Report on the Feasibility of an Environmental Rights Centre Scotland

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Commissioned by

Scottish Environment LINK's Legal Strategy Subgroup

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1 Executive summary

Background

Scottish Environment LINK's (LINK) legal strategy subgroup has identified the opportunity to establish an Environmental Rights Centre Scotland (ERCS) to respond to unmet needs in civil society relating to the understanding of legal rights and access to legal remedies in environmental matters. This report is the result of a study commissioned by LINK on the feasibility of setting up an ERCS.

The report provides recommendations on the activities, governance, financing and establishment of an ERCS, according to LINK's vision for an ERCS. Section two discusses the background, aims and research methodology used.

What could an ERCS do?

Section three outlines the activities that an ERCS could carry out. An ERCS could provide traditional legal services (advice and representation), pursue strategic legal cases in support of its vision, offer public legal education, advocate for change, carry out research, produce publications and provide legal services to promote a sustainable economy. Examples drawn from case studies of several public interest environmental law and access to justice organisations (see appendix one) illustrate how an ERCS could work in practice.

The case for an ERCS

Section four sets out the arguments for creating an ERCS and makes recommendations on the activities of an ERCS.

It finds a number of arguments in favour of setting up an ERCS:

- There is a gap in access to affordable legal services in public interest environmental law in Scotland.
- Scotland is in breach of the Aarhus Convention in relation to the right of the public and civil society to have access to environmental justice. Successive Scottish Governments have failed to address this is in a comprehensive or adequate manner.

- Systemic substantive environmental problems persist in Scotland (particularly in relation to air and water pollution, and biodiversity).
- There are several environmental governance problems in Scotland (including the non-enforcement of environmental and planning legislation, limited public participation in the planning system and wildlife crime).
- There are a number of ongoing and impending constitutional developments which require expertise and advocacy to protect and improve environmental law. These include devolution and the development of 'Scottish environmental law', the threats of lower environmental standards and a 'governance gap' after Brexit and the need for new forums to hear environmental disputes in Scotland.

To address these problems and developments, it recommends that an ERCS should carry out the following activities:

- Provide affordable legal advice and representation to the public and civil society in planning and environmental law.
- Carry out public legal education.
- Carry out research.
- Advocate for change.
- Pursue strategic litigation.

Governance arrangements

Section five outlines the possible governance options for an ERCS. It examines the legal structures used by law centres in Scotland – typically, a private company limited by guarantee registered as a charity plus a law firm registered with the Law Society of Scotland.

It discusses the regulation of solicitors and law firms in Scotland and its implications for an ERCS' governance options and running costs. To be able to carry out litigation in Scotland for clients, an ERCS will have to employ qualified solicitors and register a 'law practice unit' with the Law Society of Scotland.

It discusses the available legal structures and their suitability. It recommends that an ERCS should incorporate as a Scottish Charitable Incorporated Organisation and a Limited Liability Partnership which is registered as a law practice unit with the Law Society.

It further recommends that an ERCS explores the option of becoming a membership organisation, appoints trustees according to needs for particular expertise (e.g. legal, personnel and finance) and adopts a case selection policy to ensure that any casework reflects its aims.

Funding options

Section six examines the funding arrangements for an ERCS. It recommends general policies on funding which maintain organisational resilience (i.e. use diverse funding sources and maintain sufficient reserves) and ensure that any funding is consistent with its vision statement.

It makes specific recommendations on sources of initial and long-term funding. Funding bodies which could be approached for initial start-up funding are largely charitable trusts and foundations. A number of options are given for long-term funding, including: trading income (e.g. legal aid and legal fees); further charitable foundations and trusts; public and corporate funding; and several miscellaneous sources of funding including membership fees and crowdfunding.

Recommendations

Section seven details the recommendations made throughout the report.

Appendices to the report

- **Appendix one - Legal organisations case studies** - contains eighteen case studies of public interest environmental law and access to justice organisations interviewed as part of the research.
- **Appendix two - Access to environmental justice case studies** - comprises ten case studies of individuals and organisations which have faced environmental problems in Scotland, and their struggles or inability to secure access to environmental justice.

2 Background, aims and methodology

2.1 Background to this report

Scottish Environment LINK has been working to improve access to justice in environmental matters through its legal strategy subgroup for several years since 2013.

The subgroup has identified the opportunity to establish an Environmental Rights Centre as a means to respond to unmet needs in civil society relating to the understanding of legal rights and access to legal remedies in environmental matters.

In December 2016 LINK held a seminar where it sought input from legal, environmental, community and academic stakeholders to develop its thinking. The seminar confirmed and reinforced the strong support for the initiative.

In early 2017, the subgroup secured funding (from SE LINK and member organisations Friends of the Earth Scotland, RSPB Scotland and WWF Scotland) to commission an ERCS feasibility study, according to the following vision of an ERCS prepared by LINK:

> *Our vision is for an Environmental Rights Centre that:*
>
> *• provides a one-stop shop for citizens, communities and NGOs to seek advice and assistance in legal and planning matters relating to the natural environment;*
>
> *• educates citizens, communities and NGOs about their rights and responsibilities pertaining to environment and how these can be exercised by law;*
>
> *• plays a role in campaigning for improved access to justice in environmental matters and full compliance with the Aarhus Convention;*
>
> *• seeks to address inequality of arms in experience of litigation and the means to pay for it;*

• has in-house lawyers who can undertake litigation on behalf of citizens, communities and NGOs, offers non-legal routes of action, and signposts to external lawyers and experts;

• identifies and pursues strategic litigation to test and improve environmental law.[1]

This report is the result of the study which followed, carried out from June 2017 to February 2018. It is intended to assist the development of an ERCS. It provides recommendations on the activities, governance, financing and establishment of an ERCS.

2.2 Aims and Methodology

2.2.1 Aims of the study

This study is intended to support the setting up of an ERCS, in line with the vision set out at 2.1. It provides a body of research and recommendations on the activities, governance, financing and establishment of an ERCS.

It addresses the following research questions:

- Why create an ERCS?
    - What are the arguments in favour of ERCS-type bodies?
    - What are the Scotland-specific arguments in favour of an ERCS?
- What could an ERCS do?
    - What should its mission be?
    - How should it work towards that mission?
- How should it be governed?
    - What are the potential governance options?
    - What are the available legal structures?
- How could it be financed?

[1] Scottish Environment LINK, 'An Environmental Rights Centre for Scotland: Background, Context and Vision of the Proposal' (Scottish Environment Link, 2017), p2.

- Are there any possibilities for creating partnerships with others?
- How could it be implemented?

2.2.2 Research methodology

The research was carried out using desk-based research supplemented by:

- Semi-structured interviews with public interest environmental law and access to justice organisations to identify examples of best practice in these areas (see appendix one).
- Meetings with the Law Society of Scotland to identify the relevant regulatory requirements for an ERCS.
- Meetings with business, governance and finance support organisations and individuals to identify suitable governance and financing arrangements for an ERCS.
- An online 'access to environmental justice in Scotland' survey. Following this, several follow-up interviews were carried out with respondents to this survey, which were developed into ten access to environmental justice studies (see appendix two). These case studies detail individuals and organisations which have faced environmental problems in Scotland, and their struggle to secure access to environmental justice. The case studies are intended to provide evidence on unmet legal need in this area.

2.3 Acknowledgements

I am very grateful to all of the individuals and organisations who provided their time, advice and support, including:

- The members of LINK's legal strategy subgroup.
- The interviewees from the legal organisations in appendix one.
- The respondents to the access to environmental justice survey – and the access to environmental justice case studies interviewees.
- The Law Society of Scotland, FirstPort, the Princes Trust, Business Gateway, SenScot Legal and Launch.ed.
- Various other individuals who offered their help throughout.

3 What could an ERCS do?

There are many activities which an ERCS could carry out. Providing traditional legal services of advice and representation is typical of organisations of this kind; and there are several others – such as conducting strategic litigation, providing accessible environmental law resources, carrying out research, providing public legal education, campaigning and policy development.

This section lays out and discusses the potential functions of an ERCS, identified from the case-studies and elsewhere. It uses examples from the case-studies to demonstrate how such functions work in practice.

3.1 Provision of legal advice and representation

The provision of information, advice and representation can be seen as part of a 'continuum' of potential legal support to help people to understand their rights, identify and navigate legal problems and pursue legal remedies.[2]

Advice and representation can be offered in different ways. Organisations can provide these services directly – by employing advice workers or lawyers. This can be a resource-intensive activity – requiring qualified advisers, representatives or even formally qualified lawyers.

Another method is the university law clinic model. Environment People Law (EPL) in Ukraine and the UK Environmental Law Foundation (ELF) use law clinic models to provide free initial advice:

- EPL runs two clinical programmes at Ukrainian universities where students get the opportunity to work on environmental cases. The students are given initial classes to train them, and they are then allowed to meet clients and carry out casework. EPL's clinics has two streams – one for environmental studies students, and one for law students. EPL's staff are either former volunteers or former students.
- ELF runs a model whereby it has arranged partnerships with several university law clinics in England and Wales to support it with casework. ELF forwards requests for help from its

[2] Low Commission, 'Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales' (The Low Commission, 2014), p25.

clients to the clinics – the students then interview the clients and write an advice letter for them. The draft advice letter is then passed on by ELF to one of the members of ELF's professional network who checks it for legal accuracy before it is sent to the client.[3]

These models have helped EPL (and Chilean organisation FIMA, which also operates a clinic) to attract students to their organisations – they have an educational effect and help develop a public interest environmental law culture in their jurisdictions.

3.1.1 Legal advice

This would involve the provision of initial advice to clients by a duty solicitor or otherwise qualified person (e.g. a non-lawyer case-worker or adviser).

A number of organisations operate a model whereby initial advice is given for free. The Environmental Defenders Office New South Wales (EDO NSW) provides a free 15-minute consultation; whereas the Canadian Environmental Law Association (CELA) gives free initial summary advice of up to two hours of work.

Any further advice or representation is then usually given according to 'case selection criteria' (e.g. applying means-testing, or criteria which align with the organisation's purpose – such as whether the query concerns a matter of public environmental interest).[4]

The provision of advice can take several forms.

3.1.1.1 Remote advice

Advice services can be provided remotely – for example, by telephone or email. In this model, for telephone advice - an organisation will allocate certain periods as 'advice line hours'. For example, the Scottish Child Law Centre has an advice line which operates Mondays-Fridays from 9.30am to 4pm. During these hours, members of the public (including children or those with responsibilities for children such as parents or social workers) can phone for free advice from a duty solicitor on all aspects of Scots law relating to children and young people.

[3] ELF's professional network is a network of lawyers and technical consultants – they pay a fee to be part of the network and commit to give a certain amount of their time for free. See http://elflaw.org/elf-university-clinics/.
[4] The EDO NSW gives free initial advice on planning and environmental law matters by phone – this is capped at 15 minutes. In some circumstances it will provide further advice and representation, decided according to a set of case selection criteria. See http://www.edonsw.org.au/legal_advice.

Advice can also be provided online. The Scottish Child Law Centre has an email address where clients can send their queries, and an online form which clients can fill out. Clients can then email (or fill in the form) with the details of their query and their contact details – the duty solicitor will then research the query and revert to the client by email or phone with their advice.

Remote advice may be more accessible for most clients (albeit requiring phone or internet access which may exclude certain people). This could be made more accessible by the use of a freephone number, or providing support on how to make an online query (e.g. a list of frequently asked questions or a user guide which explains the details needed – so that a client can prepare in advance of making a query).

3.1.1.2 Office-based advice

Advice can be provided face to face, in an organisation's office. In this model, clients can arrange appointments to visit the office for advice, or visit the office during certain 'drop-in' hours in the week. The University of Strathclyde Law Clinic provides advice by appointment at their offices – clients can contact the clinic to arrange an appointment for advice.

An advice service which requires the physical presence of clients would have the drawback of being geographically limiting. If the coverage of an ERCS is to be Scotland-wide, then requiring physical access to an office (e.g. in Edinburgh) would severely limit the ability of most people to use its services.

In addition, advice in person would require the use of secure meeting rooms to allow clients to discuss their queries in confidence with an adviser – creating additional requirements for an ERCS in terms of physical office space and overheads.

3.1.1.3 Community outreach advice

This is used by a number of advice agencies. It is usually done through advertised, regular advice sessions which are held in different locations outwith the main office. This takes services to clients – e.g. to community centres or libraries – to remove the geographical barriers which clients may face in getting advice. Outreach advice would require extra resources for travel, venues and coordination of advice sessions.

Environmental Justice Australia (EJA) adopts an innovative model whereby it 'embeds' its lawyers with groups which it is supporting. EJA's lawyers visit and work with client organisations for 1-2 days per week.

3.1.2 Legal representation

Representation can take many different forms. Depending on the type of representation it can be more or less formal, may require certain qualifications, and can be inexpensive or costly.

3.1.2.1 Client-based representation – not including formal litigation

Client-based advocacy does not necessarily require litigation. Non-litigious representation can be much less expensive and less resource-intensive in terms of the preparation required, yet it can be similarly effective in terms of producing a result for a client or leading to a change in law or policy.

Such non-litigious representation can take many forms – from communicating informally with decision-makers, to more formal communication with decision-makers such as letter-writing, and even participation in non-litigious dispute resolution or complaint schemes – such as:

- Raising complaints with the European Commission;
- Sending communications to the Aarhus Convention Compliance Committee and other convention compliance bodies;
- Raising complaints with the Scottish Public Services Ombudsman;
- Appealing refusals of information requests to the Scottish Information Commissioner;
- Supporting clients in various planning processes – such as assisting with submissions about planning applications or representing clients in public local inquiries.

Example 1 – Addressing unregulated test drilling - Oil and gas company Cuadrilla applied for permission to carry out test drilling at Balcombe in West Sussex. The Environment Agency (EA) had not been requiring environmental permits for test drilling up to this point. Friends of the Earth England, Wales and Northern Ireland's (EWNI)[5] Rights and Justice Centre (RJC) wrote to the EA to request that Cuadrilla be required to have environmental permits when carrying out test

[5] Friends of the Earth England, Wales and Northern Ireland is a separate organisation from its sister group Friends of the Earth Scotland, therefore the reach of its Rights and Justice Centre does not extend to Scotland.

drilling. The EA now requires permits for this – it has acknowledged that this intervention by the RJC changed the way it regulates onshore exploration for fossil fuels.[6]

Example 2 – Representing the community at the Hazlewood mine inquiry - The Hazlewood coal mine in Victoria caught fire in February 2014 and burned for several weeks afterwards. The air pollution caused by the fire resulted in deaths and serious health problems for local residents. The Hazlewood Mine Inquiry was set up to look into the disaster. Environmental Justice Australia represented the community group Voices of the Valley in the inquiry.[7] The resulting inquiry report concluded that the blaze probably contributed to deaths in the community.[8] Victoria's Environmental Protection Authority brought criminal charges against four companies.

3.1.2.2 Client-based representation - litigation

There will be instances when litigation is necessary to enforce environmental rights and laws. Such litigation in Scotland could take a number of different forms, including:

- Appeals against freedom of information decisions by the Scottish Information Commissioner;
- Statutory planning appeals;
- Judicial reviews – e.g. to enforce provisions of environmental or human rights law or challenge decision-making (e.g. in planning decisions);
- Statutory nuisance claims under the Environmental Protection Act 1990;
- Personal injury actions for damages – known in other jurisdictions as 'toxic torts';
- Public interest interventions in cases being taken by others.[9]

[6] See https://www.foe.co.uk/page/standing-your-right-have-say-balcombe.
[7] See https://envirojustice.org.au/blog/hazelwood-mine-fire-inquiry-wrap-up.
[8] See http://theconversation.com/the-two-year-wait-for-hazelwood-mine-fire-charges-shows-the-system-needs-to-change-55577.
[9] See Justice, 'To Assist the Court: Third Party Interventions in the Public Interest' (Justice, 2016), p57-59.

Example 1 - ArcelorMittal South Africa Transparency Litigation - the Centre for Environmental Rights (CER) represented the Vaal Environmental Justice Alliance (VEJA) - a community organisation. VEJA had been trying to gain access to information for more than a decade regarding the environmental impact of ArcelorMittal South Africa's (AMSA) Vanderbijlpark plant (a steelmaking facility) on the land which surrounded it. Acting for the VEJA, the CER used the Promotion of Access to Information Act to request disclosure of a large environmental impact study commissioned by Iscor (AMSA's predecessor) - the so-called environmental 'Master Plan'. Records relating to the closure and rehabilitation of AMSA's Vaal Disposal Site were also requested.

AMSA refused both requests, arguing that VEJA had no right to access the documents. VEJA then applied to the High Court, which, in 2013, upheld VEJA's arguments and ordered AMSA to release the documents. AMSA appealed to the Supreme Court of Appeal.

In 2014, the court ordered AMSA to release the Master Plan and other records to VEJA, and to pay VEJA's legal costs. It criticised AMSA's lack of good faith and emphasised the importance of corporate transparency in relation to environmental issues, stating that "Corporations operating within our borders… must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced".[10]

Example 2 - **Thabametsi coal power station** – environmental NGO Earth Life Africa Johannesburg (represented by the CER) challenged the approval given by the Environmental Affairs Minister to the proposed Thabametsi coal-fired power station in Limpopo. The approval was granted by the Department of Environmental Affairs despite a lack of comprehensive assessment of the climate change impacts of the power station. This was South Africa's first climate change lawsuit.

The court ordered the Minister to reconsider the approval, taking into account a full climate change impact assessment report, with all public comments received. The court confirmed that South Africa's environmental impact assessment laws require decision-makers to consider the

[10] See https://cer.org.za/programmes/transparency/litigation/arcelormittal-south-africas-environmental-master-plan-company-secretary-of-arcelormittal-south-africa-ltd-and-another-v-vaal-environmental-justice-alliance .

climate change impacts of proposed developments that may have significant effects on climate change – and that the assessment must consider the broader impacts of climate change (such as on water availability) – and how the project might exacerbate and itself be affected by those impacts. The judgement sets an important precedent for South Africa.

3.2 'Public interest' or 'strategic' litigation

'Public interest litigation' refers to the use of litigation to advance issues of broad public concern – such as human rights – and is often used to advance the rights of minority groups. 'Strategic litigation' refers to the use of litigation as a way of advancing a particular policy agenda through the use of litigation. For example, in relation to climate change this could involve the use of litigation to challenge actions which are deemed to have adverse climate impacts, such as licenses for fossil fuel extraction. It is important to note that, whilst reference is made here to public interest or strategic 'litigation', forms of client-based representation and advocacy which do not include litigation (discussed at 3.1.2.1) can also achieve public interest and strategic aims.

Such litigation can serve a number of purposes:

- Clarifying, developing and/or demonstrating the limits of existing laws by giving judges the opportunity to interpret them.
- Holding public bodies to account by ensuring that they act fairly, transparently and within their powers.
- Highlighting and raising public awareness of important issues – litigation can encourage public debate and media coverage.

In public interest or strategic litigation, an ERCS could act either in a representative capacity for a client advancing such a cause – or under its own name (but the latter may risk adverse costs liability for an ERCS).

Example 1 – UK Air Pollution Litigation - From 2011, ClientEarth has made a number of successful legal challenges in its own name against the UK Government's failure to implement the EU Ambient Air Quality Directive. The effects of this have been mixed – ClientEarth has won a

series of judicial reviews against the Government, but the Directive remains unimplemented in the UK. However, the litigation has increased government effort on the problem, has gained media attention and has raised public awareness of air pollution and the Government's failure in this area.[11]

Example 2 – Friends of the Earth Scotland's Intervention in *AXA* - Friends of the Earth Scotland (FOES) made a 'public interest intervention' in the 2011 *AXA* case. The case was a judicial review taken by Insurance company AXA against the Scottish pleural plaques legislation.[12] FOES intervened on the issue of standing for judicial review. Prompted by the intervention, the UK Supreme Court's judgement liberalised the Scottish standing test. This case has opened the door for public interest litigation in Scotland – an important strategic advance in access to environmental justice.

3.3 Public legal education

'Public legal education' is a term which covers activities aimed at empowering participants and increasing their capacity to handle legal problems.[13] It can assist participants to become more aware of their rights, know how to identify legal problems, key stages of intervention and where to get help when they arise, and to be able to understand and critique the legal system. An ERCS could provide public legal education in a number of different ways.

3.3.1 Teaching and training

An ERCS could carry out formal legal teaching – such as providing one-off seminars at universities on specific areas of practice (e.g. on the Aarhus Convention or public participation rights in the planning system). Teaching can be less formal – such as capacity-building exercises with NGOs or community groups to develop public awareness of environmental rights.

[11] For an overview on ClientEarth's air pollution litigation in the UK see - https://ukhumanrightsblog.com/2017/06/15/once-more-unto-the-breach-james-arrandale/.
[12] *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents)* [2011] UKSC 46.
[13] See http://www.lawforlife.org.uk/ and Annex 6 to the Low Commission Report (2014) – Low Commission, 'Public Legal Education' (Low Commission, 2014).

An ERCS could provide specialist training on certain topics and activities, where it is felt that there is little training offered in this area. It could hold training sessions on environmental law for lawyers (e.g. concerning legal developments or new legislation), provide sessions for the judiciary (e.g. on the Aarhus Convention) and provide training for the general public (e.g. training on information rights, the legal system and legal remedies, ways of influencing/challenging environmental decision-making, the planning system and environmental regulation in certain topics).

Example 1 – Friends of the Earth EWNI's 'Power Up' Weekends - Power Up is a training weekend hosted by Friends of the Earth EWNI. It is an empowerment-focussed training programme where lawyers and planners visit communities and provide them with the tools and skills to take steps themselves. The training provides information and presentations on judicial review, planning system and project-specific work as necessary.

Example 2 – Training the Ukrainian Judiciary on Environmental Protection and Human Rights - Environment People Law provides training to Ukrainian judges on environmental protection and human rights. It runs an online training course on human rights and the environment for Ukrainian judges and residential courses for judges.

In its summer 2017 session, Ukrainian judges visited facilities that cause harm to the environment and attended modules on: environmental protection, environmental rights and human rights; relations in the international law; jurisprudence of the ECHR and the interrelation of the environment and human rights; the Aarhus Convention and access to justice in environmental matters; the jurisprudence of the Aarhus Convention Compliance Committee; and access to environmental information.[14]

Example 3 – CELDF's Democracy Schools – this is a transformative educational course run over a weekend in different states across the USA. The democracy schools teach residents and activists how to reframe single issue work (such as opposing fracking, pipelines, GMOs, etc.) in a way to

[14] See http://epl.org.ua/en/announces/epl-spilno-z-natsionalnoyu-shkoloyu-suddiv-ukrayiny-za-pidtrymky-posolstva-shvetsiyi-provely-trening-dlya-suddiv-ohorona-dovkillya-ta-prava-lyudyny/.

confront corporate control and state pre-emption using people's inalienable rights. The Schools explore the limits of conventional 'regulatory organising' (i.e. organising that seeks to influence the regulation of harmful environmental activity) and offers a new model of organising that helps citizens to confront the usurpation by corporations of the rights of communities, people, and earth.

There are a series of lectures which cover the history of people's movements and corporate power, and the organising across the US by communities confronting agribusiness, the oil and gas industry, corporate hegemony over workers' rights, and others. Participants get a 300 plus-page notebook of background reading material.[15]

3.3.2 Provide online resources

A number of resources could be provided online to assist clients. These could include: 'how to' guides on certain areas of law to assist non-specialist readers, such as planning law, environmental impact assessment, environmental information, protest rights and public order law. It could provide a list of contacts for specialists or agencies concerning certain issues.

Other online resources include blogs on environmental law developments, and alert services which alert members signed up to an online service of developments in environmental law (e.g. consultations, significant cases, etc.). In this role, organisations take a legal watchdog function – notifying the public of new developments and helping to shine a light on the complicated workings of environmental law. In Scotland, this could take the form of monitoring the Edinburgh Gazette for significant developments – and providing notifications of significant policy developments, consultations, new legislation and caselaw.

Example 1 – Community Resource Packs - Friends of the Earth EWNI's Rights and Justice Centre provides accessible 'community rights resource packs' online.[16] They can be downloaded for free. They provide informative guides written in accessible language on the following:

- 'right to know' - information on public information rights and associated appeal rights;

[15] See https://celdf.org/how-we-work/education/democracy-school/.
[16] See https://www.foe.co.uk/page/community-rights.

- 'right to participate' - which explains rights to participate in the development plan and development control systems – with discrete guides for planning applications, local plans, environmental impact assessment and public inquiries;
- 'right to challenge' - which explains judicial review rights and procedure.

Example 2 – Environmental alert blog – the Canadian organisation West Coast Environmental Law runs an environmental law alert blog. It covers proposed changes to the law that will weaken, or strengthen, environmental protection; stories and situations where existing environmental laws are failing to protect the environment; and emerging legal strategies that could be used to protect the environment.[17]

3.3.3 Conferences and events

An ERCS could host conferences or other events to discuss and draw attention to particular topics. These can also provide a source of income.

The Legal Services Agency runs a regular programme of seminars, workshops and conferences on most areas of legal practice. They are aimed at people concerned with law and legal rights - including practitioners, anyone in the private, community, charitable or statutory sectors, policy makers, managers, campaigners and students.[18]

3.4 Advocate for change - law and policy reform

A number of organisations use their expertise to advocate for law and policy reforms, in a variety of different ways.

Advocacy for change can be reactive (such as responding to consultations) or proactive (where the organisation identifies a problem and advocates for change). It can be law reform-focussed (i.e. using precedent and established legal principles to advocate for changes to the law); or more traditional campaigning to advocate for broader social change – and even for radical,

[17] See https://www.wcel.org/law-alert-blog.
[18] See http://www.lsa.org.uk/lsa.php?id=67&n=1.

transformative change. This work can involve making highly formalised legal submissions to consultations, drafting amendments to legislation or community-based work to support communities to organise and lobby to create change by themselves.

