

Review of the Effectiveness of Environmental Governance Consultation Response 6 October 2023

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 provide free legal expertise in public interest environmental law, awareness raising and outreach to marginalised groups, and advocacy in policy and law reform.

This is ERCS' response to the Scottish Government's '[Review of the Effectiveness of Environmental Governance](#)' 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').

Overview of environmental governance - do you have any general comments on the scope of the review and the Scottish Government approach?

We are very disappointed by the narrow scope of the Report and the Consultation. The Report focusses largely on ESS and the related provisions of the 2021 Act only. The Report is not a review of environmental governance.

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.¹

We are also deeply concerned by the poor quality of the Report.

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. 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.

The Report makes numerous claims regarding the state of environmental governance which are non-evidenced.

The Scottish Government does not appear to have approached this consultation in good faith.

The conclusions of this consultation appear predetermined.

Overview of environmental governance - do you have any further comments on wider issues of environmental governance?

Contrary to the Scottish Government's view, environmental governance requires considerable improvement in Scotland across many different areas.

Environmental governance problems in Scotland

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 remedial proposals.
- The non-enforcement of numerous environmental laws and a lack of scrutiny of their implementation.²
- 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.³
- There are numerous concerns in relation to wildlife crime. These include that wildlife crime is underreported, reports of crimes are not investigated, there are low prosecution rates and sentences for those convicted of wildlife crimes are low and have limited deterrent effects.⁴
- Environmental problems including:
 - **The climate crisis.** The Scottish Government failed to meet seven of its eleven statutory targets for reducing emissions of greenhouse gases between 2010 to 2020.⁵ The UK Climate Change Committee has described Scotland's climate targets as being "in danger of becoming meaningless" for reasons which include that the Scottish



Government “lacks a clear delivery plan and has not offered a coherent explanation for how its policies will achieve Scotland’s bold emissions reduction targets”.⁶ The UK Climate Change Committee has criticised Scotland’s progress on climate adaptation for lack of quantifiable indicators for a lack of quantitative targets with clear government ownership, the lack of progress in delivering, monitoring and evaluating adaptation.⁷ The Scottish Government failed to publish a climate impact assessment of its infrastructure investment plan, as per its statutory duty under Section 94A of the Climate Change (Scotland) Act 2009.⁸

- **The biodiversity crisis.** The subtitle of the Scottish Government’s 2023 biodiversity strategy is “Tackling The Nature Emergency in Scotland”. The strategy notes that the evidence, “points consistently to a natural environment that has been heavily degraded, with continued declines across much of our land and seascapes”.⁹ The continuing deterioration of Scotland’s biodiversity is detailed in the September 2023 ‘State of Nature’ report.¹⁰
- **Air pollution.** Many people in Scotland breathe polluted air. A 2022 report by Environmental Standards Scotland states that, “Poor air quality is estimated to contribute to approximately 2,000 premature deaths and a loss of 22,500 life years in Scotland”.¹¹
- **Water pollution.** Water quality in many rivers and at beaches across Scotland is affected by sewage pollution. A September 2023 investigation by the Ferret reported that, “since the start of May, 50 of the country’s 89 designated bathing waters have breached European safety limits for faecal bacteria at least once when they were tested”.¹²

Environmental governance problems relating to Brexit

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’ report¹³ identified that gaps would arise post-Brexit in 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 and 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’.¹⁴ His recommendations included that there should be an independent dedicated parliamentary commissioner for the environment, an environment court and 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.¹⁵ His report followed a 2011 report by Tamsin Bailey which reached a similar conclusion.¹⁶

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 considered the above literature and proposed solutions to the many problems which have been identified. This review did neither.

Environmental Governance Post-Brexit - do you have any comments on the content of chapter three and the Scottish Government policy on this subject?

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".¹⁷

Environment governance in Scotland was neither effective nor appropriate prior to Brexit. If there has been any trend in environmental governance post-Brexit, it is one of deterioration. The provisions of the Continuity Act were insufficient to replace the institutions which were lost post-Brexit.

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 which is almost entirely unsupported by evidence.

It notes that "ESS has carried out a number of investigations since its formation".¹⁸ It is indicative of the poor quality of the Report that the number of investigations carried out by ESS is not identified.

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 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".¹⁹ 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".²⁰ 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.

