapter four and the Scottish Government position on this subject?

ERCS response: In short



- The report does not directly address the relevant statutory duty which the Report was required to fulfil, namely the matter of “whether the law in Scotland on access to justice in environmental matters is effective and sufficient”.
- We welcome acknowledgment of the prohibitive costs of environmental litigation, and that Scotland is non-compliant with access to justice requirements under Article 9(4) of the Aarhus Convention.
- The Scottish Government accepts that access to justice in environmental matters is unaffordable and in contravention of the Aarhus Convention, yet it has not committed to implementing the recommendations of the Convention’s governing body before a deadline of October 2024.
- Major changes are required to ensure access to justice in environmental matters is effective and sufficient, most importantly the establishment of an environmental court.
- Other necessary reforms include improving access to legal aid for environmental litigation and introducing Qualified One-Way Cost Shifting (QUOCS).
- The ‘current work’ which the Report refers to as evidence that the Scottish Government is carrying out ongoing work to aid access to justice is vague, lacking in timescales and lacking in substance.

More on the ERCS response

The relevant statutory duty which the Report was required to fulfil, was to address the matter of “whether the law in Scotland on access to justice in environmental matters is effective and sufficient” (S41(2)(b) of the 2021 Act). This matter is not directly addressed at any point in the Report, albeit chapter four concludes that the Scottish Government “does not see any strong argument for major reforms to the system of justice on environmental matters” (p.34). ERCS strongly disputes this conclusion.

We welcome the acknowledgment in the Report of the costs of litigation over the environment and that the ACCC has found Scotland to be non-compliant vis-à-vis Article 9(4) of the Aarhus Convention (p.27-28). However, we are concerned that the Scottish Government has no plans to resolve these problems. Access to justice in environmental matters is neither effective nor sufficient. Major changes are required to address this, starting with the establishment of an environmental court.

In addition to the establishment of an environmental court, the following changes should be made as a matter of urgency to improve access to justice:

- Legal aid rules should be amended to make legal aid available in public interest environmental litigation.
- Civil society organisations (including community groups and NGOs) should be made eligible for legal aid.
- Qualified one-way costs shifting (QUOCS) should be introduced for public interest environmental litigation to replace the unfair ‘loser pays’ rule where expenses follow success and associated Protective Expenses Order regime – see our [briefing on judicial expenses](#) and [Evaluation of Scotland’s Aarhus Action Plan](#) for further details.



The Report details on p.28 measures which the Scottish Government is carrying out as part of its “current work ongoing to aid access to justice”. Here we outline and assess some of the measures:

- The Report states that “the recognition and inclusion of the human right to healthy environment... in the Human Rights Bill... will improve access to forms of redress for rights holders”. The recent consultation published on the Scottish Human Rights Bill contains no proposals which support this proposition. There are no proposals in the Human Rights Bill which will remove the barrier to accessing justice caused by the costs of litigation over the environment.
- The references to legal aid reform in the report are vague and lacking in substance, and the language of the Report suggests that there are no substantive proposals to reform legal aid at present. Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 should be amended to make legal aid available in public interest litigation. Civil society organisations (including community groups and NGOs) should be made eligible for legal aid.
- The Scottish Government accepts that access to justice in environmental matters is unaffordable and in contravention of the Aarhus Convention, yet it has not committed to implementing the recommendations of the Convention’s governing body before a deadline of October 2024.
- The Report highlights ESS’ ability to provide an additional route to remedy and assist individuals and groups to ‘seek environmental justice’, but this is very limited, due to its narrow remit and its inability to deal with individual cases. The existence of ESS in no way makes up for the absence of an environmental court. ESS is not a court or any other variety of adjudicative body, and its status as effectively a quasi-ombudsman with a limited remit does not meet the Aarhus Convention’s access to justice requirements.

Overall, the ‘current work’ which the Report refers to as evidence that the Scottish Government is carrying out ongoing work to aid access to justice is vague, lacking in timescales and lacking in substance.

Equal rights of appeal in planning

The report restates the Scottish Government’s position that equal rights of appeal are not required for Aarhus compliance. This has been disputed by a coalition of NGOs including ERCS, Friends of the Earth Scotland, RSPB, and Planning Democracy, who have raised this matter directly with the Scottish Government and have a live communication under consideration with the Aarhus Convention Compliance Committee. The committee is currently considering submissions and may hold a committee hearing before issuing a final ruling.