Example 1 – CLAN Childlaw's Policy Development Unit – CLAN Childlaw's policy development unit uses CLAN's casework experience and legal expertise to influence policy. Its work is legally-focussed to avoid duplicating the policy work of other organisations and to reflect its own expertise. It carries out work such as consultation responses (e.g. a consultation to raise the minimum age of criminal responsibility in Scotland), carries out research and organises events.[19]

Example 2 – Lobbying for strengthened climate legislation in Victoria – Environmental Justice Australia (EJA) has identified weaknesses with the State of Victoria's current climate governance framework. It has campaigned for stronger state-level climate legislation – including producing a Victorian 'Climate Charter' which proposes a new legal framework to address climate change.[20] The resulting climate bill – now the Climate Change Act 2017 – reflects elements of EJA's climate charter.[21]

Example 3 – responding to the rollback of environmental laws at the Federal level in Canada - in 2012 the Canadian Federal Government made a set of changes which weakened key federal environmental laws. In 2016, a review of four of Canada's environmental laws was announced. West Coast Environmental Law has been active in lobbying for change to re-strengthen these laws. It has presented to standing committees, made submissions to expert panels, met with government officials, gathered experts to discuss solutions and campaigned with other environmental groups.[22]

[19] See http://www.clanchildlaw.org/policy/ .
[20] See https://envirojustice.org.au/major-reports/proposal-for-a-victorian-climate-charter.
[21] See https://envirojustice.org.au/submissions-and-issues-papers/the-victorian-climate-change-bill-2016-briefing-paper.
[22] See https://www.wcel.org/blog/fixing-canadas-environmental-laws-lets-get-it-right.

Example 4 – advocating for transformational change using community organising, community rights and rights of nature – the US-based Community Environmental Legal Defense Fund (CELDF) provides direct support to communities to assist them with organising themselves. This support includes training, advising and collaborating with communities on community group development, coalition-building, outreach and awareness-raising, dealing with elected officials, petitioning, campaigning, fundraising, recruiting volunteers and working with the media. It has a free online guide to community organising – 'Common Sense'.[23]

It has a community rights based approach to organising – which organises communities around a community-rights based model.[24] Community rights can take different forms and can be passed at different levels - they protect rights by banning harmful activities such as mining and fracking. CELDF has helped to produce a number of community rights ordinances at a local level.[25]

3.5 Research and publications

Legal and policy research could be an area of activity for an ERCS. This could take the form of reports on particular environmental law issues (such as the example of Environmental Justice Australia's climate charter noted at 3.4 above), more detailed specific reports, and could involve collaboration with universities.

There is cross-over between the functions of carrying out casework advocating for change, providing public legal education and carrying out research and producing publications. Casework can identify areas of law or policy in need of reform. Public legal education may require research to provide accurate and up to date resources in light of changes to the law. Advocating for change may require an evidence base for an advocate to be able to demonstrate that a particular law is not being enforced or is defective.

[23] Available at https://celdf.org/wp-content/uploads/2015/06/CommonSense_2nd_ed.pdf.
[24] See https://celdf.org/community-rights/.
[25] See e.g. Pittsburgh City Council 2010 Ordinance https://celdf.org/2010/11/press-release-pittsburgh-bans-natural-gas-drilling/.

Example 1 – legal research on water source areas in South Africa – South Africa is a water scarce country – it has 22 'water source areas'. In 2016 the Centre for Environmental Rights was invited by the WWF-South Africa to carry out a review of the legislation that could be used to protect these areas.

Example 2 – FIMA's environmental law journal, research centre and study group – Chilean environmental law organisation FIMA publishes its own annual journal 'environmental justice', which has been cited in the Chilean Supreme Court. It hosts 'CEFIMA' – a research centre for students and professionals to conduct environmental law research for use in litigation and policy debates. It also runs a study group which invites students to attend. There people meet on a regular basis to study certain topics and hear from experts in certain fields.[26]

3.6 Legal services to promote a sustainable economy

Some public interest environmental law organisations have developed methods of providing legal services to proactively promote the transition to a sustainable economy; rather than the traditional focus on providing reactive legal services.

This type of work tends to focus on providing legal support to persons and groups looking to carry out sustainable entrepreneurial activities. For example, providing business advice and support to sustainable social entrepreneurs or for someone looking to set up an environmental NGO.[27]

Environmental Justice Australia's Sustainability Law Lab[28] supports community-driven sustainability projects by:

- Providing innovative and cost effective legal services;

[26] See http://www.fima.cl/en/tag/quienes-somos-2/.
[27] See the San-Francisco-based 'Sustainable Economies Law Centre' - http://www.theselc.org/.
[28] See https://envirojustice.org.au/sustainabilitylawlab and http://envirojustice.org.au/blog/the-sustainability-law-lab-becomes-reality.

- Providing collaborative and savvy lawyers that get new business models and innovative projects;
- Running collaborative workshops for win-win and multi-party solutions;
- Identifying legal obstacles to sustainability projects and forming legal strategies for long term legal solutions;
- Providing training and education programs for skill transfer, awareness or compliance.

4 The case for an ERCS

The case for an ERCS depends on its aims and functions. For example, if it is set up to provide environmental law education – then there would need to be some evidence of a lack of other education-providers or a low awareness or understanding of environmental law in Scotland amongst the public. Similarly, a focus on access to environmental justice should demonstrate problems in this area, such as unmet legal need in environmental matters.

The 'vision' from the ERCS project brief is a helpful starting point for assessing the case for an ERCS because it provides a set of functions against which need and existing environmental and legal problems in Scotland can be assessed; and from which reasons can be given for a centre which does this type of work.

The vision gives four functions for the ERCS: provide access to environmental justice; provide public legal education; campaign for improved access to environmental justice and compliance with the Aarhus Convention and pursue strategic litigation.[29]

There are a number of arguments in favour of setting up an organisation with these functions in Scotland. This section first lays out a set of general arguments in favour of an ERCS, second it offers several Scotland-specific reasons for setting up an ERCS, third it addresses several arguments against setting up an ERCS and it fourth concludes with recommendations on the activities of an ERCS.

4.1 General arguments for ERCS-type Bodies

There are a number of general arguments for organisations which carry out the type of functions referred to in the vision above. These are grouped below under the headings of promoting environmental democracy, promoting sustainability and economic benefits.

4.1.1 Promote environmental democracy

- *Meet un-met legal need and provide access to justice.*

[29] See 2.1.

- It is difficult for individuals, communities and NGOs to find legal advice when faced with an environmental or planning issue. They may be unable find or understand the law on a particular topic, establish who the relevant decision-maker is or what their options and rights are in particular situations.
- Access to initial advice (and potentially representation) is important in realising rights and empowering individuals, communities and NGOs to protect the environment.

- *Strengthen environmental citizenship*.
  - Translating complicated planning and environmental laws into accessible formats allows the public and civil society to properly understand them, and to more effectively engage with formal processes.
  - Providing public legal education on environmental and planning law and environmental rights will cultivate an informed public who are more aware of the deficiencies of the current system of environmental rights and the legal system, and create pressure for change.
- *Develop an environmental rights and rule of law culture*.
  - Promoting awareness of environmental rights amongst the public and NGOs generally - and facilitating the public and civil society to become more involved in environmental decision-making.
  - Demystifying the law for the public – and creating a culture whereby rights to information, participation and access to justice are understood.
  - Creating a culture of respect for environmental rights in decision-making – where decision-makers and private actors are aware and respectful of environmental rights.
  - Making lawyers accessible to the public - challenging the cultural view where the public sees lawyers as 'not for them'.
  - Empowering the public by giving them the tools to address their problems – tackling the defeatist 'we can't do anything about this' mind-set when faced with environmental and planning issues.

- Challenging the perception of environmental litigants as 'NIMBYs', rather than concerned citizens, and building the understanding that it is for the courts to determine whether cases are vexatious.

- *Increase the accountability of public bodies*.
  - Providing routes to challenge non-compliance with the law (this should also improve the quality of decision-making).
  - Developing a culture of legality in environmental decision-making – where decision-makers and private actors are aware that environmental and planning laws must be followed; and that they can be challenged where this is not done.

- *Enforce environmental laws*.
  - Using legal and non-legal dispute resolution mechanisms to ensure that breaches of environmental law are challenged and remedied.
  - "…when you pass an environmental law… and you do not enforce it, you in effect authorize the conduct you sought to prohibit… Think of the consequences of a government deciding when it has to comply with the laws and when it does not. I would suggest that it is not a democracy, it is not government under the rule of law."[30]
  - "If there is a strong legal case, where is the public interest in preventing it being put before the court? Surely we all favour a system that encourages adherence to the law?"[31]

- *Realise rights in the Aarhus Convention*.
  - Providing access to environmental justice for the public and civil society.
  - Enhancing the capacity of the public and civil society in exercising environmental information and participation rights.

- *Strengthen pro-environmental advocacy (outwith litigation)*.

[30] James Thornton, 'Can we catch-up? How the UK is falling behind on environmental law', UKELA Garner Lecture 2015, London, p3. Available at https://www.documents.clientearth.org/library/download-info/james-thorntons-garner-lecture-speech-can-we-catch-up-how-the-uk-is-falling-behind-on-environmental-law/.
[31] Murray Wilcox, quoted in Murray Hogarth, *Law of the Land: Rise of the Environmental Defenders* (EDO NSW, 2015), p19.

- Supporting the use of legal advocacy in environmental campaigning and development of law and policy (e.g. the use of the law and legal arguments in consultations).

- *'Level the playing field' in environmental disputes*.
  - Reducing the inequality of arms and resources (i.e. between citizens, communities and NGOs vs developers, companies and the State) – by giving pro-environment groups access to the resources, expertise and legal services which are often enjoyed by their opponents.
  - Developers are repeat players in the planning system – whereas communities are often first-time, and one-time players. Access to experienced advocates would help reduce this inequality of experience.

4.1.2 Promote environmental protection and sustainability

- *Give the environment a 'voice'.*
  - The environment is said to 'die in silence' – it cannot represent itself in decision-making forums and needs advocates to act on its behalf to protect its interests.
- *Develop environmental rights and environmental law using strategic litigation by:*
  - Ensuring that environmental laws are enforced.
  - Holding public bodies to account by challenging harmful policies and practices.
  - Taking test cases to develop and better interpret environmental laws.
- *Provide specialist expertise and legal tools* to address environmental problems (e.g. climate change). Environmental law is becoming increasingly important in the context of growing, urgent and far-reaching environmental challenges such as climate change, resource depletion and the loss of biodiversity.
- *Improve the quality of environmental decision-making*:
  - By increasing public participation in environmental decision-making.
  - By creating a culture whereby decision-makers are not able to act with impunity, but understand that defective decisions may be subject to challenge.

- *Address systemic environmental and environmental law problems* through advocacy and strategic litigation.

4.1.3 Economic benefits of law centres

The UK Law Centre Network has contracted several research projects on the economic benefits of law centres. The 2014 'Funding for Law Centres' report found that law centres in England, Wales and Northern Ireland deliver several positive economic outcomes. Their use of early intervention and advice avoids costs in the justice system by preventing court actions, and their use of negotiated solutions for clients helps to avoid the social costs associated with outcomes such as evictions, bankruptcy and forced deportations.[32]

It estimated that the law centres in England, Wales and Northern Ireland create the following outputs and outcomes:

> *– between £446.5 million and £519.5 million in direct cost savings as a consequence of reducing the annual costs associated with debt and temporary accommodation;*
>
> *– approximately £450.6 million in indirect cost savings as a consequence of reducing 'downstream' or 'spillover' costs associated with homelessness, stress, anxiety and ill health;*
>
> *– £99.8 million in additional tax revenues to the Exchequer as employment is created and/or safeguarded.*[33]

It found that the pure fiscal benefits of law centres amount to at least twice the amount for which they are funded.[34] In addition to this, it found that Law Centres create a number of non-quantifiable wider economic benefits to society.[35] These findings – that law centres generate net economic benefits – are similar to those in previous studies by PricewaterhouseCoopers (2013) and the New Economics Foundation (2009).[36]

[32] Philip Craig, Nick Henry and Joe Sunderland, 'Funding for Law Centres' (ICF International, 2014), p8.
[33] Ibid, p8.
[34] Ibid, p9.
[35] Ibid, p9-10.
[36] PricewaterhouseCoopers, 'Law Centre Network Social Impact Study' (PWC, 2013), p39. New Economics Foundation, 'The Socio-Economic Value of Law Centres' (NEF, 2009).

For legal aid more broadly, a recent 'social return on investment analysis' commissioned by the Law Society of Scotland on legal aid spending in criminal, housing and family law cases found a positive return on monies spent in these areas. For every £1 spent in legal aid in these areas, it found that the social benefit which this generated ranged between approximately £5 for criminal and family cases to approximately £11 for housing cases (e.g. by reducing custodial sentences in criminal matters and in housing matters, reducing the demand for public services such as the NHS connected to homelessness).[37]

Evidence on the economic benefits of law centre-type organisations working in environmental law is lacking. However, by carrying out similar work – providing accessible initial advice and representation – it could be anticipated that an ERCS may reduce public expenditure as disputes are identified and addressed at the earliest possible stage, and resolved without the use of litigation. It could further be predicted that an ERCS could create broader social and economic benefits associated with protecting the environment and addressing pollution.

4.2 Scotland-specific arguments for an ERCS

There are many Scotland-specific reasons for setting up an ERCS-type body. Sections 4.2.1 and 4.2.2 identify reasons grouped under Scotland-specific 'environmental governance problems', and 'constitutional developments'.

Scotland-specific 'environmental governance problems' include non-implementation of the Aarhus Convention, the access to environmental justice gap, and general difficulties in enforcing environmental law. An ERCS could make positive contributions in these areas.

Constitutional developments in Scotland such as the development of a distinct body of Scottish environmental law, Brexit and the debate on the need for new ways of resolving environmental disputes in Scotland all provide further arguments for an ERCS.

4.2.1 Environmental governance problems in Scotland

4.2.1.1 Compliance with the Aarhus Convention

The Aarhus Convention aims to protect the human right to a clean and healthy environment. It recognises this right, and a corresponding duty for people "to protect and improve the environment

[37] Clare Hammond and Inga Vermeulen, 'Social Return on Investment in Legal Aid: Technical Report' (Law Society of Scotland and Rocket Science Ltd, 2017), p3-4.

for the benefit of present and future generations".[38] Signatory States must ensure that NGOs and members of the public enjoy rights to access information, participate in decision-making, and access justice. This fosters participatory democracy – understood to lead to a healthier and cleaner environment as people become more involved in the decisions affecting them.

The Convention's 2014 'Meeting of the Parties' (the Convention's governing body) found that Scotland was not compliant with the 'not prohibitively expensive' requirement under Article 9(4)[39] – and also the requirement to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice under Article 9(5).[40] It required 'urgent' remedial action. The Convention's 'Compliance Committee' then carried out two progress reviews in 2015[41] and early 2017[42] — finding that Scotland remained non-compliant. The 2017 Meeting of the Parties repeated its 2014 conclusion.[43]

The Scottish Government does not recognise this problem. The 2016 'Developments in environmental justice in Scotland' consultation document (intended to fulfil a 2011 SNP manifesto commitment to publish an options paper on the creation of an environmental court in Scotland) noted Scotland's 'ongoing compliance'[44] with the Convention. The 2017 response largely repeated this claim, noting that there are 'a range of statutory frameworks in place to ensure Scotland is fully compliant with all aspects of the Aarhus Convention.'[45]

An ERCS could campaign for changes to secure compliance with the Convention – lobbying decision-makers, carrying out research and seeking accountability for non-compliance through the Convention bodies and other dispute resolution mechanisms.

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[38] Aarhus Convention, preamble, paragraph 7.
[39] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 'Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland', ECE/MP.PP/2014/2/Add.1 (2014).
[40] This follows the Compliance Committee's 2010 findings of non-compliance in relation to Article 9(4) and Article 9(5), albeit these findings concerned a communication relating to England and Wales. Aarhus Convention Compliance Committee, 'Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland', ECE/MP.PP/C.1/2010/6/Add.3 (2011).
[41] Aarhus Convention Compliance Committee, 'First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2015).
[42] Aarhus Convention Compliance Committee, 'Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2017).
[43] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 'Decision VI/8k concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention', ECE/MP.PP/2017/CRP.6.
[44] Scottish Government, 'Developments in environmental justice in Scotland. A consultation' (2016), para 53.
[45] Scottish Government, 'Developments in environmental justice in Scotland - analysis and response' (2017), para 84.

Article 9(5) – a positive duty to (a) ensure the provision of information is provided to the public on available review procedures and (b) consider assistance mechanisms to remove barriers to access to justice – provides a basis for an argument for public funding of an ERCS. An ERCS would support the implementation of these two duties under Article 9(5) by providing information to the public and facilitating access to justice (in addition to providing affordable legal support – addressing the Article 9(4) issue).

An ERCS could also investigate a number of further Aarhus compliance issues which have so far not been explored, but which raise potential problems of non-compliance. These include issues of accessible interim relief and the standard of review applicable in judicial review.

4.2.1.2 Access to environmental justice

Affordability of advice and representation is the major barrier to access to environmental justice in Scotland. The Scottish Environment LINK's 'Governance Matters' report noted how the costs of environmental litigation have meant that,

> *Most citizens or non-governmental organisations simply could not afford to take cases challenging the Government's application of the law to the Court of Session – especially where taking such a case was likely to result in the need for an onwards appeal.*[46]

For example, the John Muir Trust's unsuccessful judicial review of the Stronelairg windfarm development led to the Trust owing £539,000 to the Scottish Government and developer SSE (this was eventually negotiated to £125,000).[47] The evidence at 4.2.1.1 in terms of non-compliance with the Aarhus Convention supports this argument.[48]

For anything requiring more than a simple piece of initial advice, fee rates can quickly become unaffordable for an individual, community group or small environmental NGO. The Law Society of

[46] Scottish Environment LINK, 'Governance Matters - The Environment and Governance in Scotland' (2011), p32.
[47] See https://www.thirdsector.co.uk/scottish-conservation-charity-pays-125k-settle-wind-farm-case/governance/article/1433534. This followed a judicial review in the Outer House (where the John Muir Trust was successful), and an appeal to the Inner House (in addition to two unsuccessful PEO applications). See *The John Muir Trust v The Scottish Ministers and SSE Generation Limited and SSE Renewables Developments (UK) Limited* [2016] CSIH 61. Additionally, in *McGinty and Another* [2010] CSOH 5, the petitioner's potential liability was stated as £80,000 for his own legal expenses, and a potential £90,000 liability for the expenses of the respondent were he to be unsuccessful (para 4 of the judgement). McGinty was unemployed and in receipt of jobseekers allowance.
[48] See also Mary Church, 'Tipping the Scales: Complying with the Aarhus Convention on Access to Environmental Justice' (Friends of the Earth Scotland, 2011).

Scotland's 2017 Financial Benchmarking report found that, "the most common hourly rate for civil court work was £150-£200".[49]

The inaccessible nature of legal services is borne out by the following examples and comments from those who completed the access to environmental justice survey and were interviewed for the access to environmental justice case studies included in appendix two.

A member of the NGO Biofuelwatch commented that, in relation to a biomass power station development in Grangemouth, "we'd certainly have wanted to explore the option of judicial review but none of the local people we worked with, nor ourselves, could afford that."

Kathleen Weetman, who is concerned about a housing development proposed in North Lanarkshire which threatens greenbelt land and worsening the area's air pollution problem, was of the opinion that, "this is quite a poor area so the money isn't there to fund any legal challenges. We will have to look for pro bono help because there is no money. If this was a well-off area we would be able to raise a fighting fund – but that's not possible in an area like this."

Ann Coleman, who experienced problems with a nearby landfill, opencast coal mine and incinerator proposal near Greengairs in North Lanarkshire, remarked that, "We don't have the means to challenge them… the public have no power – none, it's just not there… the law doesn't exist as far as I'm concerned".

Malcolm Spaven, who was involved in a campaign against a proposed opencast coal mine at Cauldhall in Midlothian which was able to access a limited amount of pro bono legal advice, remarked that, "We were not really able to access enough legal advice. It would have been good to be able to afford professional advice – but cost was a major factor, so this was not really a route we could go down."

Tom Ullathorne is concerned about regular episodes of pollution of the Caw Burn which runs past his home. This has been reported several times but it remains unresolved. Tom and his neighbour are unable to afford legal advice to find out their rights and ensure that the relevant regulators are carrying out their duties properly.

Simon McLean, a resident of Torry in Aberdeen, is concerned about a proposed incinerator which has been granted planning permission there. During the planning process, he and a group of other

[49] Law Society of Scotland, 'Financial Benchmarking 2017: Report' (Law Society of Scotland, 2017), p67.

residents were able to access legal advice and were informed that they had had strong grounds for a legal challenge due to alleged planning irregularities. However, they were warned that if unsuccessful, their likely adverse costs liability could be up to £65,000 - and one of them may lose their home as a result. They were unable to pursue this due to the threat of costs liability.

The legal professionals who completed the survey and were interviewed anonymously provided the following reflections on this topic:

> *Costs are a barrier - it is not realistic for individuals or community groups to approach solicitors - and there is no way to get funding for that.*

> *They (individuals, community groups and civil society organisations) cannot afford legal representation and if they get involved in a local inquiry they generally do not have the resources to get expert advice to help them. Research shows that it is the poorer communities that are generally most affected by development that has the most environmental damage and they are communities that are least likely to be able to access any expertise within the community, which sometimes is available when a more affluent community gets involved in a local inquiry. A community that also represents itself is at a disadvantage in that it does not understand the legal procedures.*

> *Most judicial reviews of this kind I am involved in I find myself up against a horde of lawyers on the other side, there is a lack of balance of resources… there is no even playing field, you feel like you're playing up against an angle of forty-five degrees.*

In addition to the costs barrier – more than one legal professional noted that large law firms are reluctant to act for public interest environmental litigants. It was suggested that this stems from concerns that doing so may lead to conflicts of interest with work done for other clients (e.g. developers) or will reduce any future likelihood of receiving contracts (e.g. contracts with public bodies).[50] In practice, this means that there are very few options for such litigants in Scotland.

The LINK report details that there has been little use of legal expertise by the Scottish environmental sector,

[50] One survey respondent stated that, "those with knowledge and experience are based in large legal firms and they may have conflicts of interest (legal, commercial or both) which prevent them from assisting people or groups".

The engagement of LINK and its members with the legal establishment has been very limited. It has largely amounted to the hiring of solicitors and advocates in the very limited number of cases taken to law by the LINK members. The process of advocates, solicitors, academics, judges and prosecutors becoming more specialised in the field of environmental law proceeds at a slow pace in Scotland by comparison with many other countries around the world (and, as is the nature of practice, much of the specialism is defence based and the work of many specialising in environmental and planning law is often focussed on getting around environmental and planning regulations).[51]

There are few options for people or NGOs looking for accessible, affordable legal services in environmental law in Scotland. It is difficult for people to find out their legal rights and access available remedies in environmental matters in Scotland.

An organisation where members of the public and civil society could go for advice to find out their rights, their ability to influence decision-making, risks, explanation of legal processes and potential remedies would help address this access to environmental justice gap in Scotland.

Providing access to environmental justice also supports public policy aims in Scotland, including:

- UN Sustainable Development Goal 16 – in particular, 16.3, 16.6 and 16.7.[52]
- The priorities in the Scottish Government's 'Justice for Scotland' strategy – in particular, those relating to access to justice and modernising the justice system to meet 21st century needs.[53]

4.2.1.3 Enforcement of environmental laws

Tamsin Bailey's 2011 'From Rhetoric to Reality'[54] report on eight pieces of Scottish environmental legislation noted a number of areas where there are enforcement gaps in environmental law in Scotland. These include:

[51] Scottish Environment LINK, 'Governance Matters - The Environment and Governance in Scotland' (2011), p34.
[52] UN SDG 16, "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". 16.3, "Promote the rule of law at the national and international levels and ensure equal access to justice for all"; 16.6, "Develop effective, accountable and transparent institutions at all levels"; 16.7, "Ensure responsive, inclusive, participatory and representative decision-making at all levels".
[53] Two of the Scottish Government's 'priorities' for the justice system state that, "We will enable our communities to be safe and supportive, where individuals exercise their rights and responsibilities… We will modernise civil and criminal law and the justice system to meet the needs of people in Scotland in the 21st Century", Scottish Government, 'Justice in Scotland: Vision and Priorities' (Scottish Government, 2017), p3.
[54] Tamsin Bailey, 'Scotland's Environmental Laws Since Devolution - From Rhetoric to Reality' (2011).

- A failure by the Cairngorms National Park Authority to apply the 'Sandford Principle'[55] as required under the National Parks (Scotland) Act 2000.
- The reluctance of Access Authorities to take action against those who obstruct access and insufficient action being taken where access creates a threat of wildlife disturbance, in relation to the Land Reform (Scotland) Act 2003.
- Concern about a lack of action to tackle diffuse water pollution under the Water Environment and Water Services (Scotland) Act 2003.
- The duty of public bodies to 'further the conservation of biodiversity' as per Section 1 of the Nature Conservation (Scotland) Act 2004 is not sufficiently influencing public bodies.
- The Strategic Environment Assessment requirements in the Environmental Assessment (Scotland) Act 2005 have not led to significantly different outcomes.
- Many legally protected SSSI sites are under threat from inappropriate development; and those without legal protection are even more exposed.

This report evidences a number of areas where environmental laws are not being fully enforced in Scotland. An ERCS could help clients to address these problems – using legal advocacy and remedies to address non-enforcement.

4.2.1.4 Public participation in the planning system

The 'From Rhetoric to Reality' report also noted that, in relation to the Planning etc (Scotland) Act 2006:

> *The overall view is that while some of the building blocks are in place, Scotland does not yet have a transparent, participative planning system in which communities feel they can influence decisions which affect their future. Those aspects of the Act designed to facilitate development have been taken forward, but those intended to improve participation have had negligible effect so far. It has taken a long time for new-style Development Plans to be adopted, so planning decisions continue to be made with reference to Plans which pre-date the Act.*[56]

[55] The Sandford Principle requires that, where irreconcilable conflicts exist between conservation and public enjoyment, conservation interests should take priority.
[56] Tamsin Bailey, 'Scotland's Environmental Laws Since Devolution - From Rhetoric to Reality' (2011), p5.

Her report notes the following problems with the planning system:

- Communities feel excluded.
- The planning system is seen as biased in favour of developers.
- Planning authorities take decisions contrary to their plan and their planners' advice.[57]

The Scottish Government is currently legislating for a new Planning Act, following a review of the Scottish Planning System which was announced in September 2015. It appointed a panel to provide a strategic perspective on the planning system and provide ideas for improvement – which sought evidence in late 2015.

The analysis of the written evidence submitted to this review, found that:

> *…There was considerable reference, particularly from Civic Society participants, to the **inadequacy of Enforcement**, particularly when arising from instances such as: breaches in planning law, non-compliance with conditions or approved drawings…*[58]
>
> *…There was general recognition that planning departments (in particular, and also local authorities more generally) **were seriously, even critically, under-resourced**…*[59]
>
> *…the absence or **lack of Enforcement capability** was seen, particularly by communities, as enabling breaches and non-compliance, thereby undermining the credibility/validity of planning locally…*[60]
>
> *…From within the community sector, there was the feeling that there was an **inherent bias and unfairness within the planning system**, favouring development and developers…*[61]

The 2016 Independent Review of the Scottish Planning System, commissioned by the Scottish Government, noted that:

[57] Ibid, p35.
[58] Kevin Murray Associates and University of Dundee, 'The Planning Review: Analysis of Written Evidence' (Scottish Government, 2016), p55 (original emphasis).
[59] Ibid, p62 (original emphasis).
[60] Ibid, p63 (original emphasis).
[61] Ibid, p68 (original emphasis).