With respect to the exclusion of individual cases from ESS' remit, the Report explains the Scottish Government's view 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".²¹

The Scottish Government's position on this matter leaves a gap for individual cases. Individual cases can have severe environmental impacts. They can provide early warnings of more 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. This problem was known prior to Brexit (it is discussed in the Scottish Government's 2018 'Environmental Governance in Scotland on the UK's Withdrawal from the EU' report)²² – yet it has been left entirely unaddressed by the Scottish Government.

Overall, chapter three is a superficial assessment of the work of ESS. Its claims are not supported by evidence. Chapter three is of very limited assistance in considering what impact ESS has had on resolving environmental governance problems resulting from Brexit.

Environmental Governance Post-Brexit - do you have any further information or evidence on the issues presented in chapter three?

Given the absence of analysis of ESS' enforcement work, and the non-evidenced claim in the Report that ESS is working effectively, we offer some comment on that subject here.

ERCS has made eleven representations to ESS and has experience of their policies and practices.

While our view is that ESS' statutory powers are insufficient for a body whose purpose is the enforcement of environmental law, ESS does have significant statutory powers to enforce



environmental laws. It appears to have a reasonable budget and a complement of staff with suitable technical skills (notwithstanding our comments below on the absence of legal expertise within ESS).

The staff of ESS are helpful and responsive.

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 achieved a positive outcome.²³

We have raised several concerns with ESS regarding their policies and practices. Our concerns include that:

- ESS is slow to act, even when presented with clear breaches of environmental law. This is evident in the following examples:
 - ERCS made a representation to ESS in December 2022 in relation to the failure by SEPA to take any enforcement action against polluters responsible for severe sewage pollution at several points on the River Almond (ESS reference IESS.22.027). Our view is that SEPA's failure to take enforcement action contravenes its duty to enforce the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (Regulation 31(1)), its duty to further the conservation of biodiversity (Nature Conservation (Scotland) Act 2004, Section 1(1)) and its duty to have regard to the desirability of protecting the water Environment (Water Environment and Water Services (Scotland) Act 2003, Section 2(5)). ESS informed us in July 2023 that they intend to invite SEPA to 'informal resolution' on this matter. It is difficult to understand why it took more than half a year for ESS to make a decision to enter into informal resolution. We are yet to be convinced that ESS' intervention will result in any substantive change which will address the breaches of environmental law which are at the heart of that representation.
 - ERCS made a representation to ESS in March 2023 in relation to the Scottish Government's failure to publish a climate impact assessment of its infrastructure investment plan, as per its statutory duty under Section 94A of the Climate Change (Scotland) Act 2009 (ESS reference ESS.23.016). ESS declined to use its statutory powers to raise judicial review proceedings in this case, despite ERCS requesting that it did so. ESS informed us in July 2023 that they intended to invite the Scottish Government to 'informal resolution' on this matter. It is difficult to understand why it took four months for ESS to make a decision to enter into informal resolution vis-à-vis a clear breach of statutory duty. It is notable that the Scottish Government only admitted having breached its statutory duty following our making a formal threat of judicial review through solicitors which were jointly instructed by ERCS and the Good Law Project. The Scottish Government did not make that concession in response to the limited steps taken by ESS.
- ESS does not use its formal statutory powers to enforce environmental laws. We are unaware of ESS have issued any compliance notices or raising judicial review proceedings.



- ESS appears to be of the view that the Scottish Public Services Ombudsman ('SPSO') is a suitable 'alternative remedy' sufficient for ESS to refuse to deal with representations which could otherwise be dealt with by the SPSO. This policy came to light in response to a representation we made to ESS relating to the failure of the Scottish Government to implement the recommendations of the 2016 'Sludge Review' (ESS reference IESS.23.022). ESS' decision letter indicated that the matter should instead be referred to the SPSO, and that the SPSO was an 'alternative remedy'. The SPSO's remit is broadly one of 'maladministration' by public bodies, which includes failures to apply the law properly.²⁴ There is significant overlap between the remit of the SPSO and ESS vis-à-vis public authorities not complying with environmental laws. However, the SPSO lacks the coercive enforcement powers of ESS and is widely seen as a relatively toothless public body. The SPSO has the power to make non-binding 'recommendations' to public authorities, whereas ESS can serve compliance notices with recourse to the courts if necessary. The SPSO is also a body with significant delays in responding to complaints (at the time of writing, the SPSO's website states that complaints will not be allocated to a complaints reviewer until up to four months after they are received).²⁵ We dispute the view that the SPSO is an alternative remedy in instances of non-compliance with environmental laws - we have serious concerns regarding ESS' policy on this matter.
- While ESS appears to have adequate fact-finding and scientific expertise to fulfil its statutory role, ESS currently lacks the legal expertise required to perform its statutory functions. ESS' role in enforcing environmental laws requires that it makes decisions on matters of law. While some of these decisions will be straightforward and may require minimal legal expertise, many will be complex matters of law. Our experience is that some of ESS' decisions on complex legal issues are being made without the necessary expertise. ESS has access to instruct external legal advice and we hope the recruitment of an inhouse solicitor will go some way to address our concern and improve the enforcement of environmental law.
- Connected to the above point regarding a lack of legal expertise, ESS' decisions appear to have contained errors of law:
 - In relation to the above sewage sludge representation (ESS reference IESS.23.022), ESS' decision letter explained that "One of the factors that we must consider before exercise our statutory powers is the extent to which our role avoids overlap with other oversight bodies. One of the bodies specifically named under our governing legislation is the Scottish Public Services Ombudsman". There is no legal authority which supports this proposition in the 2021 Act (or elsewhere).
 - In relation to a representation regarding the impacts of lead shot and the failure by a local authority to properly discharge its statutory duties vis-à-vis contaminated land under the Environmental Protection Act 1990 (ESS reference IESS.23.012), ESS' decision letter accepted the local authority's position that the duties under that Act