2. Do you have any further comments on existing access to justice on environmental matters?

n/a

3. Do you have any further information or evidence on the issues presented in chapter four?



We refer you several reports and briefings which have informed this consultation response:

- Austin (2022) [Scotland's environmental ambitions: From rhetoric to reality revisited in detail](#)
- Bailey (2010) [Scotland's environmental laws since devolution - from rhetoric to reality](#)
- ERCS/Christman (Oct 2021) [Why Scotland Needs and Environmental Court or Tribunal](#)
- ERCS (2021) [Recommendations for a plan of action on judicial expenses](#)
- ERCS/Gemmell (May 2023) [The Clear and Urgent Case for a Scottish Environment Court](#)
- ERCS (July 2023) [Evaluation of Scotland's Action Plan on access to environmental justice](#)
- Pring and Pring (2009) [Greening Justice: Creating and Improving Environmental Courts and Tribunals](#)
- UNEP (2021) [Environmental Courts and Tribunals – 2021: A Guide for Policymakers](#)

Governance Arrangements and Environmental Court

Chapter five of the [report](#) provides an overview of the evidence provided on whether an environmental court can enhance existing governance arrangements, and presents the current position of the Scottish Government on the issue.

- 1. Do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?**

ERCS response: In short

- The conclusions of chapter 5 appear to be pre-determined against an environmental court, but this view is not supported by any evidence, analysis, or references.
- No reference is made to any literature on this topic, including recent reports which ERCS has produced or the many international reports which consider the many environmental courts which have been established in other countries.
- The Scottish Government's conclusion on this matter appears pre-determined.
- An environmental court would improve ESS' effectiveness in enforcing environmental laws by giving it an affordable means of exercising its enforcement powers.
- An environmental court would also allow for the opportunity to rationalise litigation arising from the work of ESS, and allow judges to develop specialist expertise.
- Environmental courts can adopt rules, policies and processes which improve access to justice by reducing the costs of litigation and improving accessibility.

More on the ERCS response

The conclusions of chapter 5 are not supported by evidence or analysis. No reference is made to any literature on this topic, including recent reports which we have produced or the many international reports which consider the many environmental courts which have been established in other countries.

Why Scotland needs an environmental court

An environmental court would improve ESS' effectiveness in enforcing environmental laws by giving it an affordable means of exercising its enforcement powers.



An environmental court is required for the reasons detailed in our 2021 report '[Why Scotland needs an environmental court or tribunal](#)':

- Environmental litigation is unaffordable – in contravention of the Aarhus Convention. An environmental court ensure litigation is affordable and improve access to justice.
- Certain types of environmental litigation do not allow the courts to consider whether the substance of a law has been violated. An environmental court could be given the power to carry out merits review.
- Environmental litigation is carried out in several different courts and tribunals in Scotland, resulting in a system which is fragmented and inefficient. An environmental court could achieve efficiency benefits by reducing the risk of having multiple legal proceedings arising out of the same environmental dispute by having multiple legal issues heard in the same forum, providing administrative costs savings and increasing convenience for the parties.
- Effectively resolving environmental disputes requires legal and scientific expertise. Judges in Scotland may not be exposed to environmental disputes on a regular enough basis to allow them to develop a specialism in this area. An environmental court could appoint technical or scientific members to sit alongside judges – and would allow for judges to develop specialist expertise.

There is considerable evidence that an environmental court would enhance environmental governance arrangements.

Environmental courts help develop judicial expertise in environmental science and law. The use of technically-trained judges in environmental courts has improved the quality of environmental judgements in Sweden.

The jurisprudence of environmental courts helps to clarify the law – which can increase the consistency and predictability of decisions. The Land and Environment Court of New South Wales has developed the concept of 'ecologically sustainable development' and has developed numerous planning principles.

Environmental courts often incorporate alternative dispute resolution, which can allow for less adversarial and less formal resolution of disputes and is usually cheaper and faster than litigation. The Planning and Environment Court of Queensland has appointed an 'alternative dispute resolution registrar'. It has been reported that approximately 60-70% of all cases filed with the Court are settled through the help of the ADR Registrar.

Environmental courts develop innovative remedies and solutions to environmental problems. Environmental courts can adopt rules, policies and processes which improve access to justice by reducing the costs of litigation and improving accessibility. Improved access to justice can improve government accountability, and lead to better enforcement of environmental laws, as it gives citizens the ability to directly challenge breaches of environmental laws.

2. *Do you have further comments on whether an environmental court can enhance governance arrangements?*

No.



3. *Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?*

For further evidence supporting the need for an environmental court, please consult:

- ERCS/Gemmell (May 2023) [The Clear and Urgent Case for a Scottish Environment Court](#)
- ERCS/Christman (Dec 2021) [Why Scotland Needs an Environmental Court or Tribunal](#),
- Austin L, Cardesa Salzmann A, Gemmell C, Hughes J, Savaresi A & Reid C (2018) [Report by the Roundtable on Environment and Climate Change on Environmental Governance in Scotland on the UK's withdrawal from the EU](#)
- Gemmell (2019) [Environmental Governance: effective approaches for Scotland post-Brexit](#)