The evidence shows that the planning system is not yet effective in engaging, let alone empowering, communities. Although it is accepted that consultation requirements have increased with the 2006 Act, the aim of front loading engagement has not reached its full potential. Constraints to effective engagement include resources and time and it appears that often consultation is minimal, rather than meaningful.[62]

… engaging young people in the planning process. The evidence showed that at present they have little or no say in the future of their communities.[63]

A further 2017 study was carried out by Yellow Book (commissioned by the Scottish Government) on the barriers to community engagement in planning. It carried out a programme of consultations and workshops, and from the views expressed it found that there was:

A lack of fairness and unequal resources

The need for the planning system to be fair and equitable was a recurring theme of the consultations, but communities feel that the cards are stacked against them. There is a mismatch between the resources available to developers (money, professional skills and legal advice) and those available to communities. One community activist said that she was tired of being "the only unpaid person in the room". This advantage is seen to enable developers to conduct a "war of attrition", grinding down community opposition to proposals, lobbying for changes to development plans or conducting appeals against planning refusals. Short notice for responses and the publication of contentious planning applications during holiday periods are cited as examples of the way developers and, sometimes, councils "game the system".[64]

A lack of transparency

A number of people we spoke to described how planning jargon could be "used as a weapon" to intimidate and exclude communities. No one doubts the need for technical analysis and documentation, but the language in which key elements of the system are

[62] Crawford Beveridge, Petra Biberbach and John Hamilton, 'An independent review of the Scottish planning system' (2016), p36.
[63] Ibid, p37.
[64] Yellowbook Ltd, 'Barriers to community engagement in planning: a research study' (2017), p26-27 (original emphasis).

conducted often seems to be wilfully obscure, and the sheer bulk of material submitted makes it impossible for communities to scrutinise. The problem is compounded by a perceived lack of openness, with communities claiming that, instead of information being available in accessible, plain English form, it has to be extracted from local authorities.[65]

…Community organisations, community activists and third sector bodies generally found their experience of the Scottish planning system frustrating and unrewarding, and considered the system to be biased in favour of developers. Sometimes they were very angry.[66]

The review concluded that the, "overwhelmingly negative perceptions of community leaders and ordinary citizens are an indictment of the planning system".[67] A November 2017 survey commissioned by the National Trust for Scotland found that 60% of those interviewed "felt they had no influence on planning decisions affecting their local area".[68]

Planning Democracy have argued that the Scottish planning system is too focussed on providing 'sustainable economic growth', and that as a result, it is directed towards securing efficient planning consents – with little attention paid to the need for broader democratic engagement in planning decisions.[69]

Planning appeal rights in Scotland exist only for those making applications for planning permission. Applicants can appeal refusals of planning permission, whereas communities (who may be directly affected by planning decisions) cannot appeal permissions. The only route for communities to challenge planning decisions is through judicial review, which is unaffordable (see 4.2.1.1). Additionally, judicial review is a largely procedural process which focusses on legality, and does not address the substance of a decision. Planning Democracy argue for an 'equal right of appeal' – whereby communities should also have the right to appeal decisions which affect them.[70]

[65] Yellowbook Ltd, 'Barriers to community engagement in planning: a research study' (2017), p27.
[66] Yellowbook Ltd, 'Barriers to community engagement in planning: a research study' (2017), p28.
[67] Yellowbook Ltd, 'Barriers to community engagement in planning: a research study' (2017), p44.
[68] See https://www.nts.org.uk/What-we-do/News/Planning-without-the-people/.
[69] Planning Democracy, 'Response to the Scottish Government's Review of the Scottish Planning System' (2015), p1-2.
[70] Planning Democracy, 'What is the Equal Rights of Appeal campaign?' See - http://www.planningdemocracy.org.uk/what-is-equal-rights-appeal-campaign/.

There is significant dissatisfaction from communities and civil society groups with the way that the Scottish planning system functions. The evidence indicates that the Scottish planning system does not make effective use of public participation; and that there are enforcement problems in the planning system.[71]

The planning system dictates where development does and does not occur, and how developments affect their surroundings. Poorly planned developments can have detrimental impacts on communities and the environment and vice versa. Planning is a significant component of environmental governance, it is underpinned by law and therefore should be a key focus of an ERCS.

An ERCS could provide a source of expertise for communities looking to understand their rights in relation to particular planning decisions or the development of spatial plans. It could provide support and advocacy for planning procedures such as public local inquiries, and it could support the public and civil society to access remedies where legally defective decisions are made or where there is a lack of enforcement of planning conditions. In line with broader work on the implementation of the Aarhus Convention, it could take a campaigning role which would assess the planning system against the requirements of the Aarhus Convention, and lobby for change where necessary to create a more participatory planning system which reflects citizens' environmental rights.

4.2.1.5 Scrutiny of implementation of legislation

Scrutiny of the implementation of legislation is important to ensure that legislation is effective in practice. The Scottish Environment LINK's 2011 'Governance Matters' report notes that the Scottish Parliament's work in carrying out post-legislative scrutiny of Acts of the Scottish Parliament has been limited.

It found that:

[71] Although in relation to planning enforcement, one report suggests that the public perceptions of planning enforcement may not be fully reflective of the actual enforcement work which is carried out by planning authorities and that there may be a lack of understanding of the mechanisms of planning enforcement. See Land Use Consultants Limited, 'Planning Enforcement in Scotland: research into the use of existing powers, barriers and scope for improvement' (Scottish Government, 2016), p95-110.

Full and proper consideration and inquiry into the delivery of government has been lacking in our view…

…This is particularly seen in relation to agencies of government. In the environmental field, no comprehensive scrutiny of the work of either of the major agencies (SNH and SEPA) has been undertaken.[72]

Through its casework experience, an ERCS would be able to build expertise on the implementation of environmental laws in Scotland. It could use this to support research on the topic, and to identify areas of non-implementation for reform and challenge.

4.2.1.6 Wildlife crime

'Wildlife crime' broadly refers to an illegal an act or omission concerning certain birds, animals, plants and their habitats – at land and at sea. The Scottish Environment LINK commissioned a review of wildlife protection legislation, to provide an overview of the enforcement picture. The two 2015 'Natural Injustice' reports[73] that were produced found that:

- Wildlife crime is consistently underreported in Scotland;
- At least 18% - and up to one third - of incidents reported to the police were not investigated;
- Of the follow-up investigations that occurred – just over one third of respondents to the study felt that they were carried out satisfactorily;
- Only 20 of 148 incidents reported between 2008-2013 resulted in a prosecution (13.5%) – and only 15 resulted in a conviction;
- The sentences imposed were at the lower end of the scale, and have been applied inconsistently;
- There is a lack of confidence in both the investigation of wildlife crime and the judiciary's imposition of meaningful deterrent sentences.

[72] Scottish Environment Link, 'Governance Matters: The Environment and Governance in Scotland' (2011), p13.
[73] 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).

The review produced a series of recommendations to improve the reporting, investigation, prosecution and sentencing for wildlife crime in Scotland.

An ERCS could play a role in the design of legal responses to environmental crime, could support members of the public and civil society who feel that particular incidents of wildlife crime have not been reported (e.g. through making complaints to Police Scotland or the Procurator Fiscal), and could carry out research and provide expertise to better address wildlife crime.

4.2.1.7 State of the environment

State of the Environment reviews provide comprehensive assessments of the condition of the environment within a certain jurisdiction. The latest for Scotland (2014), reviewed the state of the environment in relation to air, water, land, climate and people and the environment. It found that:

- Air - air quality is generally improving in Scotland but there are a number of urban areas where air quality is of concern, and "air pollution still damages our health and the environment".[74]
- Water - rivers and lochs face a loss of habitat as a result of development, agriculture causing nutrient enrichment and habitat loss, and energy production disrupting the natural movement of water; the marine environment is subject to commercial fishing, which can harm the sea bed and marine species, aquaculture causing localised pollution, a loss of coastal and estuary habitat to development and diffuse pollution of estuaries and coastal areas; groundwater is under pressure from agricultural inputs, water abstraction - causing water-table levels to drop, pollution from historic mining and industrial activities.[75]
- Land – 59% of lowland raised bogs and one third of habitats and species in general are in unfavourable condition, 9 of 61 farmland bird species have declined significantly between 1995 and 2011 - some are now so scarce that they have almost disappeared.[76]

Civil society organisations have carried out their own biodiversity-focussed 'State of Nature' research. The latest Scottish report (2016), found that:

[74] Nathan Critchlow-Watton et al, 'Scotland's State of the Environment Report' (Scotland's Environment Web, 2014), p11.
[75] Ibid, p21-22.
[76] Ibid, p95-177.

- Scotland's 'Biodiversity Intactness Index' (a way of measuring the loss of nature as a result of human pressures)[77] value is 81.3% - values below 90% indicate ecosystems which may have fallen below the point at which they can reliably meet society's needs. Scotland is 36th from bottom out of the 216 countries for which this value has been calculated.[78]

As with wildlife crime, an ERCS could support the design of effective legal responses to the systemic environmental problems listed above, could support members of the public and civil society challenging developments which exacerbate such problems, and could carry out research and provide expertise to better address environmental problems.

4.2.1.8 Strategic lawsuits against public participation

A 'strategic lawsuit against public participation' (SLAPP) is the use of litigation (or the threat of litigation) as a way of stifling legitimate political expression. Canan describes it as the attempt to "derail political claims, moving a public debate from the political arena to the judicial arena, where the playing field appears more advantageous".[79]

Motivations for their use include retaliation for successful opposition to the SLAPP-issuer's interests, to prevent future opposition and to intimidate by sending a message that opposition will be punished.[80] They have a long history in the USA,[81] and have been used in the UK against environmental protests concerning road developments, GMOs, climate change and fracking.[82]

There is some evidence of SLAPP-type activities being used in Scotland to deter public participation in environmental matters. In 2014 lawyers from the firm Muckle, acting for Five Quarter Energy Holdings, sent a 'cease and desist'-type email to Scottish campaigner Mel Kelly.[83] Mel Kelly had written a critical report about underground coal gasification (UCG) which she had sent to politicians in Scotland. It threatened her with legal action if she did not immediately stop drawing attention to the dangers of underground coal gasification (UCG). The email stated: "Our client reserves the right

[77] For a discussion of the index, see http://www.predicts.org.uk/pages/policy.html.
[78] State of Nature 2016: Scotland (2016), p3.
[79] Penelope Canan, 'The SLAPP from a Sociological Perspective' 7 Pace Environmental Law Review 23 (1989), p23.
[80] Ibid, p30.
[81] George W. Pring, 'SLAPPs: Strategic Lawsuits against Public Participation', 7 Pace Environmental Law Review 22 (1989) 3.
[82] Christopher Hilson, 'Environmental SLAPPs in the UK: Threat or Opportunity' (2016) 25(2) Environmental Politics 248. BBC News, 'Ineos shale gas sites: Anti-fracking protest injunctions continued' (23/11/2017) - see http://www.bbc.co.uk/news/uk-england-merseyside-42098281.
[83] Paul Mobbs, 'Coal gas company warns - stop campaigning or we will sue' (The Ecologist, 18/05/2014), see http://www.theecologist.org/News/news_analysis/2402220/coal_gas_company_warns_stop_campaigning_or_we_will_sue.html.

to issue proceedings against you seeking relief for defamation and/or malicious falsehood. For the avoidance of doubt our client would also be seeking to recover legal costs and interest. Such costs could be substantial."[84]

An ERCS could provide accessible advice and representation necessary to challenge SLAPP actions, to protect public participation in environmental decision-making.

4.2.2 Constitutional developments in Scotland

Specialist expertise and advocacy could help to address the threats and opportunities in relation to changes to the Scottish constitutional landscape in the following matters.

4.2.2.1 The development of Scottish environmental law

There are divergences in environmental law across the UK. Scotland has a legal system which is distinct from the rest of the UK. The devolution of powers to the Scottish Parliament has resulted in the emergence of a Scottish body of environmental laws. Brexit may lead to the devolution of additional powers concerning the environment to the Scottish Parliament – and Scotland's divergence would also be likely to accelerate in the event of Scottish independence.

Environmental law in Scotland is different. The unique legal situation in Scotland requires legal specialism – and effective law reform or campaigning work requires an understanding of the Scottish political context.

4.2.2.2 Brexit implications - environmental standards and enforcement

Brexit poses a risk to environmental standards and the enforcement of environmental law in the UK.

4.2.2.2.1 Environmental standards post-Brexit

In its current iteration, the European Union (Withdrawal) Bill 2017-19 – the draft piece of primary legislation being used to withdraw from the EU – fails to explicitly retain overarching EU environmental principles or fully incorporate EU Directives into UK law.[85]

[84] Billy Briggs, 'Resistance: The people fighting fracking in Scotland' (The Ferret, 16/12/2015).
[85] Tom West and Karla Hill, 'The Withdrawal Bill: Destination and Journey' (ClientEarth, 2017). The Withdrawal Bill is subject to a communication to the ACCC regarding an alleged failure to consult the public on the Bill, see https://friendsoftheearth.uk/brexit/un-committee-scrutinises-uk-government-over-brexit.

There is a risk of environmental deregulation post-Brexit, because the UK may no longer be bound by EU environmental laws. The UK may regain sovereignty over environmental standards, and as a result - it may choose to lower standards beyond the floor which is currently guaranteed by a number of EU environmental laws. Roseanna Cunningham (Scottish Cabinet Secretary for the Environment, Climate Change and Land Reform) committed the Scottish Government to upholding current EU environmental standards and the principles which underpin them post-Brexit.[86] However, no commitment has been made to keep up to date with developments in EU law and the commitment is not legally enforceable so could be reversed in the future by a change of policy or government.

An ERCS – if it took a role in law reform or campaigning – could provide expert advocacy to counter any attempts to weaken environmental standards (e.g. the Habitats Directive is often criticised as 'anti-development') under this scenario.

4.2.2.2.2 Enforcement and accountability post-Brexit

Enforcement of EU law relies on two mechanisms - the supervisory powers of the EU Commission in relation to Member States as the 'Guardian of the Treaties';[87] and the ability of citizens and groups to use domestic courts in Member States to seek compliance with EU law. These enforcement mechanisms will likely cease to apply in the UK post-Brexit – leaving a 'governance gap'.[88] Several studies have raised concerns about the loss of these enforcement provisions.

The UK House of Commons Environmental Audit Committee has noted that post-Brexit, EU environmental laws which have been transposed into UK law risk becoming 'zombie legislation' (laws which are no longer enforced or updated according to the latest scientific understanding).[89] The White Paper on the UK Great Repeal Bill provides an illustrative example of this in relation to the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001:

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[86] See http://www.scotlink.org/public-documents/eu-environmental-principles-sit-at-the-heart-of-scottish-policy-making-says-secretary-for-the-environment-roseanna-cunningham/.

[87] The Commission has the power to take enforcement action against Member States which fail to comply with EU law, this can result in Member States being taken to the Court of Justice of the EU and receiving fines. SULNE notes that, "In the case of the UK the Commission has exercised its enforcement powers in relation to nature protection, waste (landfills and packaging wastes), waste water collection and treatment, and air quality standards.", Scottish Universities Legal Network on Europe, 'The implications of Brexit for environmental law in Scotland' (SULNE, 2016), p3.

[88] See also on further governance gaps post-Brexit, Andy Jordan, Charlie Burns and Viviane Gravey, 'Three Brexit Governance Gaps that no-one is talking about' (06/12/17) - https://greenallianceblog.org.uk/2017/12/06/three-brexit-governance-gaps-no-one-is-talking-about/.

[89] House of Commons Environmental Audit Committee, 'The Future of the Natural Environment after the EU Referendum' Sixth Report of Session 2016–17, HC 599 (2017), p3 and p20.

These domestic regulations contain a requirement to obtain an opinion from the European Commission on particular projects relating to offshore oil and gas activities. Once we leave the EU, the Commission will no longer provide such opinions to the UK (and we would not seek them). However, this requirement in the existing regulations would prevent certain projects from taking place unless we correct it.[90]

The Scottish Universities Legal Network on Europe (SULNE) gives the following analysis of the resulting loss of these enforcement procedures:

Brexit will therefore entail the loss of a powerful means of scrutiny over how the UK manages its environment, with no obvious replacement for it. Instead, UK citizens will only be able to access national courts to complain about breaches of domestic environmental law.[91]

Professor Maria Lee notes that as part of the EU:

We have been able to take for granted not only the big sticks of Commission-plus-Court of Justice enforcement mechanisms and fines, but also a more subtle architecture of transparency and political accountability, as well as a series of EU legal principles that render judicial review before domestic courts more effective…

…there are things we shall miss. No doubt that includes the imposition of fines on government for the breach of environmental law… More importantly, the independent scrutiny provided by the Commission and Court is vital. And closely related to this scrutiny are the routine requirements in EU legislation that government plan the implementation of environmental obligations and report on progress. This enables

[90] UK Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' (DBrexit, 2017), p20.

[91] SULNE (2016), p3. SULNE further notes that, because the access to justice requirements of the Aarhus Convention are partly implemented through the 'Public Participation Directive': "One of the main risks arising from Brexit is losing the hard, enforceable edge that EU law provides to the Aarhus Convention's provisions, and the potential lowering of standards in the domestic implementation of the Aarhus Convention if changes are made to existing legislation implementing EU law", SULNE (2016), p10.

political and legal, formal and informal, peer and citizen, scrutiny of government action.[92]

UKELA has made similar comments about enforcement deficiencies:

Post-Brexit the supervisory role of the Commission and the citizen's complaint procedure will disappear. The Government to date has suggested that in future legal accountability can be handled solely by ordinary judicial review brought by environmental NGOs. Judicial review can provide a powerful long-stop check, but we question whether the process can in itself replicate the more systematic supervision hitherto conducted by the European Commission. Apart from the costs involved, judicial review is ill suited to resolving issues by discussion and negotiation which has been a valuable feature of the Commission's investigatory functions.[93]

The loss of the Commission's enforcement role could be seen as an opportunity for an ERCS. The UK Government appears to have initially been of the opinion that the existing mechanisms of judicial review and parliamentary scrutiny will be an adequate substitute for replacing the current EU accountability mechanisms that will be lost;[94] whereas more recently the UK Government has acknowledged the limitations of judicial review.[95] The UK Environment Secretary Michael Gove has recently announced plans to consult on a 'new, independent body for environmental standards' in early 2018.[96]

Given the problems which exist in Scotland in terms of access to environmental justice – if judicial review is to be seen as a plausible replacement, there will need to be structural changes made to the system of judicial review and additional capacity added in Scotland to ensure that this system is

[92] Maria Lee, 'Accountability for environmental standards after Brexit' (2017) Environmental Law Review 19(2) 89-92. See also Maria Lee, 'Brexit: environmental accountability and EU governance' (2016) - https://blog.oup.com/2016/10/brexit-environment-eu-governance/

[93] UKELA, 'Brexit and Environmental Law: Enforcement and Political Accountability Issues' (2017).

[94] See Dr Thérèse Coffey MP, Letter to the House of Commons Environmental Audit Committee (11/04/2017).

[95] Michael Gove MP, in oral evidence to the House of Commons Environmental Audit Committee on The Government's Environmental Policy (HC 544) on 01/11/2017, stated that, "One of the reasons why I think there should be a commission or body of the kind we have been discussing is because judicial review - while it is a very good thing, and the Aarhus principles are a very good way of ensuring people have access to environmental justice - on its own I suspect will probably not be enough" (response to question 3).

[96] Its remit is yet to be announced. See https://www.gov.uk/government/news/new-environmental-protections-to-deliver-a-green-brexit and https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexit.

better and more frequently used. The existing system of judicial review will not be a sufficient replacement.

An ERCS could help to address the enforcement gaps left by Brexit. If an ERCS carries out litigation – or even less formal advocacy – this could provide a substitute (albeit a limited one) to the Commission's enforcement role. Post-Brexit there will likely be a need for organisations which facilitate and take environmental judicial reviews in the UK to maintain the levels of accountability currently facilitated by the Commission.

Additional to this – if an ERCS produced research, it could help to identify and document the enforcement gaps that are likely to arise post-Brexit. This work could help to encourage reforms which will be necessary to address enforcement problems.

4.2.2.3 Developing new ways of solving environmental disputes

The SNP's 2011 manifesto contained a commitment to publish an options paper on the creation of an environmental court in Scotland. This led to the 2016 'Developments in environmental justice in Scotland' consultation.[97] However, the consultation document was not an options paper as per the manifesto.

The Scottish Government's response to the consultation was published in September 2017.[98] In a poorly reasoned response to the consultation, the Scottish Government decided that it will not be creating a specialist environmental court or tribunal at this time. There remains a need for a proper consideration and exploration of the options for addressing environmental disputes in Scotland;[99] particularly in the context of the governance gap threatened by Brexit.

There are also calls for appeals against the new UK Oil and Gas Authority to be heard in Aberdeen; the former Lord President of the Court of Session announced his intention to carry out a feasibility study on creating a new 'energy and natural resources court' in the Court of Session[100] and for creating 'equal' (third-party) rights of appeal in the planning system (discussed at 4.2.1.4).

An ERCS would have the expertise to lead research and reform efforts in this area – its casework would provide the evidence to show how the existing justice system is functioning (and its

[97] Scottish Government, 'Developments in environmental justice in Scotland. A consultation' (Scottish Government, 2016).
[98] Scottish Government, 'Developments in environmental justice in Scotland - analysis and response' (Scottish Government, 2017).
[99] See Frances McCartney, 'Litigation over the environment: an opportunity for change' (Friends of the Earth Scotland, 2015), Crispin Agnew, 'An environmental court for Scotland?' Scottish Planning and Environmental Law (2016) (178) 133-135.
[100] David Gill, 'Speech to the Holyrood Conference' Edinburgh (28/01/2015).

limitations). It could work to develop alternative or intermediate options to a full environmental court, which may be more politically palatable whilst delivering tangible progress.

4.3 Arguments against an ERCS

This subsection addresses some obvious arguments which could be made against the creation of an ERCS.

4.3.1 Other organisations can do this work

There is clear unmet legal need in Scotland which existing organisations are currently unable to address. A specialist, well-resourced, professional legal service is required to meet the legal need.

Existing commercial law firms cannot fill the role of an ERCS. As discussed at 4.2.1.2, commercial legal services are expensive in Scotland. Matters requiring anything more than basic initial advice can be unaffordable for individuals, community groups or small environmental NGOs.

There are no law centres or other non-profit organisations with the requisite capacity and specialist environmental and planning legal expertise to fill the role of an ERCS.

4.3.2 There is not enough demand for an ERCS' services

The access to environmental justice case-studies (see appendix two) and the caseload of organisations which have operated in Scotland in similar areas indicate that there is unmet legal need in planning and environmental law in Scotland – and demand for affordable legal services.

- The Environmental Law Centre Scotland's annual reports show that it:
    - Assisted 40 individuals or communities with initial advice and provided direct representation and casework to a further 40 from March 2009 to 31 December 2009.
    - In 2010, the ELCS carried out direct casework until the end of March 2010. It directly assisted around 30 individuals with initial phone advice, and a further 12 with direct representation or casework.
- ELF handles approximately 10 Scottish queries per year.

- The EDO NSW serves the state New South Wales in Australia (population 7.8m). It deals with ~1200 advice line matters, provides hundreds of written advices, and handles dozens of cases every year.[101]

4.3.3 An ERCS will encourage NIMBYs

The NIMBY ('not in my back yard') label is one which is applied to a person or group resisting a development in their local area which they perceive to be undesirable or hazardous. It is a pejorative term often applied by the proponents of such developments to dismiss opposition to their plans as motivated by self-interest only (e.g. concern for property values if an undesirable local development goes ahead). Frequently however, those labelled as NIMBYs have genuine concerns which extend beyond self-interest – including worries for their family, community, livelihood or their local environment.

An ERCS' services would be open to all of those who meet (a) its eligibility criteria for clients, and (b) its case-selection criteria. These criteria will be designed to ensure that resources are focussed towards casework with a public interest element (i.e. not to protect purely private interests).

4.4 Recommendations on the activities of an ERCS

Based on the discussion above, it is recommended that an ERCS carry out activities in five areas. There is a degree of interlinkages between each area – for example, research would be necessary for all of the activities and advocacy for change and strategic litigation are both ways of pursuing wider, systemic legal change.

- Provide affordable legal advice and representation to the public and civil society in planning and environmental law.

There is unmet legal need in Scotland in this area. An ERCS should address this by providing a free or affordable advice and representation service for individuals, communities and NGOs on environmental and planning law matters in Scotland.

[101] The EDO NSW's two most recent annual reports show that in 2016/2017 it provided 1,218 telephone advices, 286 detailed written advices and took 14 public interest matters before the courts. In 2015/2016 it provided 1,209 telephone advices, 517 detailed written advices and took 15 public interest matters before the courts.

This could include the provision of a limited amount of initial advice – such as through the use of a telephone advice line or email service; and then further advice and representation according to capacity and a set of case selection criteria.

- Carry out public legal education.

Providing public legal education would help to nurture an informed public and civil society more aware of environmental rights and the means to enforce them – in addition to better understanding the deficiencies of the status quo and able to create pressure for change.

An ERCS should carry out public legal education on environmental and planning law matters in Scotland. This could include the provision of accessible resources on particular topics – such as rights to information, participate in decision-making and challenge decisions; and public events such as talks and workshops on topics such as rights in the planning system.

- Carry out research.

The ability to carry out research would be necessary for an ERCS to effectively perform all of the other activities recommended here. In casework, research would be necessary to answer difficult legal queries; when advocating for change, research would be essential to understand comparative legal developments in other jurisdictions or the implementation of a law in Scotland; and research will be necessary for public legal education when providing education on a topic with new legislation or caselaw.

An ERCS should carry out research on environmental law in Scotland. This could be 'reactive' - focussing on researching legal problems which are identified through its casework (e.g. the non-implementation of particular laws). It could also be more 'proactive' – identifying particular gaps, environmental problems which are not being regulated effectively or issues of environmental governance.

- Advocate for change.