apply to instances of historical contamination rather than the contamination of land resulting from ongoing activities. This position has no legal basis in the 1990 Act.

Access to justice on Environmental Matters - do you have any comments on the content of chapter four and the Scottish Government position on this subject?

Overarching comments

The Report was required to fulfil a statutory duty to address the matter of “whether the law in Scotland on access to justice in environmental matters is effective and sufficient”.²⁶

That 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”.²⁷ We strongly dispute 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.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 (discussed below).

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:²⁹

- 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. This would replace the general rule that expenses follow success and the associated regime regarding protective expenses orders. QUOCS were introduced in personal injury litigation in Scotland several years ago, in recognition of the David v Goliath-type imbalance in resources between individual pursuers and insurance company defenders. Similar imbalances exist in most public interest environmental litigation which often involve individuals or small community groups against large public authorities or businesses.



Assessment of ‘current work ongoing to aid access to justice’

The Report details measures which the Scottish Government is carrying out as part of its “current work ongoing to aid access to justice”.³⁰ Here we outline and assess each measure separately:

- 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”.³¹ The recent consultation published on the Human Rights Bill³² 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 Report refers to the review of the PEO regime currently being undertaken by the Scottish Civil Justice Council (‘SCJC’). At the date of writing, there is no detail on the proposals to reform the PEO system which may arise from this. The scope of and timescales for the review have not been published. We are concerned about the lack of transparency of the review which is being carried out by the SCJC. The previous review of the PEO rules carried out by the SCJC resulted in rules which the ACCC deemed to have contravened the requirements of the Aarhus Convention. An institution with a history of producing unlawful rules should not have been allocated this task. We are concerned that any new PEO rules will not be Aarhus-compliant.
- The Report notes the introduction of an exemption for court fees for Aarhus cases in the Court of Session in July 2022. We welcomed this change in July 2022 subject to the caveat that the fee exemption does not extend to Sheriff Court cases.³³ The introduction of a court fee exemption was a minor change which did not materially alter the costs barrier to access to justice. Additionally, the court fee exemption was introduced more than a year ago – it cannot be accurately described as “ongoing work” (as it is referred to in the Report).
- The Report refers to a Scottish Government commitment to “working towards Scottish Legal Aid reform which will consider extending legal aid availability to “legal persons”, such as NGOs, and also facilitate more targeted provision of legal aid services by area of law and/or by geographical location. It is intended that legislative reform be brought forward during this Parliament.” The references to legal aid reform in the report are vague and lacking in substance. The use of the words underlined above indicates 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.³⁴
- The Report notes that “we continue to explore means to provide further expert support to prosecutors and the judiciary on environmental matters, such as through further training opportunities”.³⁵ This is a vague statement. No detail is provided on what ‘expert support’



and 'training opportunities' are referred to. In any event, this has no clear relevance to the main barrier to access to justice, which is the unaffordable nature of litigation.

- There are two references in the Report to a programme which was launched by the University of Aberdeen in 2020 for the accreditation of expert witnesses.³⁶ The relevance of this programme to the subject of environmental governance and/or access to justice in environmental matters is not explained in the Report. While it may be laudable, this programme does not address any clear environmental governance problem. One of the reasons we have taken the view that an environmental court is needed in Scotland is to improve the expertise of the judiciary (not expert witnesses) in environmental legal and scientific matters.³⁷ We are concerned that this point may have been misconstrued. This adds to our overall concern about the poor quality of the Report.

