

Review of the Effectiveness of Environmental Governance

Consultation briefing, 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 briefing summarises [ERCS' full response to the Scottish Government's Review of the Effectiveness of Environmental Governance consultation](#).

We recommend the establishment of a special committee or working group to properly consider the defects in environmental governance and how to resolve them.

Background

The Scottish Government had a legal duty under [Section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) to produce a report and consult on the effectiveness of environmental governance in Scotland.

The report and consultation were required by law to consider 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 environmental governance arrangements.

The Scottish Government published a [Report](#) and a Consultation on the [Review of the Effectiveness of Environmental Governance](#) in June 2023.

Consultation response summary

ERCS is deeply disappointed by the Consultation and the Report.

We have significant concerns regarding the poor quality of the Report. The Report is superficial in its analysis, narrow in scope, and appears pre-determined in its conclusions.

The key points made in our consultation response are that:

- The Report contains no analysis of the various entrenched problems of environmental governance which exist in Scotland (e.g. the lack of enforcement of environmental laws, the lack of access to justice in environmental matters and the limited scrutiny of the implementation of environmental laws).



- 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.
- The Report fails to identify the clear causal connections between the problems of environmental governance and environmental degradation.
- The Report assumes the establishment of Environmental Standards Scotland ('ESS') has filled the 'environmental governance gap' which was left post-Brexit, yet it does not analyse the work of Environmental Standards Scotland in any detail.
- ESS lacks the powers to fill the post-Brexit environmental governance gap - ESS cannot deal with individual cases.
- The Report identifies that individual cases are excluded from ESS' remit yet proposes no solutions to remedy this problem.
- We have several concerns about ESS' policies and practices, including that ESS is slow to act even when presented with clear breaches of environmental laws, that ESS does not use its enforcement powers and that ESS lacks the necessary legal expertise to fulfil its statutory role.
- The Report accepts that Scotland is in breach of the access to justice requirements of the Aarhus Convention, yet it provides no proposals to remedy this.

Unlawful failure to consider establishment of an environmental court

ERCS has consistently highlighted Scotland's breach of the access to justice requirements in Article 9(4) of the Aarhus Convention.¹ We have also summarised the clear and urgent case for a dedicated environmental court, which would increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.²

ERCS has provided considerable evidence that a dedicated court with a comprehensive jurisdiction would enhance environmental governance arrangements.³

The first substantive reference to an environmental court is not made until page 17 of the Report where it states that:

The Scottish Government recognises the strengths in the current balance of parliamentary, administrative and judicial roles in decision making on environmental matters, and does not see any strong argument for the creation of a specialist court.

This statement was not preceded by any discussion of the merits and disadvantages of establishing an environmental court.



The Report failed to properly consider the possible establishment of an environmental court, and the improvements which doing so could bring for environmental governance. The Scottish Ministers had a legal duty to do this.

On 14 July 2023, [ERCS wrote to the Scottish Ministers](#) expressing our concerns about the legality of the Report.

The Scottish Ministers maintained that the Report was lawful. They published an additional briefing paper discussing evidence relating to environmental courts and tribunals, and extended the consultation deadline from 5 to 13 October.

We commissioned the opinion of senior counsel John Campbell KC. [His opinion is that the Report was not sufficient to discharge the Scottish Ministers' statutory duty on this matter.](#)

The prohibitive costs of going to court meant that ERCS did not consider it viable to seek judicial review on the failure of Ministers to discharge their duty under S41 of the Continuity Act.

Recommendation

We recommend that the Scottish Government **establishes a special committee or working group** to properly consider whether the establishment of an environmental court could enhance environmental governance arrangements. This could be something akin to the [Grouse Moor Management Group](#) which provided recommendations on grouse moor reform, or established under the auspices of the [Net Zero, Energy and Transport Committee](#).

For more information contact

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¹ ERCS (July 2022) [Evaluation of Scotland's Action Plan on access to environmental justice](#)

² ERCS (May 2023) [Briefing – the clear and urgent case for a Scottish Environment Court](#)

³ For detailed references and analysis, see ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#), ERCS/Gemmell (Feb 2023) [The clear and urgent case for a Scottish Environment Court](#). For a summary, see ERCS (May 2023) [Briefing – the clear and urgent case for a Scottish Environment Court](#).