4.2 identified several longstanding systemic environmental and legal problems in Scotland where change is needed. These include Scotland's non-compliance with the Aarhus Convention, persistent environmental problems concerning air and water pollution and biodiversity, the non-enforcement of environmental and planning legislation, limited public participation in the planning system and wildlife crime.

An ERCS should carry out advocacy for law reform to develop and strengthen environmental and planning laws in Scotland. As with the recommendations on research, this could involve responding to consultations or problems identified in its casework; or advocacy in strategically selected areas such as the implementation of the Aarhus Convention.

- Pursue strategic litigation.

To address the various problems identified in 4.2, an ERCS should pursue the use of strategic litigation. This could also be reactive/proactive – using its own casework to pursue cases with wider implications on an ad-hoc basis, or actively selecting and pursuing cases which fit with areas identified as suitable for strategic litigation.

5 Governance Arrangements

This section addresses the governance arrangements for an ERCS. 'Governance arrangements' is used here as shorthand for the legal structure, allocation of authority, decision-making powers, and accountability provisions for an ERCS.

Choosing the right governance arrangements for an ERCS is important. The governance arrangements will dictate the activities it can carry out, and different arrangements come with different regulatory regimes.

This section first discusses the governance models used by law centres in Scotland (as an ERCS has similar aims and governance requirements); it second outlines the applicable regulation of solicitors and law practices in Scotland in relation to governance; it third looks at the available legal structures and then fourth makes recommendations on the governance arrangements for an ERCS.

5.1 Governance models used by law centres in Scotland

All Law Centres in Scotland are registered as Scottish Charities with the Office for the Scottish Charity Regulator (OSCR).

The typical set-up for law centres in Scotland is a model which uses two organisations. There is usually:

1. The law centre itself. Usually this is a private company limited by guarantee without share capital or a Scottish Charitable Incorporated Organisation (SCIO).
2. A separate law firm, registered as a 'practice unit' with the Law Society of Scotland. This can take the legal form of a private company limited by guarantee, a private company limited by shares, a limited liability partnership (LLP) or an ordinary partnership.

There is usually a contractual agreement between the two organisations whereby the law firm supplies legal services to the charity. All of the law firm's profits in relation to those services are supplied to the charity.

There are differences in the legal forms that have been adopted, and there are differences between organisations in terms of how the relationship works between the two organisations (e.g. whether

the LLP partners or company directors sit on the charity board, whether there is a written agreement between the organisations, the responsibilities of the charity's board, etc.).

The models used by the law centres in Scotland are set out briefly in the table below.

5.1.1 Governance models used by law centres in Scotland

Name of Organisation	Legal Structure(s) Used
Castlemilk Law & Money Advice Centre	Private company limited by guarantee without share capital. Registered as a charity.[102]
CLAN Childlaw	Uses two structures: (1) A private company limited by guarantee without share capital (named 'Community Law Advice Network'). This is also registered as a Scottish charity. (2) A law firm (named 'CLAN Childlaw Ltd'), which is a private company limited by guarantee and a law practice unit registered with the Law Society. There is a contract between the two organisations. All of the law firm's services are exclusive to the charity, and any profits the law firm makes go to the charity.
Dundee North Law Centre	A private limited company by guarantee without share capital. Registered as a charity.
Environmental Law Centre Scotland	Now dissolved. Used two structures: (1) A private company limited by guarantee without share capital. Registered as a charity. (2) Campbell & McCartney, a law practice unit registered with the Law Society (no information available on Companies House – therefore this is presumably a general partnership).
Ethnic Minorities Law Centre	A private company limited by guarantee without share capital. Registered as a charity.
Fife Law Centre	Uses two structures: (1) 'Fife Law Centre' is a private company limited by guarantee without share capital. Registered as a charity.

[102] It is assumed that a law practice unit operates alongside the Castlemilk Law & Money Advice Centre, but details on this were unavailable. The same assumption is made for Dundee North Law Centre and the Ethnic Minorities Law Centre.

	(2) A private company limited by shares ('Fife Community Law Limited') which is a law practice unit registered with the Law Society. Legal work is undertaken by this firm.
Govan Law Centre	Uses two structures: (1) A SCIO. Had previously used a trust ('Govan Law Centre Trust'). Registered as a charity. (2) Dailly & Co. Solicitors, a law practice unit registered with the Law Society (no information available on Companies House – therefore this is presumably a general partnership). All income of the legal practice is the property of the SCIO.
JustRight Scotland	Uses two structures: (1) A Scottish Charitable Incorporated Organisation. (2) A Limited Liability Partnership which is a law practice unit registered with the Law Society. There is a service agreement between the two organisations, whereby the LLP provides legal services to the SCIO.
Legal Services Agency	Uses two structures: (1) A company limited by guarantee without share capital ('Legal Services Agency Ltd'). This is also registered as a charity. (2) A Limited Liability Partnership ('Brown & Co. Legal LLP') which is a practice unit registered with the Law Society. Any legal aid income made by Brown & Co. is assigned to the LSA.
Renfrewshire Law Centre/Paisley Law Centre	Uses two structures: (1) Private company limited by guarantee without share capital. Registered as a charity. (2) Jon Kiddie Lawyers - a law practice unit registered with the Law Society of Scotland (no information available on Companies House – therefore this is presumably a partnership).
Scottish Childlaw Centre	The SCLC is a private limited company by guarantee without share capital. It is also registered as a charity. The SCLC is not registered with the Law Society of Scotland, but employs two in-house solicitors who are registered with the Law Society.

5.1.2 Discussion on the Scottish law centre model

The more legal structures involved in the delivery of its functions, the more complex and costly governance becomes. The typical law centre model (a private company limited by guarantee which is registered as a charity, plus a law firm) involves three regulators. First, as charities, Scottish law centres are subject to regulation by the Office of the Scottish Charity Regulator (OSCR). Second, as private companies, they are regulated by Companies House. Third, operating as a law firm in Scotland requires adherence to the Law Society's requirements (see 5.2). Each regulator carries their own sets of rules to be understood, and regulatory requirements to be met - increasing running costs.

For a new Scottish law centre, there are effectively three organisations to run: a charity, some form of company or LLP and a law firm. This situation reflects the limited governance options available for non-profit legal organisations in Scotland.

5.2 Applicable regulation of lawyers in Scotland

The work of solicitors in Scotland and the operation of their legal practices are regulated by the Law Society of Scotland.

5.2.1 Certain functions reserved to 'qualified persons' (practising solicitors)

Certain areas of legal advice or activity are restricted to solicitors in Scotland. These are set out in sections 32 and 57 of the Solicitors (Scotland) Act 1980.[103] An authorised solicitor (i.e. one regulated by the Law Society) is needed to prepare writs for court proceedings. Therefore, to be able to carry out litigation on behalf of external clients, an ERCS would have to register as a 'law practice unit' with the Law Society of Scotland.

5.2.2 Requirements for registration as a practice unit with the Law Society

Registration as a law practice unit with the Law Society carries significant regulatory requirements and adds financial costs. A law practice unit must first be approved by the Law Society. This requires:

[103] Under Section 32 it is an offence for unqualified persons to prepare the following documents: any writ relating to heritable or moveable property; or any writ relating to any action or proceedings in any court; or any papers on which to seek or oppose an application for grant for confirmation in favour of executors.

- **A manager -** a practising solicitor must register as the manager of the law practice unit. The manager must be three years qualified (of which at least one year must be immediately prior to starting the practice). They must have an existing practising certificate (which currently costs £650 – payable annually).[104]
    - If the person has not been a manager in a practice unit within the last three years before setting up the practice unit, then they will be required to attend the Law Society's practice management course, within 12 months of becoming a manager. This costs £450. It consists of eight hours of reading and online modules and one training day. It is held three times per year.[105]
- **Guarantee fund contribution** – currently £580 per partner (payable annually).
- **Professional indemnity insurance** – must have this under the Law Society of Scotland's 'Master Policy'. This is currently provided by the insurer Lockton. The exact fee payable depends on the size of the business and the nature of the risk entailed, but typically it is £3-5,000 (payable annually).[106]
- **Advertising** - All advertising and other promotional activities of practice units must comply with Rule B3 (Advertising and Promotion).[107]
- **Practice Unit information** – must inform the Society of the commencement of practice and certain other details relating to the practice unit within 7 days of commencement by completing and returning the appropriate form.[108]
    - Registration as an incorporated practice (i.e. as a company or an LLP) requires an additional £400 fee, and also creates an additional (minimum) 28 day waiting period for registration.[109]
- **Data Protection** – practice units must be registered as 'data controllers' with the UK Information Commissioner under the Data Protection Act 1998. Registration currently costs

[104] See Law Society of Scotland, rule D2.1.
[105] See https://www.lawscot.org.uk/members/cpd-training/practice-management-course/.
[106] Contact the insurers Lockton to discuss this.
[107] Broadly, rule B3 prohibits approaching the clients of other solicitors to solicit business or making any misleading advertisements or identifying clients in promotional materials without their consent.
[108] See https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-d/rule-d4/forms-and-fees/d4-practice-unit-information-forms/.
[109] See https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-d/rule-d5/rules/d5-incorporated-practices/.

£35.[110] New rules on data protection will come into force under the EU General Data Protection Regulation on 25 May 2018.[111]

A number of further requirements may apply, depending on the nature of the practice unit:

- **Accounts rules** – if an ERCS will be handling clients' money (other than for legal fees) – it will need to comply with the Law Society's accounts rules.[112] The proposed activities of an ERCS make this unlikely. However, if the ERCS was undertaking litigation on behalf of clients, then handling clients' court fees would have to comply with the accounts rules (albeit this could be avoided by having clients pay court fees directly).
- **Money-Laundering requirements** – this requires formal record-keeping procedures and internal reporting procedures, and verifying the identity of every client. Such verification should have regard to the risk of money-laundering in each case.
- **VAT registration** – if necessary.[113] If unregistered for VAT and undertaking legal aid work, an ERCS should advise the Scottish Legal Aid Board so they do not pay VAT on legal aid fees.
- **Legal aid registration** – if undertaking legal aid work, the practice unit must also register with the Scottish Legal Aid Board.[114] Registration as a law practice unit with the Law Society is needed to be eligible for legal aid income.

[110] See https://ico.org.uk/for-organisations/register/.

[111] See https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/, https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/ and http://www.eugdpr.org/key-changes.html. In terms of additional operational costs that the GDPR may create, people making 'subject access requests' (requests for access to their personal data) will have the right to make these free of charge after the GDPR comes into force.

[112] See Law Society of Scotland, rule B6.

[113] VAT registration is necessary where turnover is greater than £85,000 in a 12 month period (see https://www.gov.uk/vat-registration/when-to-register). It is unlikely that the ERCS would reach this threshold in its initial years of operation.

[114] There are ten administrative requirements that must be met to register for legal aid (see - http://www.slab.org.uk/providers/SolicitorRegistration/CivilRegistration.html). This creates a regulatory burden – but the ten requirements provide a framework for robust case management, which a firm should consider as a matter of good practice if carrying out casework and need not impose an additional burden. A firm must have procedures in place for the following: 1. Opening, and closing of a file for civil legal assistance, and monitoring its status; 2. Recording work carried out for the client, and all material advice tendered to the client as the case proceeds; 3. Ensuring that all solicitors providing civil legal assistance remain acquainted with the regulations; 4. Ensuring that all documents and other paperwork submitted to the Board are in order; 5. The control of incoming and outgoing mail; 6. The periodic review of a sample of cases being conducted under auspices of the civil legal assistance scheme; 7. The review of the conduct of a sample of cases conducted under the civil legal assistance scheme at the conclusion of the case; 8. Dealing with complaints from the client, the Law Society or the Board arising from any civil legal assistance case; 9. Submitting accounts to the Board and dealing with subsequent correspondence and queries, and recording the receipt of payment; 10. Ensuring that all members of the firm's administrative and support staff are aware of the firm's procedures and are observing them.

5.2.3 Alternatives to Law Society registration

An ERCS does not necessarily need only register as a law practice unit with the Law Society, or employ practising solicitors if it intends to conduct litigation. All of its other proposed functions could be carried out without these.

Alternative options:

- An ERCS could avoid the use of qualified solicitors altogether (e.g. most Citizens Advice Bureaux in Scotland). This has several implications:
    - Lower running costs as the level of regulation and financial requirements imposed by the Law Society are lowered.
    - An ERCS would not be able to carry out litigation itself – it could still be involved in litigation, but would need to instruct other solicitors or refer clients (entailing some loss of control of the litigation process, and may add extra costs for clients if for-profit firms are used).[115]
    - An ERCS could not use the word 'solicitor' to refer to its staff.
    - A potential lack of credibility in relation to high profile issues or cases.
- An ERCS could employ 'in-house solicitors' (e.g. the Scottish Child Law Centre).[116]
    - This would have lower costs than registering as a law practice unit, however in-house solicitors are still required to pay an annual fee to maintain their practicing certificate (currently £650 p.a.).
    - In-house solicitors would be able to represent an ERCS if it were to raise a claim itself. Given the potential financial implications of environmental litigation in Scotland (at least for judicial review - see 4.2.1.1), this is inadvisable.

[115] N.b. If the ERCS was involved in litigation being undertaken by another firm (i.e. as a funder, a litigant or even a party in control of the litigation) it would risk liability for litigation expenses as a 'dominus litis'. This was defined in *Mrs Patricia Anderson v Shetland Islands Council and Scottish Water* [2011] CSOH 187, at para 27 as "a person who has an interest in the subject matter of the litigation and, through that interest, controls and directs it. Because of that, even although he is not a party to the action, it is competent to find him liable in expenses". See the discussion in that case at paras 27-32.

[116] There is no official definition of an 'in-house solicitor'. It refers here to a practising solicitor registered with the Law Society whose employer is not a law practice unit registered with the Law Society.

- The limitation of this would be that an ERCS' solicitors would not be able to represent external clients in litigation (Law Society rules dictate that only a registered law practice unit can do this).[117]

5.3 Available legal structures

The choice of 'legal structure' is a particularly important one (i.e. should it be an unincorporated organisation, a company, should it seek charitable status, etc.). There are many legal structures which an ERCS could use. It could fit within a pre-existing organisation, it could be unincorporated or incorporated, it could seek charitable status and it could adopt any number of the legal structures that are available in Scotland.[118]

Different legal structures have different implications for the way that the organisation can be run, funded and the way it is regulated. It is essential that the chosen legal structure is compatible with the aims, vision, proposed activities and funding arrangements for an ERCS.

There are several features to be considered when choosing the appropriate legal structure:

- The liability of those involved:
  - Does the legal structure chosen give the organisation legal personality?
  - What are the circumstances in which those involved can become personally liable for acts of the organisation?
- The applicable regulatory regime (e.g. companies are regulated by Companies House):
  - Specific duties and requirements.
  - Accounting requirements.
  - Limitations on certain activities imposed by certain structures.
- Powers of the organisation.
- Funding arrangements – certain legal structures attract more funding, and certain legal structures will not be able to apply for certain types of funding.
- Tax liability – certain structures are liable to more or less taxes.

[117] See Law Society Scotland, 'Guide for in-house lawyers'.
[118] See Cooperatives UK, 'Simply Legal: All you need to know about legal forms and organisational types' (3rd Edn, 2017).

- The duration and longevity of an ERCS. It is important to consider dissolution of the organisation, dispersal of any assets, or removal from the charity register.
- Membership and control of the organisation:
    - Who will run an ERCS – will it be the board, the staff or a combination of the two?
    - Should the wider community or its clients have a say in how it is run?

5.3.1 Use a pre-existing legal structure

In this model, an ERCS would be incorporated into a pre-existing organisation – becoming an internal unit or department within another organisation. For example, an ERCS could become part of the Scottish Environment LINK.

There are existing models which use pre-existing legal structures:[119]

- The Scottish Women's Rights Centre (SWRC) was originally hosted within the Legal Services Agency (now hosted by JustRight Scotland).
- Friends of the Earth EWNI hosts the Rights and Justice Centre (FOE RJC).

5.3.1.1 Advantages

Using a pre-existing legal structure would have the following advantages:

- Avoid the costs of incorporation and setup.
- Reduce running costs associated with general office and business administration by effectively sharing these with another organisation.
- An organisation with a large public profile would draw attention to the work of an ERCS and could attract clients.
- There may be useful synergies between the work of an ERCS and the work of the pre-existing organisation. E.g. FOE RJC uses FOE's campaigning and planning expertise in its casework and public legal education work; and vice-versa, FOE RJC's casework feeds into the campaigning work of FOE. Many of these synergies could be gained from partnership working between an ERCS and pre-existing organisations.

[119] See the Friends of the Earth EWNI's Rights and Justice Centre and Legal Service Agency case studies in appendix one for discussion of how these models work in practice.

5.3.1.2 Limitations

There would be the following limitations:

- Lack of identity for an ERCS – it would be subsumed within a larger organisation so could be overlooked.
- Lack of internal independence – its ability to set its own priorities and policies would be limited.
- Lack of outward independence – clients may be reluctant to approach an ERCS if it was part of an organisation with which they disagree or have had negative experiences. Using another organisation would effectively transfer any of its 'baggage' onto an ERCS.
- Potential for conflicts – the work of an ERCS could lead to conflicts with the host organisation. E.g. a client may approach an ERCS for legal support in relation to an issue which would contradict or conflict with the larger organisation's campaigning work or own legal cases (e.g. a client approaching for support in relation to the legality of a planning consent for a windfarm – where the larger organisation is campaigning for more wind energy).
    - This has been a problem for the SWRC, where tensions have been caused by effectively having two organisations involved with differing priorities (casework vs campaigning). However, if carefully thought through at the outset, the risks of this can be minimised and managed (e.g. through case selection and contingency planning arrangements).
    - The FOE RJC – being based in England – has access to a wider network and culture of pro bono support than would be available in Scotland. Use of this network allows it to manage any cases which raise organisational tensions, by referring clients with problematic queries out to partners. An ERCS would not have access to a similar network – and therefore intra-organisational tensions may be more problematic for an ERCS.

If an ERCS provides legal services, then there will be a need for institutional independence to build and maintain credibility amongst its clients and avoid any conflicts of interest. If an ERCS was to fit within a pre-existing organisation, there is some potential for intra-organisational conflicts caused

by competing organisational priorities. For these reasons, it is not recommended that an ERCS uses a pre-existing legal structure.

5.3.2 Unincorporated structures

Unincorporated organisations do not exist in law. In general, unincorporated organisations have a greater freedom to operate and can have certain tax benefits.

The key drawback of unincorporated structures is the personal liability of those involved. All legal acts and liabilities – e.g. the liability for debts, ownership of property and entry into contracts – are carried out by and fall upon the unincorporated organisation's members. When an organisation is incorporated it develops a legal personality which limits the risk of its members. This can be of benefit to those organisations that have property interests or contractual obligations. Incorporation also provides a clear structure for governance.

Potential unincorporated structures include sole traders, unincorporated associations (e.g. sports clubs or community groups) or partnerships.[120] Setting up an ERCS will create some risks - e.g. if an ERCS employs staff there will be wages and potential liability for employment disputes; or it may be liable to suppliers, landlords or clients for debts. Due to the lack of protection from liability, it is not recommended that an ERCS be run as an unincorporated organisation as it would expose those involved to liability.

5.3.3 Incorporated structures

Incorporation means creating a distinct legal identity for an organisation from its members. It creates a 'corporate body', which carries out the legal acts of the organisation and bears its own liability.

The members of an incorporated body are protected by limited liability. There are certain situations where this can be overridden – for example, company directors must act in accordance with their duties as set out in company law; and charity trustees must act according to their duties set out in charity law – and directors and trustees risk personal liability where they fail to do so.

Incorporation carries several disadvantages or burdens:

[120] Trusts are not considered as these are bodies usually used to administer funds or resources. Govan Law Centre operated as a trust (see 5.1), before changing to a SCIO. Partnerships have their own legal personality in Scotland, but partners are jointly and severally liable for their partnership's debts (Partnership Act 1890, S4(2)).

- Cost – often there are initial registration costs and ongoing annual fees.
- Administration – there are rules concerning the records that corporate bodies must keep, and liability for when such record-keeping requirements are not met.
- Privacy – corporate bodies must disclose certain information (e.g. information about their members and finances) which is available to the public. This forces a degree of transparency on an organisation (which can be advantageous).

There are many different forms of incorporated legal structures. Only those deemed to be potentially suitable incorporated structures are explored here (company limited by guarantee, community interest company, limited liability partnership and Scottish charitable incorporated organisation).[121]

5.3.3.1 Companies

Companies are regulated by Companies House, and are subject to the Companies Act 2006. They must have a 'memorandum of association' (a statement signed by the initial shareholders agreeing to form the company) and 'articles of association' (the company's governing document).

Setting up a company requires those setting up the company to submit their memorandum and articles of association and incorporation form to the companies' regulator (Companies House).

Companies are subject to various ongoing requirements:

- They must notify Companies House of any changes to the directors, the company secretary or the registered office.
- They must file annual accounts and annual returns. The annual costs of auditing accounts depends on the complexity of the accounts to be audited - and can cost ~£1-3,000 for a small organisation. Private companies below certain size thresholds do not have to have their accounts audited.[122]
- They must file an annual 'confirmation statement' – confirming that the information held about the company is up to date.

[121] This is not an exhaustive examination of all the available corporate forms which exist, and instead discusses those typically used and recommended by interviewees and business support organisations in the process of this research.
[122] A private limited company may qualify for an audit exemption if it has at least 2 of the following: (a) an annual turnover of no more than £10.2 million; (b) assets worth no more than £5.1 million; (c) 50 or fewer employees on average. See https://www.gov.uk/audit-exemptions-for-private-limited-companies.

5.3.3.1.1 Company Limited by Guarantee (CLG)

CLGs are set up with each member guaranteeing a certain amount (usually £1 each) in the event that the company is wound up with existing debts. There are no shareholders and a CLG cannot issue shares. A CLG with charitable status is the most popular legal structure used by Scottish law centres.

5.3.3.1.2 Community Interest Company (CIC)

CICs are designed for organisations wishing to further social objectives as a social enterprise and use their profits for the public good (but which do not require, or are ineligible for, charitable status).[123]

A CIC is a limited company with an extra layer of community interest. They can be either a private company limited by shares, a private company limited by guarantee or a public limited company.[124]

Two main features distinguish the community interest company from other corporate forms:

- First, a CIC must pass a 'community interest test'. It must demonstrate that its purposes could be regarded by a reasonable person as being in the community or wider public interest. A community need not be defined geographically but may be a community of interest.
    - The CIC Regulations[125] set out certain purposes that would not be acceptable for the purposes of the community interest test. One of these excluded purposes is 'political activities'. Regulation 3 defines political activities very broadly[126] – and include the promotion of any legal changes in the UK. It is likely that an ERCS' proposed activities in the areas of advocating for change and supporting strategic litigation would not be allowable.

[123] See also the voluntary code of practice for social enterprises in Scotland - http://www.se-code.net/.
[124] A CIC limited by shares has the option of issuing shares to its members that may pay a dividend. In most instances such dividends are subject to a cap which is designed to strike a balance between encouraging people to invest in a CIC and the principle of community benefit. The rate of the dividend cap is set by the CIC Regulator. A CIC limited by guarantee would have no share capital and therefore would not be eligible to issue shares.
[125] The Community Interest Company Regulations 2005 (SI 2005/1788).
[126] Political activities include those involving: "(a) the promotion of, or the opposition to, changes in— (i) any law applicable in Great Britain or elsewhere; or (ii) the policy adopted by any governmental or public authority in relation to any matter; (b) the promotion of, or the opposition (including the promotion of changes) to, the policy which any governmental or public authority proposes to adopt in relation to any matter…".

- Second, CICs have a compulsory 'asset lock'. CICs' assets can only be used for the benefit of the community and may only be distributed to a specific community interest company or charity, not to members or investors. Transfers of assets are regulated to protect the community interest in the asset.

CICs are registered with Companies House as companies. There is also a CIC Regulator (Office of the Regulator of Community Interest Companies)[127] which decides whether an organisation passes the community interest test.

Similarly to companies, CICs are governed by their articles of association. CICs must file annual accounts and a confirmation statement. They must also file a community interest report. Incorporation requires the preparation of a memorandum and articles of association, IN01 form and Community Interest statement (CIC36 form).

A CIC's members have control over the organisation. CIC status can help to secure funding as it is a recognised and regulated entity.

5.3.3.2 Limited Liability Partnership

Limited Liability Partnerships provide the flexibility and tax advantages of a partnership – with the limited liability that comes with incorporation. They require two or more 'members' to set them up.

They have similar accounting and filing requirements to private companies. Provided that members are not 'salaried members' – they are taxed as a partnership (meaning that the LLP is regarded as transparent for tax purposes and each member is taxed on their share of the profits).[128]

5.3.3.2.1 Features of LLPs

- An LLP requires an LLP agreement to be sent to Companies House. The default LLP governance rules provide a very basic default governance regime, and it is advisable to create a written agreement.
- Partners are called 'members'. Some members are 'designated members' – they are expected to sign annual returns, others are just members.
- Designated members have several responsibilities, they must:

[127] See https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies.
[128] The rules governing LLPs are found under the LLPA 2000, and the accompanying regulations.

- Register the LLP with HMRC for self-assessment – and register themselves individually for self-assessment.
- Register the LLP for VAT if they expect sales to be more than £85,000 a year.
- Send annual accounts and confirmation statements to Companies House.[129]
- Inform Companies House about any changes (e.g. to members, or the registered name or address).

5.3.3.2.2 Merits of LLPs

- LLPs are not subject to corporation tax (lower overall tax bill than companies).
- The requirement to publish accounts may give extra confidence to those dealing with the LLP.

5.3.3.2.3 Drawbacks of LLPs

- Disclosure/transparency requirements create an administrative burden and raise privacy concerns.
- Governance costs from legislative complexity and a number of changes made to the law on LLPs.
- Limited liability may be difficult for small firms to achieve in practice. Creditors may be reluctant to accept limited liability of LLPs and may take personal guarantees and similar protective steps (e.g. by seeking security over homes of members).

5.3.4 Charitable status

A charity in Scotland is an organisation which is registered on the Scottish Charity Register and is regulated by the Office of the Scottish Charity Regulator (OSCR). There is no cost to apply for charitable status.

Charitable status is an additional legal status that an organisation can use, and it brings some benefits. When used by a pre-existing organisation (e.g. where a private company limited by guarantee applies for charitable status), it is not a legal structure of itself. Instead, charitable status adds an extra layer.

[129] See https://www.gov.uk/government/publications/limited-liability-partnership-accounts-guidance/llp-accounts#accounting-records.