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.

The Scottish Government accepts that access to justice in environmental matters is unaffordable and in contravention of the Aarhus Convention, yet it has no plans to address this problem.

Environmental Standards Scotland and access to justice

The Report discusses the role of ESS vis-à-vis access to justice in environmental matters. It states that ESS is "an additional route for individual (sic) and groups to seek environmental justice".³⁸ We disagree with this statement.

ESS' ability to assist individuals and groups to 'seek environmental justice' is very limited. This is mainly due to ESS' narrow remit and its inability to deal with individual cases. Our view is supported by the information which is published on ESS' website and our own casework and experience.

ESS' website indicates that ESS has received 37 'representations'.³⁹ Of those 37 representations received by ESS:

- 20 representations (54%) appear to have been closed with no action having been taken by ESS. Of the representations which were closed, the reasons given for closure include 'alternative remedy available' (phrase used 13 times), 'did not meet ESS criteria for investigation' (phrase used four times), 'relating to individual regulatory decision' (phrase used six times) and 'no evidence of wider systemic failure' (phrase used twice).
- 11 representations (30%) are described as 'under evaluation'.
- 6 representations (16%) are described as having been subject to an investigation by ESS.



These figures indicate that ESS was unable to deal with the majority of the representations it has received. ESS has investigated only 16% of the representations which it has received.

These figures undermine the Scottish Government's position that ESS is an additional route to seek justice.

In terms of ERCS' own casework and experience, in most of the advice cases which ERCS assists with, and where we have identified non-compliance with environmental law by public authorities (a frequent occurrence in our casework), ESS has no remit to assist. It is only the most exceptional and/or widespread matters of non-compliance where ESS may be of assistance.

ESS may only be 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 we assist have limited capacity to gather sufficient evidence to demonstrate the existence of a systemic failure.

We have made some representations to ESS on behalf of individuals and community groups. 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.⁴⁰

Finally, 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. George Rock and Catherine Pring have explained that an ombudsman (ESS is effectively a quasi-ombudsman albeit with a limited remit relative to other ombudsman) "is no substitute for an ECT (environmental court or tribunal), and alone does not meet the Aarhus Convention requirements for access to justice".⁴¹

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. We dispute this.

Our view is that planning appeal rights in Scotland are non-compliant with the requirement of Article 9(4) of the Aarhus Convention that the procedures referred to in Article 9(2-3) must be 'fair'.

Planning appeal rights between applicants for planning permission and other members of the public in Scotland are unequal. Applicants for planning permission enjoy statutory appeal rights which enable them to have the full merits of planning decisions reviewed at no or low financial



cost. Members of the public who may be affected by planning decisions do not enjoy those statutory appeal rights.

This matter was considered by the Aarhus Convention Compliance Committee in communication ACCC/C/2013/90. In ACCC/C/2013/90, the ACCC made a finding of non-compliance due to the absence of equal rights of appeal in the planning legislation which applies in Northern Ireland.

ERCS has raised this matter directly with the Scottish Government. Along with Planning Democracy, Friends of the Earth Scotland and RSPB Scotland, ERCS submitted a communication to the ACCC.

Our communication is currently under consideration by the ACCC (communication reference ACCC/C/2022/196).⁴²

Governance Arrangements and Environmental Court - do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?

Overarching comments

Chapter five considers the matter of whether to establish an environmental court. The Scottish Government is opposed to the establishment of an environmental court.

Chapter five is two pages long.

It contains five paragraphs.

It is 382 words in length.

There are no references.

We are very concerned about the poor quality of this review. Its conclusion is supported by no 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.

The Scottish Government's conclusion on this matter appears to be predetermined.



Unlawful failure to consider whether to establish an environmental court

The Report was published by the Scottish Government as a result of a statutory duty to produce a report on the effectiveness of environmental governance arrangements set out in Section 41(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

Section 41(2)(c) of the 2021 Act required the report to cover, “whether and, if so, how the establishment of an environmental court could enhance the governance arrangements referred to in paragraph (a).”

The Report failed to consider whether the establishment of an environmental court enhance environmental governance arrangements.

On 14 July 2023, we wrote to the responsible minister (Mairi McAllan MSP) to express our concerns that the Report was unlawful.

Mairi McAllan responded by letter of 27 July 2023. She disputed that the Report was unlawful.

Her letter explained that, “...I do note your concern that background information about environmental courts that was considered in the production of the report might not be available to all MSPs and stakeholders. Therefore, to ensure that this information is available, we will release a briefing paper as part of the consultation process, summarising the information on environmental courts that was considered in the production of the report”. That briefing paper is discussed below.

We instructed [the opinion of senior counsel John Campbell KC](#) on the question of whether the Report was unlawful. We enclose a copy of his opinion with this response.

His opinion is very clear: the Report was not consistent with the Scottish Ministers’ statutory duty.

The Scottish Ministers acted unlawfully in their failure to publish a Report which covers the matters required by statute.

We are very disappointed that the question of whether the establishment of an environmental court enhance environmental governance arrangements has not been considered.

Briefing paper: Information considered on environmental courts

On 5 September 2023, the Scottish Government published an additional document related to the Consultation titled ‘Briefing paper: Information considered on environmental courts’ (‘the Briefing Paper’).

The Briefing Paper was published in response to our letter to Mairi McAllan MSP of 14 July 2023. Its publication does not change the position that the Report fails to cover the matters required by the 2021 Act.



It begins with a summary of the ‘Scottish court system’. Significant portions of text in this summary appear to have been copied directly from Wikipedia and the Scottish Courts’ website.

Page 2 of the Briefing Paper states that, “The current structure of the Scottish courts and tribunals is summarised in figure 1”. Figure 1 (copied below) is a low quality image which appears to have been copied from the Wikipedia page ‘Courts of Scotland’.⁴³

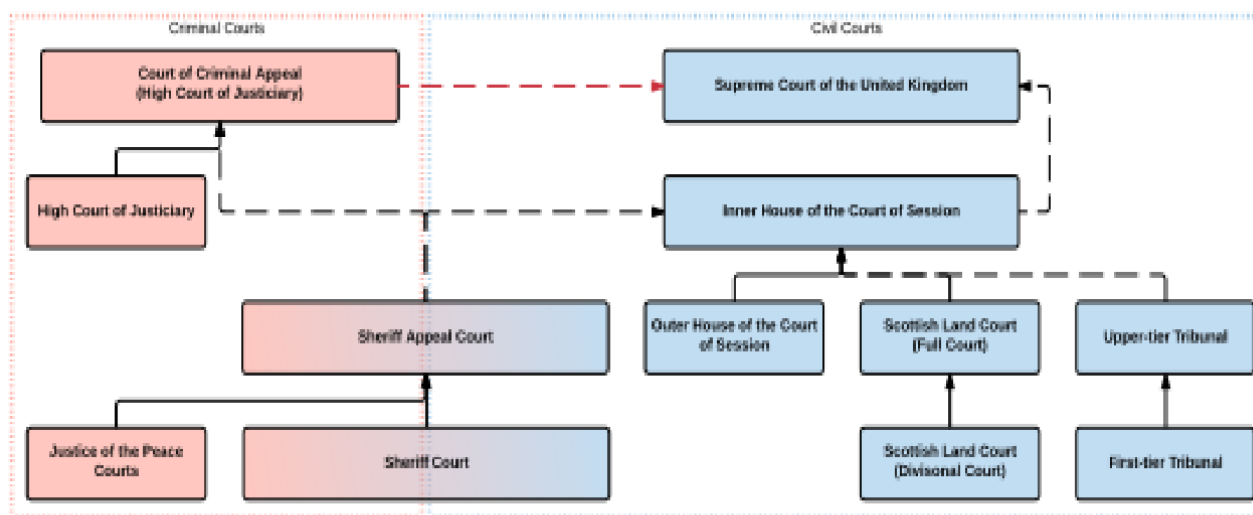


Figure 1: The Scottish Court System

Despite the Briefing Paper’s description of figure 1 as including “courts and tribunals”, figure 1 lists none of the many tribunals which operate in Scotland.

The report contains some discussion of UNEP reports on environmental courts and tribunals in other jurisdictions.

It contains several arguments which we have previously rebutted in our 2021 ‘Why Scotland needs an environmental court or tribunal’ report.

The Briefing Paper refers to local sheriff courts as being better suited to hear environmental cases rather than a “centralised specialist court”.⁴⁴ This argument presupposes a centralised environmental court model, which ignores the possibility that an environmental court could be established in a way which avoids the problems of centralisation (for example by adopting an approach similar to that of the First-Tier Tribunal for Scotland Housing and Property Chamber, which conducts hearings in numerous venues across Scotland). This argument fails to acknowledge that the Court of Session (where many environmental disputes are currently heard) is centralised in Edinburgh, and that the Scottish Government has closed numerous sheriff courts – meaning that it is now difficult to accurately describe many remaining sheriff courts as ‘local’.