To become a charity, an organisation must meet the 'charity test', requiring it to:

- Have only 'charitable purposes',[130] and;
- Provide 'public benefit'.[131]

Charities are subject to regulation in terms of their activities, and must provide annual accounts to the OSCR. Accounts need to be subjected to some form of external scrutiny – either by 'independent examination'[132] or an audit. Accounts do not need to be formally audited unless this is specifically required by the charity's constitution.[133]

Charitable organisations can either take the form of:

- (a) An organisation which uses another legal structure (incorporated or unincorporated) – and registers as a charitable organisation (e.g. a company limited by guarantee, which is also registered as a charity – this legal structure is used by the Legal Services Agency, the Scottish Child Law Centre and CLAN Childlaw).
- (b) A Scottish Charitable Incorporated Organisation (JustRight Scotland and Govan Law Centre use this structure). The existence of a SCIO is dependent on its charitable status – if a SCIO is removed from the Scottish Charity Register it ceases to exist.

The general control and management of charities is given to its 'trustees'. They are responsible for making sure that the charity works to achieve its charitable purposes, and complies with the law.

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[130] These are set out in S7(2) of the Charities and Trustee Investment (Scotland) Act 2005: "(a)the prevention or relief of poverty, (b)the advancement of education, (c)the advancement of religion, (d)the advancement of health, (e)the saving of lives, (f)the advancement of citizenship or community development, (g)the advancement of the arts, heritage, culture or science, (h)the advancement of public participation in sport, (i)the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended, (j)the advancement of human rights, conflict resolution or reconciliation, (k)the promotion of religious or racial harmony, (l)the promotion of equality and diversity, (m)the advancement of environmental protection or improvement, (n)the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage, (o)the advancement of animal welfare, (p)any other purpose that may reasonably be regarded as analogous to any of the preceding purposes."

[131] See OSCR, 'Meeting the Charity Test' (v5.2, 2017), pp76-80. At p76: "In general, public benefit is the way that a charity makes a positive difference to the public. Not everything that is of benefit to the public will be charitable. Public benefit in a charitable sense is only provided by activities which are undertaken to advance an organisation's charitable purposes."

[132] See OSCR, 'Independent Examinations for Charities and Independent Examiners' (2015).

[133] Further, only receipts and payments accounts are needed if the charity's income is less than £250,000 p.a. – more complicated, 'fully accrued' accounts are needed where income is above this threshold. Charitable companies are always required to prepare fully accrued accounts also. See OSCR, 'Scottish Charity Accounts Guidance' (2015). The guidance states that, "The type of external scrutiny appropriate for a particular charity will be determined by: any reference to audit in the constitution or governing document of the charity; whether the charity is a company; the charity's gross income and the value of assets held (before deduction of liabilities) for the accounting period; a decision of the charity trustees to carry out an audit" (p11) - funders may also require that an organisation's accounts are audited.

Charity trustees cannot be remunerated, but can reclaim expenses. Their duties are set out in the Charities and Trustee Investment (Scotland) Act 2005.

Broadly, these are:

- A general duty to act in the interests of the charity, requiring them to:
    - Operate in a manner consistent with the charity's purpose.
    - Act with care and diligence.
    - Manage any conflict of interest between the charity and any person or organisation who appoints charity trustees.
- A number of specific duties, requiring them to:
    - Ensure that the charities register is kept up to date.
    - Report any changes to the OSCR.
    - Keep proper accounting records and comply with reporting requirements.
    - Comply with charity fundraising requirements.
    - Provide the required information to the public (charity name and number on documents and give certain documents to the public on request).

5.3.4.1 Benefits of charitable status

- Tax benefits:
    - Exemption from income, corporation and capital gains tax on profits and gains.
    - Exemption from Land and Buildings Transaction Tax.
    - Exemption (for the donor) on inheritance tax on donations.
    - Certain goods and services provided or bought may be exempt from paying VAT.
    - May claim back income tax paid on donations using gift aid.
    - 80% rate relief for properties used for charitable purposes and a further 20% discretionary relief.
- Increased funding options available (some organisations - such as trusts and foundations - will only fund charities).

- Public image – charitable status is widely recognised and may create greater public trust in an organisation.
- The governance requirements - having a set of trustees, constitution and the various accounting and publicity requirements - should encourage good governance.

5.3.4.2 Drawbacks to charitable status

- Trustees are unpaid, voluntary positions.
- A charity is controlled by its trustees, rather than its staff (may also be advantageous).
- Trading activities are limited – only those carried out to directly achieve a charity's objectives are permitted (referred to as 'primary purpose trading').
    - A charity will not pay tax on primary purpose trading activities provided that this falls below the charity's 'small trading tax exemption limit'.[134]
    - Charities can also set up subsidiary trading companies to trade on their behalf. These trading companies will not have to pay corporation tax on donations which they make to the parent charity's main purpose.[135]
- Campaigning activities are regulated – campaigning must be done in accordance with charitable objectives, it must be politically neutral and subject to the terms of governing documents.
- Regulation – burden of compliance.

5.3.4.3 Scottish Charitable Incorporated Organisation ('SCIO')

SCIOs are incorporated, so have legal personality which protects trustees from personal liability. They have different reporting and regulatory requirements from a company.[136] Unlike charities that are limited companies with charitable status, SCIOs have the OSCR as a single regulator (SCIOs do not need to report to Companies House).

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[134] See https://www.gov.uk/guidance/charities-and-trading.
[135] See https://www.gov.uk/guidance/charities-and-trading#subsidiary-trading.
[136] See https://burnesspaull.com/blog/2013/05/scios-frequently-asked-questions https://www.turcanconnell.com/charities/scottish-charitable-incorporated-organisations/. A SCIO is required to submit an annual return and a signed copy of the latest set of annual accounts every year to OSCR, within 9 months of its financial year end date. See https://www.oscr.org.uk/charities/managing-your-charity/annual-monitoring.

Companies that are also charities have to report to both Companies House and OSCR. Additionally, charitable companies must comply with company law and charity law; and a charitable company must prepare fully accrued accounts regardless of its size. SCIOs are only regulated by OSCR and are subject to the same accounting thresholds as unincorporated charities.[137]

A SCIO's existence depends on its charitable status. A SCIO does not exist until it is entered on the Scottish Charity register. If removed from the register, it no longer exists; whereas other legal forms can stop being a charity but continue to operate as non-charities.

In addition to trustees, SCIOs also have members. The members of a SCIO have some of the same duties as charity trustees.

5.4 Governance recommendations

5.4.1 Discussion

5.4.1.1 Charitable status

Charitable status will maximise access to potential sources of funding – particularly large grant funding. It also provides favourable tax status and public credibility. Although it carries additional regulation, the recognised governance requirements of a charity will provide extra confidence to stakeholders (i.e. clients, funders and partners) – that an ERCS is well-managed. The suggested activities of an ERCS would likely meet the 'charity test'. An ERCS should seek to register for charitable status.

5.4.1.2 Registration of a law practice unit

If an ERCS is to carry out litigation on behalf of clients, then it will need to be registered as a law practice unit with the Law Society.

There are limitations on the types of incorporated bodies that can be used to register as law practice units with the Law Society. Only companies (limited by share or guarantee or unlimited companies) and limited liability partnerships can be used as law practice units.

This leaves an ERCS with two options for the practice unit (given that the use of unincorporated organisations was rejected at 5.3.2) – an LLP or a private company limited by guarantee.

[137] A SCIO with an annual income of below £250,000 can prepare more simple receipts and payments accounts, instead of fully accrued accounts. See https://www.oscr.org.uk/media/2733/v13_scio-accounting-guidance.pdf.

The main difference between the two are that LLPs have more internal flexibility (companies are subject to more rigid rules than LLPs in terms of internal administration – it is easier to change internal rules in LLPs).

5.4.2 Recommendations

The recommended legal structure is two-fold, incorporate as a SCIO and as an LLP – with the LLP then registered as a law practice unit with the Law Society.

An ERCS could potentially operate with one legal structure – an LLP also registered as a charity – however this would span two sets of regulation and regulators; and the use of a SCIO at the outset would allow for lower setup and running costs in the early stages of an ERCS.

The SCIO could be set up first as it would have low running costs and administration, with the LLP/law practice unit phased-in as funds allow.

To be able to carry out litigation itself, an ERCS should seek to:

- Set up an LLP.
- Register the LLP as a law practice unit with the Law Society of Scotland.
- Set up a contractual agreement between the LLP and the SCIO, so that the LLP's legal services and profits are transferred to the SCIO.

5.5 Other Governance considerations and recommendations

There are a number of other considerations involved in setting up the SCIO, LLP and the law practice unit.

5.5.1 One tier or two tier SCIO

In a single-tier SCIO, the same individuals are both members and charity trustees, and there is no wider membership that can vote at an AGM. A single-tier SCIO leaves control of the organisation in the hands of a small group of individuals (the trustees), including control over future changes to the constitution, and over who serves on the SCIO board. A single-tier SCIO has the benefit of simplicity and reduced administration, but it lacks wider accountability – and may not be representative of the community it serves.

In a two-tier SCIO there are trustees and a wider group of members. In this structure, the trustees are elected by and accountable to a wider body of ordinary members at the organisation's Annual General Meeting. Members have ultimate control, rather than the board. The board manages and supervises the activities of the organisation, and monitors its financial position. This level of accountability can be favoured by funders, as it is seen as more democratic and representative of community interests – it can also be a way of raising funds through membership fees. However, a two-tier SCIO makes decision-making more complex and may increase administration costs (e.g. managing membership lists and larger AGMs).

The SCIO could set up initially as a single-tier organisation to minimise initial administration costs – but seek to move to a membership-based organisation as it develops, to increase its legitimacy with stakeholders.

5.5.2 Selection of trustees and members

Registration as a SCIO will require the recruitment of three trustees (the 'board') at a minimum. The board should be independent from those involved in the daily operations of an ERCS – and must also avoid conflicts of interest.

In terms of board selection, the following factors should be considered:

- Consider having clients or client-representative organisations on the board – such as members of civil society organisations (particularly if opting for a single-tier organisation).
- There is a need for particular expertise on the board. There should be trustees with experience in the following areas:
    - Legal - preferably environmental or other public interest experience – either in practice or academia (but preferably both);
    - Personnel;
    - Finance (e.g. an accountant);
    - Fundraising;
    - Civil society (environmental NGO);
    - Communications.

In addition to the board, an ERCS could seek less formal forms of association with individuals to increase credibility and public awareness of the organisation:

- As advisers - for particular legal specialisms and scientific topics (e.g. the EDO NSW has a register of ~180 technical experts).
- Associates or honorary members/patrons (for well-known or prestigious individuals – e.g. retired judges).

5.5.3 Case selection policy

An ERCS will need a case-selection policy to carry out casework. This would cover the types of clients whom it would represent and the types of cases in which it would provide legal services to clients.

This would conserve resources, and minimise any risk of an ERCS being engaged in activities which would conflict with its mission and aims. More generally – it would need a set of various internal policies common to many charities.

6 Funding Options

An ERCS could be funded in many different ways. It could be funded purely through grants and donations (similar to the Centre for Environmental Rights and ClientEarth); it could use income from legal aid for providing legal services and events (such as the Legal Services Agency); or it could adopt a membership model (such as the Environmental Law Foundation).

This section addresses the funding options for an ERCS. It first sets out some general considerations for all funding decisions. Second, it provides a list of potential initial funding sources which could be used to set-up and run an ERCS in its initial stages. Third, it presents a list of funding sources which could be used for long-term funding of an ERCS.

6.1 Funding considerations

There is a need for a general framework within which an ERCS' fundraising operates, to ensure that it does not affect the integrity of an ERCS and that the funding is organised such that an ERCS is able to function effectively.

6.1.1 Vision-consistent funding/ethical funding policy

Given the aims of an ERCS, its credibility could be damaged if it received funding from certain sources. An ERCS should draw up an ethical funding policy (e.g. excluding funding from activities related to mining, fossil fuel extraction and production, etc.).

An ERCS should seek to be as transparent as possible about its funding sources to ensure that it is able to establish and maintain trust amongst its stakeholders.

In addition to this – funding options chosen should not compromise the vision or mission of an ERCS – e.g. if clients are to be charged for services, this must be done very carefully to avoid compromising access to justice.

6.1.2 Funding resilience

There are examples from the case-studies of organisations from the case studies which relied on particular sources of funding, and whose activities (and existence) then became threatened as certain funding sources were reduced or taken away.

The Environmental Defenders Office New South Wales received a substantial proportion of its funding from the national Australian Government. This funding was terminated in 2012-2013 following a mining industry backlash relating to a challenge to the Carmichael coal mine (this also affected Environmental Justice Australia).

West Coast Environmental Law used to receive 50-60% of its funding from the Law Foundation of British Columbia's interest on lawyer trust account scheme. This led to problems as the 2008 global financial crisis hit (meaning that there was less money going into trust accounts). WCEL's funding from the Law Foundation was cut in half at this point.

These case studies indicate that is important not to become reliant on one (or a small number of funding sources). Given that the work of an ERCS may involve disputes with public bodies, it is particularly important not to become overly reliant on public funding.

More generally, a diversity of funding sources is important to build organisational resilience. A reserves and funding forecasting policy should also be considered.

6.2 Funding options

Some form of start-up funding e.g. from charitable trusts and foundations is needed to give an ERCS initial resources and stability. In the longer-term, an ERCS could be funded from several sources.

6.2.1 Trading income

Being a charity imposes constraints on trading income – income generation would have to be considered carefully.[138] An ERCS could generate income from:

- Legal aid income for legal services from SLAB. It could register as a legal aid provider and seek legal aid income for services provided to clients.[139] The use of the legal aid system is resource-intensive and administration-heavy.
- Charging clients for services (i.e. for advice and representation).[140] It could adopt a cost-recovery model for legal services – e.g. charging according to a set of fixed fees developed in

[138] See 5.3.4.2.
[139] This requires registration as a civil legal aid provider with the Scottish Legal Aid Board (which requires a compliance certificate from the Law Society of Scotland). To be eligible for legal aid, clients would need to meet income and capital threshold criteria.
[140] See Law Centres Network guides on setting up fee-charging services - http://www.lawcentres.org.uk/policy-and-media/papers-and-publications/guidance.

relation to certain aspects of work. Fees could be charged where clients are able to pay. This would require a fee structure – e.g. a table of applicable fees to particular services.

  - Charging fees could have detrimental implications for access to justice. Fees may deter or restrict potential clients from using the service. If instituted, it would need to be carefully considered, bearing in mind the aims of an ERCS.
  - On the other hand, some of the case study interviewees mentioned their concern that offering entirely free services may be a strategic mistake, because clients are likely to be less cooperative when they have not paid for services (i.e. in terms of attending meetings or appointments, meeting deadlines and sending documents).

- Charging for training and conferences.
- Carrying out consultation work – e.g. research for NGOs.
- Fundraising events – e.g. an annual dinner.
- Purchasing/leasing of property.

6.2.2 Voluntary sector funding

An ERCS could approach individuals with known interests in the area for large one-off or regular donations (general individual giving to advice and advocacy groups is low). It could also seek to charge annual membership fees as an ERCS develops.

There are further charitable trusts and foundations which may be contacted for funding.

6.2.3 Public funding

An ERCS could seek public funding in several different ways.

First, it could approach SLAB for grant funding under S4A(1) of the Legal Aid (Scotland) Act 1986.[141] SLAB is currently running three grant programmes which focus on money advice, housing and small claims.[142] The proposed activities of an ERCS would not fit under any of these three programmes.

[141] This provides that SLAB may on an application made to it by any person make grants of such amounts and subject to such conditions as it may determine in respect of any of the matters and purposes mentioned in sections 4A(2) and (3). Section 4A(7) of the 1986 Act requires SLAB to prepare and publish a plan as to the criteria which the organisation will apply in considering whether or not to make such a grant; and SLAB must submit the plan to the Scottish Ministers for approval. S4A also requires that Scottish Ministers must specify a limit to the total amount that may be paid out of the Fund under section 4A(1) and must specify the period in relation to which the limit applies.

[142] These are: (1) 'Tackling Money Worries' (2014-2018) (focus on improving outcomes for low-income families with children facing a change in their circumstances which places them at higher risk of debt and money problems); (2) 'Early resolution of

However, the programmes finish in March 2018, so there may be space for advocacy for a new grant stream with an Aarhus focus (this also links into the ongoing Scottish Legal Aid Review). SLAB's grant funding priorities are set by the Scottish Government, so an ERCS could approach the Scottish Government to prioritise grant funding for its work.

Second, Section 32 of the Planning etc. Scotland Act 2006 provides a discretionary power for the Scottish Ministers to "make grants for the purpose of assisting any person to provide advice and assistance in connection with any matter which is related to the planning Acts or the Planning etc. (Scotland) Act 2006". The ERCS could approach the Scottish Government for the provision of grant funding on this basis.

Third, an ERCS could approach the Scottish Government and Scottish local authorities for funding.[143]

6.2.4 Funding from businesses

An ERCS could seek corporate sponsorship. For Scottish law firms, funding an ERCS could be a good PR/CSR opportunity. An ERCS could reciprocate by publically acknowledging support of any sponsoring law firms. Law firms could provide funds, staff secondments or other resources to an ERCS (however this would have to be treated carefully, due to potential conflicts of interest between larger firms and the work of an ERCS - see 4.2.1.2). Other private entities may also be willing to sponsor an ERCS.

6.2.5 Alternative sources of funding

There are other miscellaneous sources of resources and funding which could be pursued.

6.2.5.1 Fee statutes

An ERCS could gain income from winning cases. Expenses follow success in civil litigation in Scotland, therefore if an ERCS was very careful in its selection of cases, it could gain income from successful casework.

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advice programme' (2012-2018) – focussed on projects on housing court action support, and small claims support; (3) 'Making Advice Work programme' (2013-2018) – three streams (a) 'community-wide advice' – focussing on benefits advice, (b) 'helping tenants of social landlords', (c) aims to tackle barriers in accessing advice or to test new ways of resolving problems related to debt, financial management and social welfare law for one of the following priority groups - People with disabilities and People experiencing domestic abuse. See https://www.slab.org.uk/providers/advice/grant-funding/.

[143] E.g. the various Scottish Government community funds - http://www.gov.scot/Topics/Built-Environment/regeneration/communityfunds or the Scottish Government's Equality Unit funding - http://www.gov.scot/Topics/People/Equality/Funding/funding.

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is currently going through the Scottish Parliament. It includes a provision whereby if a party is being represented for free (in personal injury cases covered by the Bill) – the party may claim legal expenses if successful. These expenses would be paid in the form of a donation to charity.[144]

Any award must be paid to a registered charity designated for that purpose by the Lord President. The charity must have as one of its charitable purposes improving access to justice in civil court proceedings.

An ERCS could seek to register as an eligible charity, and arrange with lawyers for the donation of their fees. However, given that this is an untested way of providing funding, it is unclear how much funding it could provide – and whether it would be able to provide anything more than occasional ad-hoc income.

6.2.5.2 Interest on lawyers' trust accounts

Interest on lawyers' trust accounts (IOLTA) schemes work by pooling the interest which is generated from lawyers' trust accounts – the monies held by lawyers on behalf of clients. The interest is then collected and distributed to access to justice organisations.[145]

IOLTA schemes were first established in Australia in the 1960s to generate funds for legal services to the poor. They now exist in the USA, Canada and New Zealand. Law firm Allen & Overy runs an internal voluntary IOLTA scheme in London - this has raised about ~£250,000 over 7 years for the London Legal Support Trust.

Solicitors in Scotland are bound by strict rules requiring them to account for all sums held for clients, and to pay clients interest on any sums held.[146] A national IOLTA scheme would likely require regulatory change, which would require resources to lobby relevant decision-makers.

6.2.5.3 Membership fees

Membership fees could be used to generate income for an ERCS – e.g. annual membership fees such as those used by the Environmental Law Foundation (see appendix one).

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[144] See https://digitalpublications.parliament.scot/ResearchBriefings/Report/2017/8/24/Civil-Litigation--Expenses-and-Group-Proceedings---Scotland--Bill#Expenses-where-the-party-is-represented-free-of-charge.

[145] See The Low Commission, 'TACKLING THE ADVICE DEFICIT: A strategy for access to advice and legal support on social welfare law in England and Wales' (Low Commission, 2014), p104.

[146] See Rule B6.10 (Interest to be earned for a client). Where no owner can be identified and where the sum is less than £50, the practice unit can send the money to a registered charity (Rule 6.11.3).

6.2.5.4 Crowdfunding

Crowdfunding could be used to provide start-up capital for an ERCS; or funding for one-off costs, such as the expenses of particular cases or for work on particular projects. Crowdjustice is an example of how legal-focussed crowdfunding can work.[147]

6.2.5.5 Third-party funding of litigation

Third party funding of litigation is where a litigant acquires all or part of the financing to cover his/her legal costs from a third party funder with no direct interest in the proceedings.[148] It can reduce or neutralise financial risk for the litigant, and the funder can seek a share of the damages if successful.[149]

It has been little-used in Scotland.[150] This may be suitable for private law claims (i.e. personal injury) where damages are sought – but not for public law litigation (i.e. judicial review) where damages are rarely awarded.

[147] See https://www.crowdjustice.com/how-it-works/.
[148] See Taylor Review, 'Review of Expenses and Funding of Civil Litigation in Scotland' (Taylor Review, 2014), p239-253.
[149] See also fn 115 on the liability of a dominus litis in litigation.
[150] Cat Maclean, 'Where there is a will, there is a lawsuit: Third Party Funding of Litigation in Scotland' 13/12/2016.

7 Recommendations

This report has made the following recommendations concerning the activities of an ERCS, its governance arrangements, its funding and its establishment.

7.1 Activities of an ERCS

An ERCS should adopt the following vision and mission statements:

- Draft vision statement – 'A Scotland where every person's right to live in a clean and healthy environment is fully realised'.
- Draft mission statement – 'The ERCS assists members of the public and civil society to use the law to protect the environment, and engages in public education, research, advocacy and litigation to advance the right to live in a clean and healthy environment'.

An ERCS should carry out the following activities in pursuit of its vision and mission statements (these will be phased in as the ERCS is established, and depend on the funding which can be secured):

- Provide affordable legal advice and representation to the public and civil society in planning and environmental law.
- Carry out public legal education.
- Carry out research.
- Advocate for change.
- Pursue strategic litigation.

7.2 Governance arrangements

An ERCS should incorporate as a Scottish Charitable Incorporated Organisation.

The SCIO could set up initially as a single tier organisation to minimise administration costs – and seek to eventually move to a membership-based organisation.

The SCIO will need at least three trustees. The board should have legal, personnel, finance, civil society and communications expertise. An ERCS could also seek less formal associations with individuals – such as advisers on particular legal or scientific topics, and associates or patrons for well-known individuals.

To undertake litigation, a Limited Liability Partnership should also be created in addition to the SCIO. The LLP should register as a law practice unit with the Law Society. A contract should be put in place between the LLP and the SCIO, to ensure that the LLP's legal services and profits are transferred to the SCIO.

An ERCS will need a case-selection policy to carry out casework. This should cover the types of clients whom it would represent and the types of cases in which it would provide legal services to clients.

7.3 Funding arrangements

Any funding options chosen by the ERCS should be consistent with its vision statement.

Funding arrangements should be undertaken with organisational resilience in mind. An ERCS should avoid a heavy reliance on public funding, should seek to secure funding from a variety of sources, and should consider creating a reserves and funding forecasting policy.

Initial start-up funding should be sought from charitable trusts and funders.

Long-term funding for the ERCS could be drawn from:

- Trading income:
    - Legal aid fees.
    - Charging clients for services.
    - Training and conferences.
    - Fundraising events.
    - Purchasing/leasing property.
- Further charitable trusts and foundations.
- Public funding:

    - Direct grants from SLAB.
    - Grants from Scottish Ministers under powers in the Planning etc. (Scotland) Act 2006.
    - Direct approaches to the Scottish Government and local authorities.
- Sponsorship from businesses.
- Various alternative sources:
    - Fee statutes.
    - Interest on lawyers' trust accounts.
    - Fees from members of an ERCS.
    - Crowdfunding.
    - Third party funding of litigation.

7.4 Establishment of an ERCS

2018 and 2019 should focus on the incorporation, planning and set-up necessary for the ERCS to open and start its operations, requiring the following:

- Write a constitution and incorporate as a SCIO.
- Write a set of internal policies.
- Find and appoint (a minimum of 3) trustees for the SCIO.
- Set up a website.
- Begin fundraising and secure start-up funding.
- Develop a long-term organisational strategy for the ERCS.

Depending on the funding secured, the ERCS could phase-in a number of different activities in 2020-2022, including:

- Opening an affordable advice and advocacy service for the public and civil society.
- Developing a set of online guides on environmental and planning rights.
- Developing a community education programme which is able to provide training on planning and environmental rights to communities facing environmental issues.

- Carrying out an ‘Aarhus audit’ of the Scottish civil justice system – assessing the Scottish civil justice system against the requirements of Article 9 of the Aarhus Convention.
- Carrying out a research project on changing from a regulation-based model of environmental protection to a rights of nature-based model.
- Developing a campaign for creating a specialist environmental court in Scotland.
- Monitoring post-Brexit developments in environmental governance – and develop policy and campaign responses to any reductions in environmental protection.
- Responding to consultations and developments in environmental and planning law more broadly as they arise.
- Developing a strategic litigation programme to challenge systemic environmental governance problems in Scotland.

Report on the Feasibility of an Environmental Rights Centre Scotland

Appendix 1 – Legal organisations case studies

This appendix presents eighteen case studies of public interest environmental law and access to justice organisations interviewed as part of the research. Those interviewed reviewed and consented to their case study being published.

Contents

1 Canadian Environmental Law Association

Website - http://www.cela.ca/

1.1 Foundation details

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms.

CELA is a specialist community legal clinic providing services to low income individuals and disadvantaged communities across Ontario in environmental law matters. It was established in 1970, funded as an Ontario specialty legal aid clinic since 1978, and incorporated as a not-for-profit corporation without share capital pursuant to the laws of Canada in 1982, providing legal aid services to the community without fees for service.

It was founded by University of Toronto law students. Pollution Probe (a Canadian environmental NGO) had been finding that they needed lawyers to help with cases. It initially took on cases on pesticides and water contamination. CELA was founded to have lawyers available to help with pollution cases.

CELA evolved quickly in the mid-1970s as part of the development of Ontario's legal aid system. CELA was one of the first clinics to be funded as part of that system, which set up a number of legal aid clinics in Ontario. Environmental law was seen as an important part of social justice. It was funded as a legal aid clinic from that point onwards.

CELA later split into two organisations. Its legal education and research wing became a charity – this evolved into the Canadian Institute for Environmental Law and Policy (which has now been wound down). This set up an 'environment and the law' library which remains open to the public.