The Briefing Paper states that, “...environmental cases are often appealed many times and the introduction of a new lower environmental court of first instance has the potential to add two further appeal stages for environmental cases, firstly to the Sheriff Appeal Court and secondly, to the Inner House of the Court of Session. If decisions go through all the appeal stages possible, the total cost of challenging a decision by an authority is likely to be much increased”.⁴⁵ The appeal route which is outlined in this quote (which presupposes without any justification that an



environmental court would be established within the sheriff court hierarchy) describes the ordinary appeal process against sheriff court decisions. A description of the existing appeal process cannot be accurately described as one which would ‘add two further appeal stages for environmental cases’. There is no obvious inherent characteristic of an ECT that would cause litigation costs to increase. One of the main arguments for establishing an ECT is to provide access to justice by making environmental litigation more affordable. An ECT should be designed to reduce litigation costs – for the parties involved and for public expenditure more broadly.

Significant portions of the Briefing Paper appear to have been copied directly from the Scottish Government’s 2017 analysis and response to the ‘developments in environmental justice in Scotland’ consultation.⁴⁶

The direct reproduction of previous consultation documents speaks to the overall impression that the Scottish Government’s opposition to the establishment of an environmental court is entrenched, and that the issue was not properly considered in this consultation.

Why an environmental court would enhance ESS’ effectiveness

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

Whilst ESS’ strategy on enforcement is to seek ‘informal resolution’ where possible and to use its statutory enforcement powers such as the service of a compliance notice or judicial review in relatively limited circumstances,⁴⁷ it is important that recourse to the courts is a realistic possibility for ESS.

Enforcement powers set out in statute have little value without a real prospect of recourse to the courts. In the absence of any realistic recourse to the courts by ESS, public authorities may decide that they can fail to comply with any intervention from ESS with impunity.

We are concerned that, due to the need for ESS to litigate in the Court of Session to enforce information notices, compliance notices or raise proceedings for judicial review,⁴⁸ the associated costs and financial risks of litigation are such that litigation is not a realistic prospect for ESS (which is a relatively small public body with limited resources).

Our position is reflected by the recent comments of ESS’ chair Jim Martin in a March 2023 lecture. Discussing the costs of judicial review, Mr Martin explained that:

...Judicial Review is effectively the justice system’s version of the glass ceiling. You can see it, you know it’s there, but in reality, unless you are a public body using public funds, or a corporation or business, or a large NGO, or have very deep pockets, it is a route to justice in name only.

When setting the budget for ESS we had to make provision for possible Judicial Reviews that we might undertake ourselves or in which we would intervene, or which we would be required to defend.



Our advice is that it is likely that we would need to be prepared to spend around £40k as a minimum to see through a JR - and be prepared to meet almost the same cost again if we lost and had to meet the other sides costs as well as our own. Around £75k we were advised would be a prudent figure to keep in mind...⁴⁹

In addition to the above, an environmental court would also allow for the opportunity to rationalise litigation arising from the work of ESS. An environmental court could be given jurisdiction to hear all litigation relating to ESS.

At present, appeals by public authorities against compliance notices from ESS are heard in sheriff courts. ESS' powers to enforce information notices, compliance notices and apply for judicial review against public authorities are all exercised by way of litigation in the Court of Session.⁵⁰ This unusual sheriff court-Court of Session dichotomy gives public authorities access to a means of challenging ESS' decisions which is significantly cheaper than ESS' recourse to the Court of Session against public authorities, to the detriment of ESS' ability to enforce environmental laws.

Why Scotland needs an environmental court

An environmental court is required for the reasons detailed in our 2021 report 'Why Scotland needs an environmental court or tribunal':⁵¹

- 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.