CELA is composed of two corporations. There is CELA (an environmental advocacy and legal aid organisation), and there is also the resource library which is separately incorporated. The board members of the two are the same. The library is located at CELA's office.

CELA is 47 years old. It recently relocated to be located alongside other legal aid clinics – all of which have public libraries. They have formed a co-op to run the space.

1.2 Purpose

CELA works toward protecting public health and the environment by seeking justice for those harmed by pollution or poor decision-making and by changing policies to prevent problems in the first place.

CELA's objectives are:

- to provide equitable access to justice to those otherwise unable to afford representation for their environmental problems;
- to advocate for comprehensive laws, standards and policies that will protect and enhance public health and environmental quality in Ontario and throughout Canada;
- to increase public participation in environmental decision-making;
- to work with the public and public interest groups to foster long-term sustainable solutions to environmental concerns and resource use;
- to prevent harm to human and ecosystem health through application of precautionary measures.

In accomplishing these objectives, primary recognition is given to CELA's mandate to assist low-income people and disadvantaged communities.

CELA is governed by the Legal Services Act 1988. This defines clinic law (the word 'environment' is not found in the legislation). The Attorney General at the time gave CELA a mandate to represent disadvantage communities.

Ontario has 70 clinics – 12 of which are specialist (including CELA). CELA can represent clients at first instance. CELA has financial eligibility criteria and its own criteria which it applies to assess clients' eligibility for using services. CELA tries to represent clients where there is a gap in services. It also looks at the work of other NGOs and identifies where the gaps are. CELA helps to redress the power imbalance in environmental disputes, and helps people to realise their appeal, participation and information rights.

1.3 Activities

1.3.1 Legal Services

CELA provides (a) Legal aid representation, and (b) General advice and referrals.

For complex cases requiring retainers, CELA cannot do this work without legal aid. For summary advice (anything <2hrs) no financial eligibility assessment is required. CELA can offer coaching or strategy for groups that it cannot represent. Private practices can ask CELA for help and environmental law expertise –

parliamentarians can also access its services. CELA does not charge for this – but these are capacity, priority and expertise-dependent requests.

CELA will seek external funding if it wants to develop a model bill – e.g. water bill and toxic use reduction bill. Where bills are tabled by the Governments or the opposition, CELA often gives its points of view on the proposals – providing specific suggestions and amendments.

Clinic Mandate: CELA services include environmental law legal services, including representation before a variety of courts and tribunals as well as assistance to individuals representing themselves, summary advice, law reform and public legal education.

Community legal clinic which offers services in specialised area of law (environmental law). CELA also undertakes additional educational and law reform projects funded by government and private foundations.

1.3.2 Law Reform Priorities and Public Legal Education Activities

CELA has law reform and PLE activities in the following areas:

- Access to Environmental Justice
- Water Sustainability

CELA focuses on the regulation of drinking water. There was a tragedy in 2000 where 7 died from contaminated drinking water – CELA represented the community in that inquiry.

- Pollution and Health

CELA has an environmental health and pollution focus, and works on toxics. CELA does international work, e.g. on the Rotterdam and Stockholm Conventions. CELA looks at trade agreements from time to time in relation to toxics.

- Green Energy

CELA looks at the differential impacts of laws and policies on vulnerable communities. E.g. in relation to the proposed cap and trade climate legislation in Ontario, CELA pushed for the inclusion of low income protection as part of that development. CELA also views children as a vulnerable community and works to protect their interests.

CELA works on low-income energy issues such as energy poverty.

It works on nuclear energy too. Ontario is a nuclear-heavy jurisdiction. There is currently a programme of refurbishing nuclear units in Ontario. 7/10 plants are located in the Greater Toronto Area – these are poorly situated.

- Planning and Sustainability

- Acting Globally

1.4 Governance arrangements

CELA is set up under the federal Not for Profit Corporation Act. It has a board which is elected by the members – the members are restricted to members of the board. The board is composed of staff and non-staff. CELA's statute requires there to be more non-staff than staff on board.

CELA has been incorporated since it was founded – this is a bit unorthodox. It has avoided board vs staff problems. CELA is a flat organisation – the executive director and 3 other lawyers have high levels of responsibility and seniority. CELA has a collective approach – it uses active staff teams and joint staff-board committees.

CELA has 11.3 FTE permanent staff and 3 FTE contracted staff. It has student programmes also. CELA employs 2 paralegals and 2 admins, the remainder are lawyers.

CELA's articling student (junior lawyer) looks at cases initially. CELA looks at its legal priorities when considering taking on cases. Recommendations then go to the board as a whole to approve. Environmental cases are resource-heavy. They often require experts, and hearings can be long and complex. CELA utilises its litigation fund which comes from costs awards. It is important that there is a level of oversight before taking cases.

CELA tries to balance its public outreach work and its litigation. It tries to carry out a mix of both.

CELA's directors have a memo of understanding with Legal Aid Ontario (LAO is an arms-length agency, with its own board. LAO and the Attorney-General have a memo of understanding.

1.5 Funding arrangements

See CELA's annual reports on its website.

Core funding comes from Legal Aid Ontario. CELA can also enter into grant agreements – foundations, etc. – uses these funds for research projects. It can enter into arrangements with provincial or federal governments also for discrete pieces of work – this allows the organisation to do more with existing resources.

The Law Foundation of Ontario (funded from lawyer trust account funds) is funding a CELA project. CELA is working with first nation groups on source water protection – drafting legal instruments for them to protect water. 2 lawyers are working on that – both of whom are non-core funded.

Some statutes in Ontario/Canada have the potential for pollution fines/levies to be awarded to people bringing private prosecutions. The levies are for NGOs/community organisations – CELA can raise funds this way.

CELA has a disbursement fund from costs orders in litigation. CELA intervenes at the Ontario Energy board on behalf of low-income consumers, this process includes a procedure for costs awards.

Ontario used to have an intervener funding project which allowed groups to retain money for funding lawyers/experts – this ended in the 1990s. It was a model which worked well. It funded support for environmental assessment hearings and environmental appeal hearings – including pollution permit appeals. This led back to the Ontario Environmental Bill of Rights in the 1980s – which gave standing for environmental protection cases. There is no ordinary award of adverse costs with those cases.

1.6 Challenges

Obtaining funding and core funding are particularly difficult.

There are challenges facing the legal aid system and the clinic system as a whole. The question of whether there should be legal aid for environmental cases has been under discussion recently. There is a need for CELA's advocacy on this, and for CELA to provide education about the need for environmental legal aid. CELA's integration with other clinics' work has also helped.

CELA has been spared the recent effort by federal government to limit the activities of environmental charities. NGOs were accused of acting 'politically'.

Capacity is a constant challenge. There is far more demand for CELA's services than CELA has the ability to meet.

1.7 Advice

It is critical to do both law reform work and casework. This allows CELA to know what is and what is not working in the field. Using its experience from casework, CELA can then feedback on how laws are working. There is a constant tension in maintaining the balance between the two and it stretches CELA's capacity – but this is an essential feature in terms of CELA's success and credibility. It gives CELA a grounding in law reform proposals – makes them realistic in terms of what is needed.

Start small – so that fundraising demands are not too onerous at the start.

Be very focussed in the work that you do at the outset – record and monitor this – and then demonstrate successes to funders to expand. You will not be able to do everything when you open – figure out your priorities at the beginning and set mechanisms to review them.

CELA's funding has stayed largely the same until 2-3 years ago when the Attorney General gave legal aid a funding infusion, this allowed CELA to hire a new permanent lawyer.

When seeking new funding sources - make sure that other funding models can be pursued and these are not affected by clawback of existing funding streams.

Keep the administrative side thorough, but streamlined.

Integrate your services with the communities you are serving. CELA's boards are meant to be representative of the communities they serve – clients should make up part of the board. People with a good perspective on the overall landscape. Partnerships – have a list of these. Being actively involved with your community allows for a constant assessment of what's needed.

Ensure that your initial documentation is useful enough to give your work a focus – but also flexible enough to allow the organisation to develop.

2 Centre for Environmental Rights

Website - https://cer.org.za/

2.1 Foundation Details

The Centre was established in October 2009 by eight civil society organisations (CSOs) in South Africa's environmental and environmental justice sector (this group has since grown to eleven) to provide legal and related support to environmental CSOs and communities. It opened in April 2010.

In the early 1990s there was a reawakening of the public importance of environmental issues after Nelson Mandela was released from prison. The new SA constitution included environmental rights (in Article 24). Two key pieces of environmental legislation were passed in the late 1990s. In 2003 – amendments were made to put enforcement provisions in place. In 2008-2009 – it became clear that the enforcement of environmental law was too slow. NGOs realised that they needed legal capacity to enforce environmental laws.

The idea of the Centre was alive for at least 10 years before its establishment in 2009. It was a slow process to get the CER established – it took time to properly understand the problem. A grant was awarded in 2009 from the table mountain fund – an anchor grant. This gave the CER its initial kick-start.

2.2 Purpose

Vision: a South Africa where every person's Constitutional right to an environment that is not harmful to health or well-being, and to have the environment protected for future generations, is fully realised.

Mission: to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

2.3 Activities

The CER runs a number of different programmes.

2.3.1 Biodiversity

Together with the Table Mountain Fund and the South African National Biodiversity Institute, the Centre has coordinated collaboration between key government departments and agencies in the Western Cape and civil society organisations to address some of the challenges posed to threatened and endangered ecosystems by the unauthorised conversion of virgin land, and to promote responsible management of virgin land.

2.3.2 Corporate accountability

The CER's corporate accountability team exposes corporate failures to comply with environmental laws, and raises investor awareness of the risks of non-compliance. It seeks to change public expectations of corporate obligations to realise environmental justice, and to ensure that the operations of industry do not violate our Constitutional rights.

2.3.3 Mining

The CER's mining programme focuses on the environmental management of mining in South Africa. The goal of the programme is to promote environmental justice in the mining sector by advocating for better environmental laws and improved implementation of laws, litigating on behalf of mining-affected communities and civil society organisations, facilitating networking among relevant stakeholders and supporting activists.

For the past few years, there has been ongoing engagement between civil society, community organisations, academic institutions and law clinics increasingly concerned about the impacts of mining on the environment and on the communities that rely on those natural resources. This has evolved into a Mining-Environment-Community Alliance that works together to implement a Civil Society Legal Strategy to Promote Environmental Compliance, Transparency and Accountability in Mining.

The focus is not to oppose mining, but to ensure that adequate assessment and mitigation of detrimental impacts take place within reasonable timeframes before prospecting and mining start, followed by predictable compliance monitoring of requirements set, and strong enforcement action taken when non-compliance is found. This is the only way to ensure responsible environmental practices at mines.

2.3.4 Pollution and climate change

South Africa has excellent environmental legislation, but non-compliance with and poor implementation and enforcement of those laws mean that pollution's harmful impacts on the environment, human health and wellbeing are prevalent in large parts of the country, and most often unfairly discriminate against vulnerable and disadvantaged people.

South Africa persists with its reliance on coal for electricity and has even approved the procurement of 2500MW of new coal-based electricity. The CER's Pollution & Climate Change team predominantly works in a collaborative project with partners GroundWork, the South Durban Community Environmental Alliance, the Vaal Environmental Justice Alliance (VEJA), and the Highveld Environmental Justice Network – who all support several community-based organisations – to promote environmental justice, ensure compliance with environmental laws, and strengthen civil society participation in decisions on industrial pollution, waste, and land use; and with partners GroundWork and Earthlife Africa Johannesburg to challenge the exploitation of coal for electricity.

2.3.5 Transparency

The CER advocates for greater transparency in environmental governance and for swift and easy access to environmental information. It has campaigned for automatically available, online public licence registers. It monitors compliance with access to information legislation and applies pressure on regulators and companies for greater disclosure of all information required for citizens to ensure that the constitutional right to a healthy environment is upheld.

2.3.6 Water

South Africa is a water scarce country in the throes of a water crisis – just eight percent of its land area provides 50% of its surface water. This land is made up of 22 water source areas (WSAs) in five provinces

and considered foremost among SA's strategic natural resources. As such, it supplies 70% of SA's irrigation water, supports 60% of our population, and underpins 67% of our national economic activity and supply.

The WSAs were first mapped by the National Freshwater Ecosystem Priority Area (NFEPA) project, a multi-partner project funded by the Council for Scientific and Industrial Research (CSIR), South African National Biodiversity Institute (SANBI), Water Research Commission (WRC), the then Department of Water Affairs (DWA), Department of Environmental Affairs (DEA), Worldwide Fund for Nature South Africa (WWF-SA), South African Institute for Aquatic Biodiversity (SAIAB) and South African National Parks (SANParks).

In 2016, the WWF-SA invited the Centre for Environmental Rights to contribute legal expertise to the WSAs project to secure the long-term legal protection of South Africa's WSAs. The CER has completed a comprehensive legal review to identify and prioritise the most effective legal mechanisms. It is now working alongside key officials and other decision makers to help ensure the urgent, correct, and efficient implementation of these mechanisms for the long term integrity and protection of SA's WSAs.

2.3.7 Wildlife

Pilot programme to improve the transparency, compliance, monitoring, enforcement and effectiveness of South Africa's biodiversity, conservation and welfare laws relating to wild animals to help protect ecosystems and species for the benefit of current and future generations.

2.4 Governance arrangements

The CER has a board with five members – one executive and four non-executive members.

Has several committees – e.g. audit and litigation committees. The board is responsible for CER's annual financial statements, signs off on budgets, and has oversight of the CER's funding.

Various options were looked at before the CER was set up – part of this was whether the CER should be independent or built into existing universities or NGOs. It was felt that there was a need for independence.

The CER is set up as a non-profit company. This carries with it certain reporting obligations which create an administrative burden, but are positive for promoting transparency.

CER is set up as a law clinic with the SA law society. This means that it can only act for those who cannot afford services. There are certain legal services which it cannot do – e.g. wills and trusts – some limitations on their work, but these do not affect CER in terms of the work it wants to do.

CER has a 17m ZAR budget (~£1m). It has ~25 staff – including several management staff and an office manager.

2.5 Funding Arrangements

It is largely funded by foundations and trusts. It receives no government or corporate funding. The CER has some individual donors. Some smaller funders – e.g. for particular projects.

NGOs have helped to raise funds to secure CER's services for particular projects. This has allowed the CER to leverage from other funders. There are complications involved in setting up a new NGO and securing funding – in particular, it is important to avoid competing on funding with other NGOs. The CER has targeted social justice funding in SA to avoid this – it tends to apply to funders who fund work on equality and human rights issues; whereas its NGO partners access the more environment-focussed funds.

2.6 Partnerships

The CER has a close relationship with NGOs in SA. The 8 NGOs that established the CER remain members – it now has 11 NGO members. The CER works closely with NGOs – e.g. as partners on projects or as clients. Sometimes the CER works under its own name or for clients. The CER's NGO members have the same voting rights as members, they do not have any special status as members of the company – they do not make financial contributions or pay membership fees.

The CER works closely with communities and activists, developing and maintaining longstanding relationships.

2.7 Achievements

Litigation is hard work – it is very slow and risky – but it can be an incredible tool, and gets public attention. In CER's early days there was some uncertainty whether it should be involved in litigation at all. In SA there are national provisions for costs protection, and the standing provisions are very wide.

The CER focussed on transparency work in its initial stages – this is easily understood, companies dislike it and the benefits are enormous if you get it right. The Arcelor Mittal case (below) set an important precedent – but was also empowering for the community which had been fighting for ten years and was able to then confront the company in court.

In the Thabametsi case the CER adopted a conservative approach – essentially the judgement requires a consideration of climate impacts for developments EIA. This was not a very risky case, but it is effective in that it sends a powerful message to industry, finance and the government.

SA is still in the process of setting environmental standards – e.g. air quality standards in SA do not even meet WHO guidelines. There is a battle in SA to get these standards legislated for and to then keep them once passed. The CER is operating in a less advanced regulatory environment than elsewhere.

2.7.1 Arcelor Mittal South Africa case

In November 2014 SA's Supreme Court of Appeal ordered ArcelorMittal South Africa Ltd (AMSA) to release various environmental records to the Vaal Environmental Justice Alliance (VEJA), and to pay the communities' legal costs.

The Supreme Court of Appeal (SCA) refused AMSA's appeal against the September 2013 High Court judgement ordering AMSA to release its environmental 'Master Plan', as well as documents relating to its Vaal Disposal Site, and unanimously upheld the High Court judgement.

The SCA made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct. The SCA also emphasised the importance of corporate transparency in relation to environmental issues, stating that "Corporations operating within our borders… must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced".

VEJA fought for access to the Master Plan for more than a decade. AMSA has consistently refused to release it. This comprehensive strategy document contains the results of numerous specialist environmental tests for pollution levels at AMSA's Vanderbijlpark facility, as well as its plans to address this pollution and rehabilitate its sites over a 20 year period.

2.7.2 Thabametsi coal power station case[1]

In South Africa's first climate change lawsuit, ELA challenged Environmental Affairs' Minister Molewa's rejection of its appeal against the approval given to the proposed Thabametsi coal-fired power station in Limpopo. The approval was granted by the Department of Environmental Affairs (DEA) even though there had been no comprehensive assessment of the climate change impacts of this new coal-fired power station.

The court ordered that the Minister reconsider the appeal, now taking into account a full climate change impact assessment report, and all public comments received. It referred the appeal back to the Minister of Environmental Affairs on the basis that climate change impacts had not properly been considered.

[1] See https://cer.org.za/news/victory-in-sas-first-climate-change-court-case.

The judgement makes clear that the DEA and the Minister should have given proper consideration to the climate change impacts of the proposed coal-fired power station before a decision could have been made to allow it to go ahead.

2.8 Challenges

Demand for services - the biggest challenge has been dealing with the demand for CER's services. Having to constantly say no is stressful for staff. In terms of adopting a strategic approach to litigation vs meeting unmet legal needs, the CER has gone for a more strategic approach where it tackles identified environmental and governance problems in SA. Doing everything can be paralysing.

The CER gets weekly requests for help from people who can afford their services – often these are worthy causes – but often there are NIMBY matters too. People in more difficult circumstances tend not to ask for help – they often don't know that they can ask.

Politics – the CER operates within a complex national environment in SA. The governments are dysfunctional and politically captured, it is difficult for the CER to form effective working relationships with government.

Changing demographics – there is a transformation occurring of the CER's staff demographic. The environment has historically been seen as a privileged/white person's concern in SA. There is now a generation of young black lawyers coming through the education system – often they are the first generation to have had a university education and there is cultural pressure on them to meet economic needs and earn money. Public interest environmental law is not seen as a safe or financially rewarding career choice. The CER is trying to redirect the environment as a problem of environmental quality and pollution – more than just a conservation issue – a human health issue.

Funding has not been a major challenge for the CER. From the moment it was set up – it has been supported financially. People see the need for CER's work. It has had repeat funding from existing funders. The CER has good relationships with its funders.

2.9 Advice

Adopting a strategic focus and finding winnable cases are important. Successful litigation attracts funding and publicity.

Communications are important. Strategic communications – not just being media-focussed.

Learn from other people's work – look at other countries. Understand other organisations' strategies and ways of operating.

Figure out who are the people that you need as staff and hire them.

Fundraising – funders appreciate if you create a theory of change for your organisation. This helps with funding applications. Never miss a funding deadline – e.g. reporting. Be reliable and effective in your work and the funders will come to you. Establish and cultivate good ongoing relationships with funders.

3 ClientEarth

Website - https://www.clientearth.org/

3.1 Foundation Details

CE was founded to use the power of the law to protect the environment – to address the lack of public interest environmental lawyers in the environmental movement in Europe and the relatively underdeveloped use of the law by NGOs working on environmental matters. It was recognised that the EU was the key originator of environmental law – and that there was a need for the enforcement of environmental law. CE has been EU-focussed from the start.

The first ClientEarth (CE) office opened in London in 2007. CE was in an early phase of development for 1-2 years before that. CE's Brussels office opened less than a year after the London office opened. London is more of an international HQ – many of CE's staff there are working on international projects.

The first issues taken on in the UK were coal power stations (e.g. proposed Kingsnorth power plant) and access to environmental justice (e.g. problems relating to the prohibitively expensive nature of judicial review and lack of merits review).

James Thornton (CE's founder and CEO) was originally supported by the Macintosh Foundation to work on CE's initial development. The Macintoshes supported the early development of PIEL in the US. They had funded previous work for JT. The Macintoshes became interested in translating US PIEL approaches into the EU context. JT did some research on the position and issues in the EU and spoke to people in the environmental community in the EU. Based on that early scoping work, the Macintoshes and JT decided to set up CE.

CE received early support from the Macintosh Foundation (they were interested in the strategic value of investing in legal environmental philanthropy) and the Esmee Fairburn Foundation (which supported some of the early set-up of the organisation – e.g. governance and institutional work).

3.2 Purpose

Mission: We use law as a tool to mend the relationship between human societies and the Earth. We work in Europe and beyond, bringing together law, science and policy to create practical solutions to key environmental challenges.

Vision: An Earth where people can achieve their full potential within a diverse, resilient biosphere.

3.3 Activities

CE thinks in terms of 'working through the lifecycle of the law'. Scientific understandings on environmental issues develop into policy responses to the problem(s) – this then develops into legislation – after which comes the law's implementation and enforcement.

The range of topics addressed by CE is very broad – it includes the law relating to climate, oceans, human health, forests, energy, wildlife, democracy and governance, and business. ClientEarth carries out strategic litigation, legal advocacy and legal and policy research in these areas to influence decision-makers.

CE has tried to focus on neglected areas – particularly the enforcement (e.g. through litigation) and the implementation phases of environmental law. Examples of implementation work include: the REACH Directive – CE has worked on transparency and participation in the processes on implementation of REACH, and sought to gain access to the data on chemicals themselves; the EU Timber Regulation – CE involved in the implementation and enforcement of this by the operators and competent authorities – CE has helped to shape the practical operation of this law.

Access to environmental justice – CE focusses on making strategic interventions to develop this area of law. CE also engages with other organisations in the NGO community – this allows CE to understand the key strategic environmental challenges and CE can identify what it thinks the response should be. CE is starting to explore this type of work in the finance and pensions area – it has worked with ShareAction to identify individual pension holders to make legal challenges.

It is important to consider how deep a presence an organisation has in a particular geography – CE has been EU-focussed. Access to justice and the role of the citizen are seen by CE as systemically important – we must guarantee that those rights exist. The challenge that then follows on from this is – on an individual basis – how are these rights realised? CE focusses on opening up the system.

CE does very little work in Scotland – it has one Scottish qualified solicitor (who works on EU legal issues). CE has previously had Scottish solicitors. Its Scottish work has been on fisheries, air pollution and Brexit.

The question of environmental governance post-Brexit is very significant – the forthcoming loss of the EU Commission's enforcement powers, plus the loss of the 'back-up' remedy of UK judicial review, bolstered by EU fines if necessary. There is an ongoing debate concerning how the role of environmental NGOs needs to change after Brexit, as environmental policy-making and enforcement changes.

CE has expanded the range of the types of laws looked at beyond core environmental law – e.g. energy team looks at state aid, competition and markets law and the company and finance team is looking at pensions and financial regulation.

CE has expanded the opportunity to be a PIEL lawyer in the UK/EU – can now have a career in this area.

3.4 Governance arrangements

CE is a company limited by guarantee and a charity. CE employs solicitors and barristers. CE is not regulated as an entity by the SRA, but its solicitors are individually. CE's solicitors are effectively in-house lawyers.

CE has trustees responsible for the financial management of CE. The experience of CE's trustees includes philanthropic funders, artists, financial services, business, media, environmental policy, legal, people with experience as trustees of other NGOs. The Charities Commission and English charity law regulates other activities around campaigning and political activity of CE.

CE has ~102 staff. It has offices in London, Brussels, Warsaw, China, New York. ~60% of staff are lawyers – the rest work in management, finance, fundraising, communications, administration and human resources.

3.5 Funding Arrangements

ClientEarth is funded through grants and donations. Its grants are mostly from trusts and foundations. CE has a smaller number of institutional funders – e.g. UK DFID funds CE's forests programme. CE's funders are listed in its annual reports.

CE has a number of large individual donors – CE actively seeks them out. It has a major donor programme to identify and cultivate wealthy individuals interested in the environment. The advantage of this type of funding is that whereas grants tend to come with restrictions, individual donors do not.

It can be challenging to find grants for work in the 'hard to fund' categories – such as work on access to justice and anything health-related. Climate, biodiversity, forests and oceans work are often easily

understood and obviously related to the environment – and work on these more obvious 'environmental' issues is easier to fund.

3.6 Challenges

When you bring a new idea and approach into a well-established community it can be difficult to get people to understand what you are doing. It can also create territorial concerns – and issues of competition (e.g. for funding).

CE's trajectory has been one of increasing funding and growth – but it has also had instances of losing funding and having to make significant changes as a result of this. CE grew exponentially for several years – this brought challenges for the development of the organisation.

There have been political challenges too. E.g. CE has been operating in Poland – the early work of CE was high profile and unwelcome by the Polish Government. CE had to endure a difficult initial period in challenging coal subsidies in Poland. The recent political climate has become difficult again. CE was named by the Polish treasury minister as 'public enemy number one'. CE became subject of feature articles by the right-wing press, it was accused of working for Russia due to its opposition to coal. There can be private criminal prosecutions for defamation in Poland which creates an additional operational risk.

Recruiting and developing talent (particularly environmental lawyers) is challenging.

3.7 Advice

Be very strategic and focussed in relation to the issues or approach that you pick – pick one or two main things to focus on, either on your own or with others.

It can be difficult for funders to see the value of a project before it is up and running. Think about where you can add something.

CE has opted for a degree of specialisation. You can be more generalist, but it can be more effective to allow the specialisation of your staff. CE's approach has been to create opportunities and space for its staff, give staff autonomy – to help develop more thinking and deliver more.

4 Community Environmental Legal Defense Fund

Website - https://celdf.org/

4.1 Foundation Details

CELDF was set up in 1995 to help communities to protect the environment.

CELDF spent a lot of time trying to understand how environmental law works and why it works that way. It saw that the structure of law is not set up to stop threats to communities and allow them to protect themselves.

CELDF reached the conclusion that it's not enough to address environmental threats on an individual basis. Instead, the larger system of law which protects, insulates and authorises each of those threats needs to be taken on. CELDF went from being a conventional environmental law firm to being one that came out from under conventional environmental law.

CELDF is now no longer in the process of working within the existing system (e.g. appealing licensing decisions or permits) – it is working at a more foundational place. It works on enhancing rights and addressing systemic problems. That work has helped the CELDF to address corporate rights in the USA, the pre-emptive authority of higher levels of governments; and also to advance new rights for humans (e.g. the right to a clean and healthy environment) – and rights of nature itself.

It now works to both advance new rights and eliminate the barriers which stand in the way of those rights. Without doing that, CELDF doesn't see how it can truly protect the environment – because existing environmental laws are focussed on authorising environmental harm, and protecting that harm.

Examples of this in the U.S. include:

- The national Clean Water Act, under which mountaintop removal mining is authorised;
- The national Clean Air Act, under which global warming and other pollution is allowed and regulated;
- Oil and gas acts at the national and state levels, which legalise fracking, frack wastewater injection wells;
- State water protection acts, which authorise private water withdrawals of millions of gallons of fresh water a day (these are the acts that companies such as Nestle are permitted to siphon off water and bottle and sell it);
- Agriculture laws that legalise industrial farming (factory farms).

Basically, any 'environmental protection' law - whether in the U.S. or in other countries - is in fact authorising activities which pollute or harm the planet. So these laws generally are not about prohibiting activities, rather they are about authorising them to take place under certain conditions. So even though practices

such as fracking are proving inherently unsustainable no matter how much you regulate them, they are legalised under state and national laws.

The current focus of the CELDF was the result of many years of casework. CELDF proved to itself how the system works. It witnessed that when it helped a community to a conventional environmental legal 'victory' – such victories were only temporary, and the system would close in on itself to reverse that victory.

It is difficult to tell people how the system works, because this stands in stark contrast to how we're told it works. The US has a great mythology about its democracy – but to see that this is a myth people have to see, experience, taste and feel it. Major US environmental laws are supposed to be world-leading. The act of just telling people that they're not doesn't work – you have to experience this to understand how they truly work. Now the CELDF tries to take others on that journey as well.

4.2 Purpose

Our mission is to build sustainable communities by assisting people to assert their right to local self-government and the rights of nature.

4.3 Activities

The CELDF works at the grassroots community, state, national, and international levels.

It assists communities through providing education, outreach and organising support, and also to advance rights through law-making. These two components (education/organising and legislative) go together – they help to advance a cultural and legal shift to advance rights. It does that work at the local, state and national levels. It engages groups to help build a certain understanding with communities – and where communities want to change the law, the CELDF then works with local governments or grassroots groups to prepare draft laws and have them passed or used in local campaigns.

CELDF's International Center for the Rights of Nature works outside of the USA to advance rights of nature legal frameworks in different countries.

4.3.1 Legal services

CELDF provides pro bono and low-cost legal assistance to grassroots groups and municipal governments seeking to advance community rights, environmental rights, worker rights, as well as other social and economic justice rights.

4.3.2 Organising support

CELDF provides a full range of organising support in assisting community groups, whether they are seasoned or newly formed with little activist experience. CELDF organising support is delivered through training, advising, and collaboration with community groups. The CELDF produces a community organising 'primer' called commonsense.

4.3.3 Education

Provides accessible written materials, democracy schools and seminars for communities.

'Democracy schools' – these last for a day and a half. They focus on unpacking the legal system – exploring how it works, why it works in the way that it does, and its history – it looks at 1000 years of history from the Magna Carta to the American Revolution to help understand how we got to where we are today. It helps to give participants an understanding of how things work and why they work that way. The discussion then moves to 'what can we do about it'? CELDF has considered running one of these in the UK.

4.3.4 News and Information

Through its website (and other areas of its work) – the CELDF shares stories of how government and corporate interests are protecting a system that advances the interests of the few over the many; and how a new movement is forming to change this.

4.4 Governance arrangements

CELDF is a 501(c)(3) organisation – a federally recognised non-profit organisation. It has tax-exempt status. It operates with a board of directors and staff. It has 10 staff. Most of CELDF's lawyers work on contract.

Its board members have legal, academic and community backgrounds.[2] It also has a board of advisors with writing, media, film-making, activism, business and legal experience.

4.5 Funding Arrangements

The CELDF is funded from foundation grants and individual donations. CELDF does not charge for its services – i.e. the use of staff time. It will charge for costs (e.g. travel costs, legal filing fees or venue costs if necessary).

[2] https://celdf.org/about/board-staff/

4.6 Partnerships

CELDF has many partners at the local level – grassroots groups and municipal governments. It has helped groups to form their own networks. Very few groups work on thinking about or pursuing systemic change – so CELDF has helped groups to set up to do this type of work (e.g. to legally incorporate and to organise within their states). It is difficult for pre-existing organisations to take on something of that scope.

4.7 Achievements

The CELDF has worked with the first places in the US to pass laws to strip corporations of legal rights. It has worked with the first places in the world to draft and enact laws recognising the rights of nature (the first communities and countries - Ecuador).[3]

4.8 Challenges

There has been legal pushback against its rights-based work. This comes from the obvious actors – industry and corporations. It has also – more significantly - come from governments in the USA. State governments have filed lawsuits against communities seeking to put in place stronger environmental protections than those which exist at higher levels of government. Government itself has tried to shut this type of work down. It is important to anticipate this – it's similar to every other people's movement – the central government seeks to protect its power and the status quo. Usually the arguments are framed around 'this is non-constitutional' – 'the community doesn't have the authority' to take this type of action – 'the government wasn't set up to do that' - 'that violates corporations' rights'.

There have been sanctions against CELDF's lawyers. Corporations have filed complaints against CELDF's lawyers due to their rights-based work, focussing on the individual lawyers. This can be an effective way of chilling legal innovation.

There have been challenges from other NGOs. CELDF's work can challenge the way that other environmental NGOs operate, it has experienced opposition from other environmental NGOs.

4.9 Advice

The focus of your work is important – start with a clear understanding of the problem you are facing. Most environmental law groups are very much focussed on working within the conventional environmental law framework to try to make that system work better, and are unwilling to step outside it and look at the

[3] See https://celdf.org/rights/rights-of-nature/rights-nature-timeline/.

systemic problems of that framework. There is more need for organisations which address systemic problems – rather than individual cases (e.g. fracking or mining projects) – and recognising the systemic reasons why those harmful activities are allowed to take place to begin with.

New organisations being formed now have the benefit of previous experiences – they can tap into previous experience and research which demonstrates how the system is working now. You don't need to start on a conventional environmental law basis, and build up an experience of the failures of environmental law – the history and experience already exists.

You must think - how is the system working now? What don't we understand? What can we learn from others' experiences? If you just set yourself up to protect the environment – that's not a lot of analysis and suggests that you don't understand the problems you're facing. The problems being faced in the USA are not unique – they are mirrored elsewhere.

The CELDF was a small organisation when it changed its approach – it was unique in that it carried out such a radical shift to its work – this is very difficult for most organisations. It is very difficult to change your focus after you have been set up (for various reasons) – it is better to do the analysis before you set up – and set your organisation up to address the problems that you have identified.

Just because other PIEL organisations are doing something (i.e. focussing on enforcing environmental law and acting within the conventional system of environmental regulation) doesn't mean that you have to do it too – think about your situation, and do your own analysis. Understand the system that you are working in and why it works the way that it does. The UK system of governance is very centralised – there is little opportunity for self-governance by local communities seeking to protect the environment. Analyse and seek to understand this from the outset.

5 Clan Childlaw

Website - http://www.clanchildlaw.org/

5.1 Foundation Details

Clan Childlaw was founded in May 2008. Planning for Clan started in November 2007.

Clan's founder worked as a children's reporter before setting up the organisation. There was a recognition that the legal system provided for a number of rights for children which were not being realised in practice.

Also influential was a research paper written by Youth Access on how children and young people access the law in England. This research noted the particularities of how young people access the law – children don't want to speak on the phone, they want outreach services and they want lawyers who are specially trained to work with children or social workers who know about the law. These findings were understood to broadly apply to Scotland also.

Clan's founders approached the Scottish Government's Children's Rights Department – they were supportive and gave a small amount of initial funding to get Clan set up and get going.

Clan was initially focussed on representation work for children. Soon after that it developed a training focus. Clan then developed a policy focus three-four years after it was created.

Clan started with one full time and one part time staff member – it started small and took an incremental approach to development. Clan also started without an office – its staff worked from home for the first year. Clan had no administrative support to begin with either.

5.2 Purpose

Vision – We work as lawyers using our legal skills and expert knowledge to help young people take part in decisions that affect them and to try to get changes in the law in Scotland that will make things better for children and young people. We believe that doing these things will make life better for all the children and young people in Scotland and will help to change the lives of the young people we work for.

Purpose – We are lawyers for children and young people. We provide free legal advice and legal help to children and young people and represent them in court and at Children's Hearings. We use what we learn from this work to train lawyers and other people who work with children and young people on children's rights and how the law affects young people. We have a free legal information service which gives young people information about the law and finding a lawyer. We use our direct experience from work with young people to find out what changes in the law are needed to make sure children's rights are recognised.

Aims:

1. To continue to stand up for children and young people and make sure their voices are heard when legal decisions are being made about them. To be the best place for children and young people in Scotland to get legal help.

2. To be an important voice defending children's rights and speaking up for changes to the law in Scotland which would help children and young people.

3. To have the people and resources we need to make sure we can keep doing our work now and in the future.

5.3 Activities

5.3.1 Representation work

This is core focus of the organisation - providing direct representation to children. It also helps to inform its training and policy work. Children can approach Clan directly for support – most contact is made by organisations working with children (e.g. advocacy workers, social workers and teachers).

5.3.2 Training

Clan provides training to people and organisations that work with children and young people. E.g. they delivered a training programme on the Children's Hearings (Scotland) Act 2011 to all Scottish local authorities.

5.3.3 Policy development

Clan focusses on using the law to influence policy and its implementation. Clan's policy work is legally-focussed to avoid duplicating the policy work of other organisations and to reflect its own expertise.

5.3.4 Information service

Clan runs an advice phone line which the public can approach for free information and advice. There is an online component to this also – people can email queries to Clan.

5.3.5 Strategic litigation work

Clan has specific funding to run a strategic litigation group in Scotland. It is using the law to advance policy on children's rights through a strategic litigation programme. Clan has intervened in two significant UKSC cases – the *Christian Institute* case concerning the named persons scheme (Clan intervened on the issue of information sharing in the COS IH and the UKSC – the case resulted in the UKSC declaring the information sharing components of the scheme was non-compatible with the ECHR) and the case of *AB* (concerning 'relevant sexual offences' by children – Scottish legislation was found to be incompatible with the ECHR). These two cases provide useful practical examples for showing how strategic litigation can work in Scotland.

Sibling contact is a problem in Scotland – siblings in Scotland in the care system in Scotland can be split up and it is very difficult for them to keep in touch. The law on this topic does not support sibling contact. This is an issue which Clan is working on in conjunction with the Strategic Litigation Group and other interested organisations.

5.4 Governance arrangements

Clan consists of two organisations. There is a company limited by guarantee which is registered as a Scottish charity as Community Law Advice Network ('Clan'). There is also an accompanying law firm which provides services to the charity, with two partners. The law firm is a company – ('Clan Childlaw Ltd'). There is a contract between the two organisations – all of the law firm's services are exclusive to the charity, and any profits go to the charity.

Clan has 13 staff. 2 admin posts, coordinator posts for projects, one non-practicing advocate and 6 staff with practicing certificates.

The charity has a board of directors – this is kept distinct from the law firm (the law firm's partners are not on the board) – to ensure independence. The board has a mix of expertise (albeit it is lawyer-heavy) – the chair is an accountant and an economist. Financial experience is critical. The law firm has 2 directors being the Chief Executive of the Charity (who is also the Principal Solicitor of the law firm) and the Head of Representation.

5.5 Funding Arrangements

The Scottish Government provides approximately 1/3 of Clan's funding. This comes from two funds - the early intervention fund and the children's rights fund. One is awarded on an annual basis and one on a three-yearly basis.

Other funding comes from delivering training and grants (grant funders include the Baring Foundation, Esmee Fairburn Foundation, Paul Hamlyn Foundation, the Legal Education Foundation, the Big Lottery, Aberdeen Asset Management, Lloyds TSB Foundation, the City of Edinburgh Council, the Portack Trust and the Robert Barr Trust). It also applies for legal aid where possible.

5.6 Partnerships

Clan is currently working on a Big Lottery-funded project with Streetwork (an Edinburgh based charity which helps young people with housing and homelessness problems). Clan supports Streetwork by training their staff on the law, and taking on any difficult cases for Streetwork.

5.7 Challenges

Funding - the short-term nature of funding is particularly difficult. It makes it difficult to make long-term decisions and create a stable organisation. Clan aims to have a spread of funders to avoid dependence on any one funder.

Growth of the organisation – expanding the team comes with challenges such as creating HR policies and needing more office space.

5.8 Advice

Be creative about how you manage the risk involved in setting up your organisation. Look at the problem from different angles. Think about the long-term sustainability of your organisation – the challenges will be more about organisational and operational issues, rather than the legal work of the organisation itself. Think about whether there is any scope for self-generated income.

6 Environmental Justice Australia

Website - https://envirojustice.org.au/

6.1 Foundation Details

Environmental Justice Australia (EJA) was initially set up in 1992 – it was previously named 'Environmental Defenders Australia'. The idea had been explored previously in Australia. Seed-funding was secured in 1991 to set up the office. It was largely driven by lawyers alongside the general development of environmental law in Australia. It aimed to ensure legal support was there to enforce rights under the Planning and Environment Act. There was support from larger conservation groups in the beginning also.

The key factor was getting the initial grant of funding to pilot the organisation for its early years. The EDO NSW was founded at a similar time. The national environmental law association provided networking and some coordination.

EJA is part of the broader community legal sector/movement in Australia. Before the EDOs were founded, a series of 'community legal centres' were created – these focussed on providing legal services on particular

issues and in particular locations. A key moment for the EDOs was securing national community legal centre funding. That was a key point – the national network of EDOs was then created in Australia.[4]

6.2 Purpose

Objects (from EJA's constitution):

- to provide, in the public interest, environmental and planning services to the community in connection with the conservation, protection and enhancement of the natural or cultural environment including advice and representation;
- to promote and develop educational programs for the community in relation to environmental and planning matters;
- to promote and encourage environmental laws and policies for the conservation, protection and enhancement of the natural or cultural environment;
- to undertake any research necessary to further any of the objects specified above;
- to do all such other lawful things as are incidental or conducive to the attainment of any or all of the above objects.

Mission: "We will use the law to protect and restore Australia's environment. We will work to achieve better environmental laws that truly protect our environment, for the benefit of all Australians. We will ensure that our communities can have a real say in decisions about our environment."[5]

6.3 Activities

The EJA does two things: it uses the law to allow communities to enforce their legal rights; and acts to strengthen laws and ensure that they are better implemented. A large part of its work is now advocacy-oriented, rather than providing legal representation. It has also branched out beyond 'traditional' environmental law areas – e.g. EJA employs a lawyer who works on corporate finance and climate change.

The EJA predominantly employs lawyers – but also has admin, funding and communications staff.

Its areas of work include:

[4] See http://www.edo.org.au/.
[5] https://envirojustice.org.au/who-we-are.

6.3.1 Advice and legal representation

EJA runs a 'community environmental legal service'[6] - which provides legal help for Victorians through the publication of kits, fact sheets and videos which provide accessible and practical environmental law information to the Victorian community.

6.3.2 Law reform advocacy

Its work here focusses on nature protection, pollution and climate change.

6.3.3 Sustainability law lab

This is a work in progress and part of an exercise in reinvention which has occurred over the last few years. Most of EJA's work has been reactive – largely helping to stop bad things from happening.

This work helps to support community projects – it is more transactional work. The lab explores the needs and opportunities in this area. For example, crafting agreements for community projects, the results of which are open-sourced and available for other groups to use. It adopts a collaborative approach to problem solving. The need for this work relates to a number of people with legal need outwith the traditional environmental law categories. It draws on a model from the US-based Sustainable Economies Law Centre.[7]

The sustainability law lab supports community-driven sustainability projects by: providing innovative and cost effective legal services; providing collaborative and savvy lawyers that get new business models and innovative projects; running collaborative workshops for win-win and multi-party solutions; identifying legal obstacles to sustainability projects and forming legal strategies for long term legal solutions; providing training and education programs for skill transfer, awareness or compliance.[8]

6.4 Governance arrangements

EJA is a Company Limited by Guarantee not having a Share Capital. It is essentially a limited company.

It is governed by an honorary board. Board members are elected by members on an annual basis.

EJA has 'members' who pay membership fees. The EJA is not a membership-based organisation; it is more expertise-based – it takes its steer from the environmental movement. It has a small dedicated pool of members.

It employs 14 staff. 4/5 of these are non-lawyers – admin, fundraising, communications and supporter engagement. There is one researcher and campaigner.

[6] See http://www.cels.org.au/.
[7] See http://www.theselc.org/.
[8] See https://envirojustice.org.au/sustainabilitylawlab.

6.5 Funding arrangements

EJA is principally funded by trusts, foundations and donations. E.g. it has had longstanding support from the Lord Meares Foundation in Melbourne. There is funding from private foundations and individuals also.

EJA seeks funding through a network of environmental grant makers in Australia. It has found it very challenging to secure funding – there are a limited number of funders which will support its work.

A proportion of its income comes from charging fees and cost recovery (~10%). There is some charging for its clients – this depends on the type of work and how the work this fits with legal needs and impacts, vis-à-vis EJA's objectives. Funding depends on the nature of the work and the nature of the client, including the ability of the client to pay for services.

A small proportion of EJA's funding comes from membership fees, and a small amount also comes from legal aid work.

6.6 Partnerships

Works with other conservation and environmental groups – e.g. national Australian or local groups on law reform.

These include Environment Victoria, the National parks association and the Australian Conservation Foundation. These are not formal partnerships – EJA frequently engages with these groups and others on collaborative campaigns. EJA is part of various alliances – such as the national climate action network – which is focussed on the closure of coal-fired power stations and the impacts of coal on local communities.

It is involved in partnerships working to develop and reform environmental protection laws.

It works with local, grass-roots groups also – e.g. groups on landfills and waste (these are often ongoing relationships).

EJA is experimenting with embedding lawyers with local organisations. They visit and work with these organisations for 1-2 days per week. This is a move away from providing help to those seeking assistance from the EJA, towards a more strategic focus on key issues for the EJA. It is working in a more collaborative manner on certain key issues, and being more strategic in how its resources are deployed.

6.7 Achievements

EJA has grown and developed in the last 5 years, despite the threats to EDOs nationally in Australia. The national government terminated Commonwealth funding in 2013, putting EJA's survival in doubt. It has pursued change on the back of that threat.

Significant changes are now happening to pollution control laws and climate legislation in Victoria as a result of EJA's efforts.

Hazelwood mine fire inquiry. The Hazelwood coal mine caught fire in February 2014 and burned for 45 days – this severely polluted the air for the surrounding residents and was linked to a number of deaths in the area. EJA represented the local community in persuading the government to reopen an inquiry into the incident, and during the inquiry process.[9] This led to the closure of the connected Hazelwood power station. There were positive findings on the impacts of the fire, local coal mining and the operation of the coal power station on the community. A number of positive recommendations came from the inquiry. This was environmental justice-type work which focussed on the human health impacts of pollution.

6.8 Challenges

6.8.1 Funding

National commonwealth funding was cut off in 2013. This funding challenge has caused insecurity and uncertainty, and has required a re-orientation for EJA.

The national EDO network developed around the idea of providing publically funded legal services – facilitating access to justice. The recent political context in Australia, where there is hostility for environmental legal aid and a withdrawal of legal aid has challenged this. EJA has had to become a more supporter-focussed organisation. It has had to have more engagement with trusts and foundations. This has been positive for the organisation, but has also been challenging.

6.8.2 Staffing

Historically, it used to be difficult for EJA to retain/attract good senior lawyers, but this has lessened as the EJA has become more established and its reputation has developed. It cannot offer similar conditions to other private firms (or even lawyers in public service roles) – nor does it aspire to. Instead the EJA gives the opportunity for values-driven lawyers to work in a values-driven environment. It can also be a more flexible working environment for lawyers to work in, which is very different to a commercial legal environment.

6.8.3 Focussing work

Knowing what to focus on is a challenge. There are many environmental problems requiring attention and there is unmet environmental legal need. This has required the EJA to develop a clear focus for its work, be disciplined about pursuing its objectives and measure and assess its performance.

[9] See https://envirojustice.org.au/blog/hazelwood-mine-fire-report-confirms-deaths-likely.

It has recently moved from being largely access to justice-focussed organisation, to a more strategic environmental law organisation. It has adopted a more impact-driven model.

EJA still provides some A2EJ services – it can provide limited support for clients. Previously, it used a set of criteria to assess clients' eligibility for legal assistance. EJA has move towards an EarthJustice/EcoJustice/ClientEarth-type model.

6.9 Advice

It is impossible to do everything – focussing on access to environmental justice can be a bit of a trap. There is some perception in Australia that the original radical intent of community law centres has been lost by being publically funded – they have become more of a public service delivery model.

EJA is reorienting itself as a changemaker rather than an access to justice provider. It is important to choose between one of these models (environmental NGO or law office model), to be clear about your aims and how this work will be funded.

Developing a new organisation requires an upfront investment for 2-3 years to allow it to properly develop. It is likely that it will be swamped at the start with requests for help, offers of collaborative projects, etc.

Organisational independence is important, although this does not stop collaboration with other groups.

EJA's location may be significant to its outlook and the development of its culture also. It is located within a 'green building' with other environmental NGOs – this has led to a number of chance discussions with other NGOs and a more collaborative outlook.

7 Environmental Law Centre Scotland

This case study is drawn from the documents available on the Companies House website.

7.1 Foundation Details

The ELCS was incorporated 12/08/2008. It was wound up in October 2015.

7.2 Purpose

Company objects (from the ELCS' Memorandum of Association document):

(1) To advance education and, in particular, to increase knowledge and awareness of the law in the fields of environmental law including areas of planning, transport, human rights, pollution control, nature

conservation, human health and in areas of cultural and natural heritage and all other fields in relation to which there appears, in the opinion of the directors, to be insufficient general knowledge and awareness of the law.

(2) To promote environmental protection by the availability of, and facilitating access to, legal advice, assistance and representation geared to the special needs of persons and organisations who are concerned with the protection of the environment and where such advice, assistance and representation could not readily be obtained by such persons elsewhere.

(3) To promote the protection of human health insofar as it relates to the environmental effects on human health by the availability of, and facilitating access to, legal advice, assistance and representation geared to the special needs of persons and organisations who are concerned with the protection of human health by environmental effects and where such advice, assistance and representation could not readily be obtained by such persons elsewhere.

(4) To advance community development insofar as community groups, community councils, groups of individuals and others are seeking to promote environmental protection within their communities and to seek to understand legal protection of the environment by the availability of, and facilitating access to, legal advice, assistance and representation geared to the special needs of such persons and organisations where such advice, assistance and representation could not readily be obtained by such persons elsewhere.

(5) To promote the advancement of human rights insofar as human rights relate to environmental protection by in particular the availability of, and facilitating access to, legal advice, assistance and representation geared to the special needs of such persons and organisations where such advice, assistance and representation could not readily be obtained by such persons elsewhere.

7.3 Activities

7.3.1 Advice and representation

ELCS assisted 40 individuals or communities with initial advice from March 2009 to 31 December 2009; and provided direct representation and casework to a further 40.

In 2010, the ELCS carried out direct casework until the end of March 2010. It directly assisted around 30 individuals with initial phone advice, and a further 12 with direct representation or casework.

The types of problems faced by clients using the service included – individuals trying to retain green-spaces within their communities; communities seeking advice on contaminated land to ensure clean-up is done safely; communities and individuals seeking to enforce established access rights which have been restricted

by landowners closing off land with gates or fences, small scale local food producers seeking advice and assistance on the Nature Conservation Scotland Act 2004, individuals who have been confused – seeking advice and assistance on who has what power under regulatory regimes.

In 2010 the ELCS' legal work was allocated to a firm of solicitors – the ELCS had only been employing one solicitor part-time – which was not enough to meet the demands of the ELCS' casework.

No direct legal work was carried out in 2011 due to a lack of resources.

7.3.2 Education

Between 2008-2009 the ELCS held a series of seminars on public law, climate change, public interest litigation and environmental justice.

7.3.3 Policy Development

The ELCS contributed to Lord Gill's Scottish Civil Courts Review.

The ELCS contributed to a number of detailed joint policy responses and strategic work to assist FOES' access to environmental justice campaign.

It gave evidence on the Courts Reform Bill.

7.3.4 Research

The ELCS carried out research on access to environmental justice – comparing the situation in Scotland with elsewhere.

It researched the feasibility expanding its work into the field of advising communities and other groups on taking positive environmental action to reduce environmental impacts – a 'sustainable communities project'.

7.4 Governance arrangements

ELCS was set up as a company limited by guarantee and not having a share capital. It was also registered as a charity.

Trustees were sought with a wide range of expertise. 5 trustees resigned in 2011-2012. Most decisions on the operation of the charity were taken by the trustees, with staff given delegated authority to take day to day decisions. Often trustees' views were sought by email or phone. The legal work was excepted from this arrangement – this was wholly delegated to staff.

ELCS became a membership organisation.

7.5 Funding Arrangements

Direct donations, membership fees, charitable trusts and grants and fees from casework.

2008-2009 - income included £21,250 legal aid income, £3,171 fees and £36, 990 in grants. Grants received: £13,000 - Big Lottery (specifically for seminar costs), £5,000 - Scottish Community Fund (specifically for employee costs), £8,000 – Polden Puckham, £8,000 - Scotland Unlimited Social Entrepreneurs Fund, £2,990 – Lush Charity Pot (specifically for producing publications). There were £11,998 in gifts and £1,100 in donations also.

2010 – income included £9,123 in legal fees, £644 in seminar fees, £24,104 in grants (£8,000 – Scottish Community Fund, £1,000 – Argyll and Bute Council (for training for the development officer), £10,000 – Friends of the Earth (grant income for a research report on Aarhus compliance), £5,104 – Terre Humaine Foundation). Other funding from the Big Lottery – Investing in Ideas (£9,800) and the Hunterston Judicial Review challenging its inclusion in NPF2 (£16,115 in donations).

2011 – (p2 of trustees report) 'the main risks the charity is exposed to are lack of resources, and in particular financial resources. The charity has been unable to find funds to employ permanent members of staff.' In 2011 there was no income.

2012 – Tay Charitable Trust (£500).

2013 - £3,106 in legal fees.

2014 – £0.