In his 2023 report for ERCS ‘The clear and urgent case for a Scottish Environment Court’,⁵² Professor Campbell Gemmell summarised his view as follows:

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.⁵³

Whether an environmental court would enhance existing environmental governance arrangements

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.⁵⁴

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.⁵⁵

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.⁵⁶ 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.⁵⁷

Environmental courts develop innovative remedies and solutions to environmental problems. In the case of *KM & others v Attorney General & others* (a case which concerned severe air, water and soil pollution caused by a lead-acid smelting plant), the Land and Environment Court of Kenya awarded the plaintiffs a range of remedies to address the full scale of damage suffered. The remedies included a declaratory order stating that the specified environmental human rights have been violated; a thorough investigation of the full extent of environmental and health impacts of lead pollution to provide a springboard for remediation and clean up; adequate remediation and clean up; monetary damages to compensate for the loss of life, livelihood, and the cost of medical care for those who suffered from pollution-related diseases.⁵⁸



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 as “Government agencies are more liable to act in a transparent and responsible manner if they have an informed judiciary looking over their shoulders”.⁵⁹ Improved access to justice can also lead to better enforcement of environmental laws, as it gives citizens the ability to directly challenge breaches of environmental laws.

Please publish this consultation response.

¹ Page 6 of the Report.

² Tamsin Bailey, [‘Scotland’s Environmental Laws Since Devolution --- From Rhetoric to Reality’](#) (2010).

³ Yellowbook Ltd, [‘Barriers to community engagement in planning: a research study’](#) (2017). Planning Democracy, [‘Response to the Scottish Government’s Review of the Scottish Planning System’](#) (2015).

⁴ R E Tingay, [‘Natural Injustice – Paper I: A review of the enforcement of wildlife protection legislation in Scotland’](#) (Scottish Environment LINK, 2015). Scottish Environment LINK, [‘Natural Injustice: Paper 2. Eliminating Wildlife Crime in Scotland’](#), (Scottish Environment LINK, 2015). See also Scottish Environment LINK, [‘Comments on the Scottish Government’s Wildlife Crime in Scotland 2017 Annual Report and on the evidence given to the Scottish Parliament Environment, Climate Change and Land Reform Committee’](#) (2019).

⁵ UK Climate Change Committee, [‘Progress in reducing emissions in Scotland - 2022 Report to Parliament’](#) (2022), page 36.

⁶ UK Climate Change Committee, [‘Scotland’s climate targets are in danger of becoming meaningless’](#) (7 December 2022).

⁷ UK Climate Change Committee, [‘Is Scotland climate ready? 2022 Report to Scottish Parliament’](#) (2022).

⁸ ERCS, [‘Scottish Government admits climate law breach and says it will fix it’](#) (21 September 2023).

⁹ Scottish Government, [‘Scottish Biodiversity Strategy to 2045: Tackling the Nature Emergency in Scotland’](#) (2023), page 18.

¹⁰ State of Nature Partnership, ‘State of Nature Scotland’ ([State of Nature Partnership](#), 2023).

¹¹ Environmental Standards Scotland, [‘Air Quality Investigation Improvement Report’](#) (ESS, 2022), page 7.

¹² Paul Dobson and Petra Matijevic, [‘“Disgusting”: half of Scotland’s most popular beaches plagued by sewage’](#) (The Ferret, 24 September 2023).

¹³ Austin L, Cardesa Salzman A, Gemmell C, Hughes J, Savaresi A & Reid C [‘Report by the Roundtable on Environment and Climate Change on Environmental Governance in Scotland on the UK’s withdrawal from the EU’](#) (Scottish Government, 2018).

¹⁴ Campbell Gemmell, [‘Environmental Governance: effective approaches for Scotland post-Brexit’](#) (Scottish Environment LINK, 2019).

¹⁵ Lloyd Austin, [‘Scotland’s environmental ambitions: From rhetoric to reality revisited in detail’](#) (Scottish Environment LINK, 2022).



¹⁶ Tamsin Bailey, [‘Scotland’s Environmental Laws Since Devolution --- From Rhetoric to Reality’](#) (2010).

¹⁷ Page 25.

¹⁸ Page 20.

¹⁹ Page 20.

²⁰ Page 22.

²¹ Page 24.

²² Austin L, Cardesa Salzmann A, Gemmell C, Hughes J, Savaresi A & Reid C [‘Report by the Roundtable on Environment and Climate Change on Environmental Governance in Scotland on the UK’s withdrawal from the EU’](#) (Scottish Government, 2018), paragraphs 3.3.5 and 3.3.11.

²³ See ESS’s full report [‘Marine Scotland’s Enforcement of Acoustic Deterrent Devices’](#) (2022).

²⁴ See the ‘What does maladministration mean?’ tab on the [SPSO’s FAQs page](#) (accessed 5 October 2023).

²⁵ See <https://www.spsos.org.uk/detailed-information-delays> (accessed 5 October 2023).

²⁶ S41(2)(b) of the 2021 Act.

²⁷ Page 34.

²⁸ Pages 27-28.

²⁹ Discussed in ERCS, [‘Scotland’s non-compliance with the Aarhus Convention on prohibitive expense: Recommendations for a plan of action on judicial expenses’](#) (2021).

³⁰ Page 28.

³¹ Pages 28-29.

³² Scottish Government, [‘A Human Rights Bill for Scotland: Consultation’](#) (2023).

³³ See <https://www.ercs.scot/news/ercs-welcomes-exemption-of-court-fees-for-some-aarhus-cases-but-more-is-needed/>.

³⁴ See ERCS, [‘Scotland’s non-compliance with the Aarhus Convention on prohibitive expense: Recommendations for a plan of action on judicial expenses’](#) (2021).

³⁵ Page 29.

³⁶ Pages 28 and 33.

³⁷ ERCS, [‘Why Scotland needs an environmental court or tribunal’](#) (2021), pages 18-20.

³⁸ Page 29.

³⁹ We refer to the ‘representations received’ table published by ESS here <https://www.environmentalstandards.scot/investigations/representationsreceived/> (accessed 29 September 2023). ESS’ website contains limited information about representations and summarises them only.

⁴⁰ S44(2) of the 2021 Act.

⁴¹ George Rock and Catherine Pring, [‘Environmental Courts & Tribunals: A Guide for Policy Makers’](#) (UNEP, 2016), page 40.



⁴² Communication documents available at https://unece.org/env/pp/cc/accc.c.2022.196_united_kingdom (accessed 29 September 2023).

⁴³ See Wikipedia's 'Courts of Scotland' page at https://en.wikipedia.org/wiki/Courts_of_Scotland (accessed 29 September 2023).

⁴⁴ Page 10.

⁴⁵ Page 11.

⁴⁶ Page 11 of the Briefing Paper states that, "...the introduction of a new lower environmental court of first instance has the potential to add two further appeal stages for environmental cases, firstly to the Sheriff Appeal Court and secondly, to the Inner House of the Court of Session. If decisions go through all the appeal stages possible, the total cost of challenging a decision by an authority is likely to be much increased". Paragraph 92 of the 2017 consultation analysis and response states that, "The introduction of a lower court of first instance has the potential to add two further appeal stages, firstly to the Sheriff Appeal Court and secondly, to the Inner House of the Court of Session. If decisions go through all the appeal stages possible, the total cost of challenging a decision by an authority is likely to be much increased".

⁴⁷ ESS, '[Strategic Plan 2022-25](#)' (ESS, 2022), pages 16-22.

⁴⁸ S25 of the 2021 Act gives ESS the power to report a failure by a public authority to comply with an information notice to the Court of Session. S36 of the 2021 Act dictates that a public authority may appeal to a sheriff against a compliance notice. S37 of the 2021 Act gives ESS the power to report a failure by a public authority to comply with a compliance notice to the Court of Session. S38 of the 2021 Act gives ESS the power to make an application for judicial review in relation to a public authority's conduct in certain circumstances.

⁴⁹ Jim Martin, '[Effective Environmental Standards, Law and Governance Speech](#)', given at the University of Edinburgh on 15 March 2023.

⁵⁰ Ss 25, 36, 37 and 38 of the 2021 Act.

⁵¹ ERCS, '[Why Scotland needs an environmental court or tribunal](#)' (2021).

⁵² Campbell Gemmill, '[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](#)' (ERCS, 2023).

⁵³ Page 26.

⁵⁴ UNEP, '[Environmental Courts and Tribunals – 2021: A Guide for Policymakers](#)' (UNEP, 2021), page 46.

⁵⁵ Brian Preston, '[Leadership by the Courts in Achieving Sustainability](#)' (2009) page 4. Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart, 2022), page 32.

⁵⁶ UNEP, '[Environmental Courts and Tribunals – 2021: A Guide for Policymakers](#)' (UNEP, 2021), page 31.

⁵⁷ George (Rock) Pring and Catherine (Kitty) Pring, '[Greening Justice: Creating and Improving Environmental Courts and Tribunals](#)' (The Access Initiative, 2009), page 64.

⁵⁸ Rosemary Mwanza, '[Environmental human rights in Kenya: between promise and reality 2021](#)' (CCEEL, 2021).

⁵⁹ George (Rock) Pring and Catherine (Kitty) Pring, '[Greening Justice: Creating and Improving Environmental Courts and Tribunals](#)' (The Access Initiative, 2009), page 15.