8 Environmental Law Foundation

Website - http://elflaw.org/

8.1 Foundation Details

ELF was founded 25 years ago by environmental campaigner Diana Schumacher and lawyer Martin Polden, and an environmental scientist. They recognised that there was a dearth of resources available to members of the public suffering environmental harm; whereas there were vast resources available to those doing the harm.

8.2 Purpose

The mission statement of ELF is to provide access to environmental justice for all. It seeks to give a voice to ordinary people and enable their participation in environmental decision-making.

8.3 Activities

8.3.1 Advice and Referral Service

ELF runs an advice phone-line which is open from 8am to 8pm Mondays to Fridays, and 9am to 5pm Saturdays, Sundays and Bank Holidays. The Client Services Team at Irwin Mitchell Solicitors takes the initial query and passes it on to ELF staff who can provide 'guidance' (rather than advice) on the issue. If a query requires professional advice – it is passed on to a lawyer or technical expert who will give up to an hour of their time working on the case.

ELF has a network of barristers, lawyers and technical consultants – they all pay a fee to be part of the network and commit to give a certain amount of time. It is up to the members as to how much time they give, some will give more than an hour of advice.

ELF has built up relationships with environmental law chambers – largely in London. It works with junior barristers and pupils – they get good experience from this casework. ELF staff are involved in cases which are taken on also.

ELF handles ~200 inquiries per year. It used to take in about 600 per year when it had more capacity. It struggles a little bit with finding enquiries – it gets referrals from FOE and ClientEarth. Its remit is limited to public interest environmental matters - ELF won't look at business clients or private matters.

In terms of Scottish enquiries – ELF has one member who handles ~10 enquiries per year. There are no ELF members in NI, and two member firms in Wales. The system of pro bono is developing in England as the availability of legal aid has been reduced.

8.3.2 Educational Clinic Network

ELF has relationships with university law clinics in England and Wales. ELF forwards requests from its advice service to partner universities – students get to interview client and write a letter of advice. The advice letter comes back to ELF – it is then scrutinised by a member of the professional network to ensure its legal accuracy. This is proving very popular with students. ELF runs an annual event where the clinics and students

get together. The clinic network helps to draw-in students and builds a culture of public interest lawyering in students.

The participating university clinics are: University of Greenwich; Cardiff University; University of Birmingham; University of Manchester; Nottingham Trent University and University of Law, London.

ELF used to run an internship (up to three years ago) – it used to get law students in to its offices to manage the advice and referral system. Students would work on enquiries and then outsource to its network. ELF also previously did outreach work in the form of delivering education. ELF responds to consultations also.

8.4 Governance arrangements

ELF is a company limited by guarantee which is registered as a charity. It has a board of trustees which meets six times per year. The trustees are heavily involved – it has a new QC chair. The trustees are very supportive of the staff.

ELF has 2 staff members - one works 20hrs per week and one works one day per week.

8.5 Funding Arrangements

ELF used to be well-funded. It used to be the only kid on the block and got funding from Government. It has had lottery grants; DCLG funding and Equality and Human Rights Commission funding.

ELF has fallen on hard times recently as its funding has dried up. ELF had been around for a long time – and therefore offers no novelty for funders which constantly seek innovation. New organisations which have been created – such as ClientEarth – which have got the available sources of funding.

ELF has no external funding (it continues to submit funding applications). Membership, subscriptions and donations now fund ELF. It is now proactive with its clients also (ELF asks that all those it helps either make a donation or join ELF. Membership is currently £35 for individual membership or £50 for community group membership. About half of ELF's income comes from members of the public making donations.

ELF's annual budget is ~£20,000 p.a.

8.6 Partnerships

ELF is open to working with anyone, but this depends on capacity. It has a working relationship with a group of BME students at UCL. It has a relationship with the open spaces society – to work on village greens. It has relationships with various university law clinics (as detailed above).

8.7 Challenges

Funding is the main challenge for ELF. ELF could do much more with more money. This lack of resources makes it difficult to cope with demand. Generally ELF is able to cope with demand, its network is very supportive.

Trying to divide work up can be challenging – some matters can be hugely time-consuming. It can be difficult to meet deadlines in light of limited resources.

8.8 Advice

If you intend to be self-sustaining, get external funding.

There needs to be a better system of being self-sustaining. It is challenging to work for nothing and be financially sustainable. Think about how to make an organisation self-sustaining.

Young people (particularly law students) can be a great resource - use their enthusiasm. You could mentor or help them under supervision. There is great enthusiasm out there for PIEL work – tap into this.

A number of Universities have pro bono infrastructure in place – which ELF's service can slot into. ELF is flexible and fits around what exists. ELF is now starting to be pursued by universities which want to work with it.

9 Environment People Law

Website - http://epl.org.ua/en/

9.1 Foundation Details

Environment People Law (EPL) was founded on 24th March 1994. It was started by Svitlana Kravchenko – who at that time was a professor of environmental law in Lviv National University in Ukraine. She later moved to the University of Oregon. She thought there was a need to use and practice the knowledge and skills which she taught in environmental law to make the law work for people. Ensuring the enforcement of environmental law was important.

SK had many followers (particularly her students) who wanted to use their knowledge in practice. EPL was an opportunity for her students to apply their theories and knowledge in practice.

There was no environmental law organisation in Ukraine before EPL was set up. Ukraine needed PIEL lawyers to help civil society - Ukrainian civil society needed the EPL. The environmental movement in Ukraine started the process of developing civil society in Ukraine more generally. Environmental issues were very pressing at that time – this was the post-Chernobyl era. The environmental movement became the leader of civil society.

9.2 Purpose

To establish the rule of law for environmental protection.

9.3 Activities

EPL has two offices in Kyiv and Lviv. It works across several areas.

9.3.1 Providing legal services to individuals

EPL provides pro bono legal aid to protect the environmental rights of people, to help and empower people to oppose environmental injustice and use legal tools to enforce their environmental rights. EPL has clients who visit their office and EPL provides consultations by phone – it takes clients from all over Ukraine. The Ukrainian public also uses EPL's website which contains resources with advice and environmental law information. EPL receives many requests for help, often more than it has the capacity to handle.

9.3.2 Strategic litigation

EPL carries out strategic litigation to protect the environmental rights of citizens, and to react to different violations of environmental law. This includes litigation against developers, business, authorities, etc. – anyone violating environmental law. It can achieve systematic changes through this – and can change the consciousness of the public in Ukraine about environmental matters.

9.3.3 Education and environmental awareness

EPL has come to the realisation that their efforts to enforce environmental laws are not very successful of themselves due to a general lack of awareness of people in Ukraine about the effects of environmental problems – particularly the links between poor environmental conditions and human health. EPL carries out awareness-raising activities using radio, tv, video, workshops, seminars and through publications.

EPL also runs a course on international environmental law, and runs an online course on human rights and the environment for Ukrainian judges.

Its educational work requires significant human and financial resources – EPL is looking to expand its educational work – it is currently thinking about developing national environmental awareness raising campaigns on tv. EPL has signed a memo with a media group to do this. This is crucial to help shift the consciousness of Ukrainian people regarding the importance of environmental protection.

9.3.4 Raising a new generation of environmental lawyers

EPL works to develop students who are ready to devote their lives to environmental protection. They show that this is a career choice and that students can do great things for the world, and that this work is often a better career choice from a moral point of view.

EPL runs an environmental law clinic program for students. This has two streams – one for students of environmental studies (i.e. scientists) and one for environmental law students.

9.3.5 Legislative work

EPL works on law drafting and commenting on proposed laws. EPL tries to react to draft laws in the Ukrainian Parliament.

EPL had been working hard to enforce two crucial laws in Ukraine – environmental impact assessment (EIA) and strategic environmental assessment (SEA) laws. In 2011 the old EIA law was repealed – Ukraine was then left without an EIA law, despite being a signatory to various international environmental treaties requiring domestic EIA laws (e.g. the Aarhus Convention). There was international pressure on Ukraine to remedy this situation. EPL had to fight against business and the president of Ukraine (who vetoed a replacement EIA law in October 2016). In June 2017 an EIA law was adopted and signed by the president.

9.3.6 Think-tank work

EPL works like a think-tank on environmental issues. EPL develops green and white policy papers.

Policy analysis is a priority. EPL wants to achieve systematic changes in environmental governance in Ukraine. It is important to build an effective system which allows legislation to be effective. The current system of environmental governance in Ukraine is ineffective. EPL is actively involved in reformation processes. It develops policy documents in different formats, and advocates and promotes different decisions.

9.3.7 Developing a volunteer movement

EPL is currently developing this work. It is looking to increase the EPL constituency across Ukraine. The idea is that this will help the EPL get better support for its initiatives nationwide. It is working to establish volunteer groups in all regions of Ukraine. These will include people working on specific environmental issues in their constituencies – their role will be to build networks amongst themselves, and to know the mechanisms and tools which are available for them to solve their problems. EPL will help to facilitate this

and to facilitate the use of these problem-solving tools. EPL is also hoping to activate and empower communities to solve their problems.

The groups will also give advice pro bono to EPL. There are two types of groups - expert and local activist groups. These mean that EPL does not need to travel around Ukraine – it can get information from these different groups on the situation in different regions of Ukraine.

9.4 Governance arrangements

EPL adopts a legal structure from Ukrainian legislation required for NGOs.

It has staff, an executive director, executive and advisory boards, and members. All power comes from the members – the members select the executive board and the advisory board.

EPL is a membership-based organisation. The exec board selects exec directors – the exec director has the right to complete deals for EPL.

EPL has a statute and a series of internal policy documents – there are provisions for boards, anti-corruption, procurement, risk management and security policy. It meets international standards for certain policies – this is a requirement of certain donors such as the Swedish embassy, European Commission.

Every 4 months, EPL has to write narrative and financial reports to send to its executive boards. Its board members live across the globe – meetings are held via skype. An annual audit is also carried out – the result is an annual narrative and financial report.

EPL employs 20 staff – 8 of which are lawyers.

EPL's members are environmental lawyers – includes several famous people in Ukraine. Includes a professor of constitutional and admin law in Oregon, Ukrainian attorneys, financial experts, a member of the Ukrainian constitutional court.

9.5 Funding Arrangements

EPL is mostly funded from international foundations. Some national foundations provide funding – but often these foundations get their funding from abroad. Its funders can be found on its website.

EPL has a funding principle – it does not accept funding from business entities, authorities, or donor organisations involved in any improper handling of environmental issues. EPL seeks to ensure its funding is not related to any environmental violations.

9.6 Partnerships

EPL works with a number of different partners on various projects, including:

- Elaw.
- European Environmental Bureau.
- It created an association of environmental lawyers from Eastern Europe and Georgia.
- National environmental law platform (environmental lawyers of Ukraine).
- WWF.
- Most environmental organisations in Ukraine (EPL uses their expertise).
- The IUCN.

The EPL was a founder of the environmental branch of the reanimation package of reforms. Following the 2014 Ukrainian 'revolution of dignity', an association was formed to develop urgent legislative initiatives for Ukraine – to make key reforms in key social spheres in Ukraine. This association works with the head of the parliament and the president. More than 80 organisations are part of this group which includes a wide variety of groups (social, economic and environmental). It works like an association. Very often it is close to being an economic pressure group – sometimes there are disagreements between the economy, tax and environment groups - this has led to internal discussions on the group's priorities, which often reach consensus. Other groups also help to promote environmental legislation.

9.7 Innovative features

EPL created a national electronic database of environmental information. EPL introduced electronic environmental governance to Ukraine. It was piloted in several regions of Ukraine. The system is more progressive than 'Pollution Release and Transfer Register' system which exists elsewhere. EPL is working on developing this system. EPL's concept is more comprehensive and flexible.

It was the first organisation to combine human rights and environmental protection. This developed from EPL's recognition that human rights protection tools are more developed than environmental protection tools. EPL created a human rights and the environment course in Oregon, and now has an online environment and human rights course.

EPL was the first Ukrainian organisation to make a communication to the Aarhus Convention Compliance Committee – it showed environmental organisations how to do this. Similarly for the ESPOO convention – EPL made a communication to its compliance committee, in a new strategic litigation case (the Danube case).

9.8 Achievements

EPL won the Goldman Environmental Prize in 2006 for its work on the Danube Black sea case.[10] In 2004, without public notice and in violation of international and national environmental laws, the Ukrainian government began dredging and shoring up narrow and shallow sections of a 106-mile delta waterway to create a canal that would allow large vessels to travel directly between the Danube River and the Black Sea. EPL learned about the project and immediately filed lawsuits to prevent construction – which brought about a temporary halt to the project.

EPL won the first environmental case for Ukraine in the ECtHR. EPL handled this for 8 years. This was the first ECtHR decision on the environment.

EPL created the first legal clinic for environmental lawyers in Ukraine – through its clinical programme for students. This gives practical training for students working on real cases. Students are supervised by lawyers, and trained in how to carry out consultations with clients. The students have classes to train them – and then work on practical issues. EPL runs two clinics. Its first clinic was internal – held within EPL – then opened one in Lviv University Law School. The EPL-based clinic is more specialist.

9.9 Challenges

9.9.1 Staffing

EPL has had to be careful about selecting staff. EPL now has an effective team that can make changes. It needs devoted people with the requisite moral convictions. The process of building this team was difficult. It is not a regular job – it requires belief, conviction and care. It requires a deep motivation – and the ability work in a team.

Often the strategic litigation cases are challenges against powerful interests in Ukraine. Staff are often under pressure from central Ukrainian authorities. A deep personal motivation helps the staff to get through this.

The central government has attempted to use insiders, who have been sent to damage the organisation from the inside. As a result, EPL never invites lawyers or scientists from the street to work for it – its staff are either former volunteers or former students. It has developed members of the team this way – this has allowed EPL to select the best people.

[10] See http://www.goldmanprize.org/recipient/olya-melen/ ; http://grist.org/article/nijhuis-melen/

9.9.2 Funding

Not many funders see the importance of environmental work – it has been difficult to get funding for its core and admin work. Raising funding from local sources is difficult – lawyers are seen as rich in Ukraine, people are reluctant to give money. Financial sustainability is a constant challenge. EPL is always working to diversify its funding sources and look for new sources.

9.9.3 Offices

EPL made a mistake early in its history – it had the opportunity to buy an office but didn't do it. This is now a significant problem, because it doesn't have its own office.

10 FIMA

Website - http://www.fima.cl/en/

10.1 Foundation Details

FIMA was founded in 1998 by a group of 20 lawyers. 5 of these lawyers were directly involved with FIMA, and 15 friends agreed to the constitution. One of the founders was working as an environmental lawyer. They realised that environmental lawyers should form an organisation – particularly in relation to a large pollution case where the lawyers were acting for many people.

10.2 Purpose

Mission: our mission is to actively promote the right to live in a healthy environment and to ensure the protection of the environmental heritage of Chile.

Vision: we seek to be an active agent in achieving sustainable development in the country.

10.3 Activities

FIMA works in a number of different areas:

10.3.1 Environmental justice

The objective of this program is to ensure individuals and communities equitable access to the right to a health environment. FIMA provides initial advice and assistance to communities and NGOs which approach it – this can develop into representation/litigation depending on the case and whether it fits with FIMA's strategic aims.

10.3.2 Environmental Democracy

FIMA seeks to promote the right to access (information, public participation and access to environmental justice) in environmental decisions.

10.3.3 Climate Change

The aim here is to contribute to the global fight against climate change and to help develop national policies for adaptation and mitigation.

10.3.4 Environmental protection and sustainability

The objectives of this program are to reduce and eliminate the degradation of the environment in Chile, and to guarantee the protection of nature.

10.3.5 Public Policy

We seek to contribute to the design and creation of more effective public policies aimed at achieving sustainable development in the country.

FIMA has several modes of action:

a. Litigation - FIMA litigates in pursuit of public interest and for communities in socio-environmental disputes in Chile. FIMA has been involved in the following cases: Río Cuervo, Hidroaysén, Celco Valvidia, Celco Nueva Aldea, Alumysa, Trillium, Cascada Chile, Alto Maipo, Termoeléctrica Los Robles, Contamination of Lead and Arsenic in Arica, and defenses of the Puelo and Archibueno river basins.

FIMA does not have a formal case selection policy – cases are taken on a case-by-case basis. Potential cases are discussed internally. This gives FIMA an important degree of flexibility which is better than a checklist approach to case selection.

Many people look for help from FIMA. FIMA does not usually turn away potential clients. There is little evaluation of clients at the beginning of a case – usually they come from communities with little information or understanding about the law and are not well organised. It is impossible for FIMA to help its clients without funding – clients' cases tend to require a significant amount of preparation before they can approach a lawyer, which is resource-intensive. In such cases FIMA will tell potential clients that they need certain basic information – if the client can provide this, then FIMA is able to offer further help. This organisational test is the main filter used by FIMA for case selection. FIMA provides clients with orientation, but clients need to have some structure for FIMA to help them. It is very difficult to take on a case where there are only one or two people in the community working on the case – often casework requires a broader effort.

b. Legal Training and Empowerment - FIMA trains communities and social organisations to be able to organize themselves and defend their interests and rights.

FIMA teaches courses and workshops for scholars, local authorities, and members of the judiciary in the areas of environmental law, water rights, citizen participation and environmental litigation, among others.

c. Research and Publications - FIMA contributes to the development and improvement of environmental law in Chile by publishing an annual environmental law journal, 'Environmental Justice'. This is the first environmental law journal published by an NGO, in which significant national and international authors participate regularly. The journal has been cited by the Chilean Supreme Court.

FIMA publishes a monthly electronic newsletter containing major news in environmental matters and columns written by staff.

FIMA hosts the Centro de Investigación (CEFIMA or FIMA Research Center), for students and professionals in law and other fields to conduct environmental law research. The resulting research is used in environmental case litigation, to propose improvements to environmental policies governing the country, and to enrich public debates on these issues.

FIMA's lawyers are professors in two clinics. FIMA runs a study group which invites students to attend. They meet on a regular basis to study certain topics – and hear from experts in certain fields. Most of the staff at FIMA started working there by first working in the clinics or attending the study group.

d. Dissemination and Advocacy - FIMA regularly organises and participates in diverse panel discussions and seminars, as well as in the consultation and discussion of different proposed environmental legislation and regulation. Also, FIMA is a member, and chair since 2013, of the Consejo de la Sociedad Civil del Servicio de Evaluación Ambiental (Civil Society Council Environmental Evaluation Service).

FIMA provides legal support for others who are involved in political activity or lobbying.

e. International Networks - FIMA is a member of organisations such as:

- Environmental Law Alliance Worldwide (ELAW) – ELAW supports lawyers and scientists working for the protection of the environment.
- Asociación Interamericana para la Defensa del Ambiente (Interamerican Association for Environmental Defense, AIDA) – AIDA is dedicated to the promotion of environmental law.
- Waterkeeper Alliance – an organization dedicated to water protection.
- The Access Initiative (TAI) – a global organization dedicated to guaranteeing the rights to information access, participation in decision-making, and justice in environmental matters for citizens.

10.4 Governance arrangements

FIMA is a non-profit association in Chile. It has a board with 7 members – all lawyers. It has an executive director.

FIMA works over 3 areas – litigation, projects, studies and research. It employs a biologist and a journalist to do its communications work. FIMA has 15 staff in total who work ~50% full-time.

FIMA is flexible in its structure – it is trying to move towards a more consistent arrangement, but staffing and activities have change historically depending on the funding which has been available. Usually FIMA's staff are part-time workers who also work elsewhere. 3 FIMA staff members work full-time, the others are all part-time. Staff wages are much lower than the general market rates for lawyers in Chile.

10.5 Funding Arrangements

FIMA is funded mostly from international foundations. These are mainly US-based, with some funding from Europe also. International foundations account for about 90% of its funding. Funders include Patagonia, Green Grants, Heinrich Boell Foundation and the Inter-American Foundation.

The remaining 10% of FIMA's funding comes from various partners in Chile and from charging for its work. FIMA tries not to charge for work – but it depends. FIMA only takes on public interest cases – if a case also involves private interests and the litigant has funds, then FIMA may charge for its services. Institutions needing its services can be charged – such as government or NGOs.

10.6 Partnerships

FIMA works in a number of different partnerships.

FIMA is currently part of a civic workers and parliamentary commission looking at reform of Chile's EIA procedure. This has involved holding meetings with workers of Chile's environmental agency, other NGOs and politicians to create a document including a diagnostic of how the EIA procedure is working in Chile. This document has been written, the commission is now asking for some changes to improve environmental justice in the EIA procedure. The alliance included most of the environmental NGOs in Chile.

FIMA is currently acting as the lawyers for marine conservation NGO, Oceana. FIMA acts for them in a mining case where there is potential for damage to an ocean conservation area.

FIMA has ~20 cases running at the moment - about half of these involves FIMA working with other NGOs. The first case for FIMA when it was established is still ongoing (the same environmental issue rather than

the same legal procedure). The complexity of environmental problems and the laxity of environmental regulation means that environmental problems are often long lasting.

FIMA participates in the Civil Society Council of the Superintendencia del Medio Ambiente (Superintendent for the environment – a Chilean public body which enforces environmental law).

10.7 Innovative features

FIMA has had significant involvement with academia – this has been central to its work. FIMA has an environmental law journalist – and FIMA's Chilean environmental law journal is now on its ninth edition. Lawyers and judges read this journal – it has been cited in Chile's Supreme Court.

10.8 Achievements

FIMA has moved the barriers of environmental law into areas in which there is not environmental justice.

Approximately twice a year FIMA wins rulings which improve Chile's environmental law system, and help to move the barriers. For example, in a case won by FIMA this year relating to EIAs. In Chile there are two ways to go into the EIA procedure: complex and simple. In the complex route public participation is always required; whereas under the simple route public participation is only required if someone asks for it and if they meet certain criteria. These criteria were being interpreted by Chile's environmental agency in a way which restricted public participation in EIA procedures. FIMA challenged this interpretation – the Supreme Court held that this was wrong interpretation – its decision has overturned the way in which the criteria are interpreted, in essence the criteria have been removed and there are now more opportunities for public participation in EIA procedures. This was a victory for the individual case – concerning a mining project – but also a wider, more strategic victory which opens roads to public participation in Chile in EIAs more broadly.

10.9 Challenges

Funding is challenging. This is in relation to paying staff, but also for gathering sufficient evidence to be able to run cases. For example, whereas EIA cases are largely legal in nature; pollution cases require specific scientific evidence – yet FIMA has no money to be able to carry out this work. FIMA has managed by allowing its staff to work part-time – but it would be better if they were full-time. Litigation costs in Chile tends not to be very expensive. Each side ordinarily bears its own costs – a litigant only has to pay the other side's costs if it is a reckless litigant.

The media is not supportive of FIMA – it is difficult for FIMA to get media space and attention for its work. Chile's political system works in favour of extraction interests rather than conservation interests.

10.10 Advice

You need a good first case to get started.

You need committed people. FIMA has tried to pull in the best students – it faces opponents with the best lawyers available. FIMA's opponents are very well resourced. The only way for FIMA to beat them is to combine heart and mind. However, the best students can earn very high wages in the private sector. This means that some of FIMA's staff do not stay as long as FIMA might want.

Having an academic perspective has helped to attract the best students – students are often also attracted to FIMA's connection to grassroots environmental cases in Chile. FIMA seeks to hire people who have attended the best universities. Attracting the best minds and developing strong relationships with universities is important for FIMA.

A different perspective (this is not FIMA's approach) on the 'attract the best students' approach is a line of thought which says that you shouldn't look for the best 'Harvard lawyers' – they want to earn millions. Seeking out students from second tier institutions will make for more committed staff who will stay longer. Students from the top-tier of academic institutions will have rich friends and partners and will seek to move jobs which allow them to be able to keep up with their friends'/partners' lifestyles.

11 Friends of the Earth (England Wales and Northern Ireland) - Rights and Justice Centre

Website - https://www.foe.co.uk/community/campaigns/rights/rights_justice_centre_23310

11.1 Foundation Details

The Rights and Justice Centre (RJC) was founded in 2009-2010 by Phil Michaels (FOE's previous head of legal). It was founded to provide free or affordable advice and legal support to communities - to provide access to environmental justice.

FOE has employed lawyers since the 1970s. The RJC brought together a variety of skills – planners, lawyers and others. This collection of skills allows the RJC to provide effective support and advice for individuals who

could not otherwise get that support. The RJC is currently on ice (except for its internship programme) because it is without a head of legal.

11.2 Purpose

The RJC does not have a mission statement as such. Its purpose and objective is to provide access to environmental justice for those who are unable to afford it otherwise.

The website states that the RJC, "offers legal support, helping communities and other campaign groups protect their environment".[11]

11.3 Activities

11.3.1 Training

This focusses on empowerment. The RJC runs training sessions to give people the skills needed to take steps to defend themselves and their local environment. FOE's fossil free campaign is providing a lot of this type of training through the 'power up' scheme. This is an empowerment-focussed training programme where lawyers and planners visit communities and provide them with the tools and skills to take steps themselves.

The training provides information and presentations on judicial review, planning system and project-specific work as necessary.

The RJC provides 'community rights resource packs' – these are free online resources on environmental information, participation and access to justice rights. They are written in a way which is accessible – and can be understood by non-experts.

11.3.2 Legal advice and support (including litigation)

The RJC runs an advice line which members of the public can phone and access a qualified lawyer for free. The advice line is staffed by volunteers (who must be legally qualified) and is supervised by a member of the FOE legal team. The advice line operates two evenings per month (from 6:30 to 8:30 p.m. on the first and third Wednesday of the month). People can also email for advice - these emails are picked up at the same times as the phone line is operated. Clients can also leave voicemails on the advice line which are handled in the same way.

The demand for the advice services goes through peaks and troughs – sometimes demand drops off, at other times the RJC is inundated.

[11] See https://www.foe.co.uk/community/campaigns/rights/rights_justice_centre_23310.

The RJC carries out strategic litigation – e.g. the ongoing judicial review of the changes to the protective costs order system in England and Wales. FOE is a party to this litigation (alongside other NGOs). FOE was party to a challenge to the UK fuel poverty strategy in 2008-2009.

11.3.3 Legal internship programme

The RJC has had volunteers over the years – but it is difficult for volunteers to support themselves in London. This internship programme was launched in September 2016 – it pays an intern the London Living Wage to work at the RJC for a six month placement. It is funded for three years – the funding is divided into six internships which are each six months in duration. The internship provides entry level experience in the law and campaigning. Its emphasis is on providing opportunities for groups which are less well-represented in UK environmental NGOs.

11.4 Governance arrangements

The RJC is a unit within FOE – it does not have separate legal personality from FOE. FOE is made of two distinct organisations - Friends of the Earth Trust and Friends of the Earth Limited. FOE Trust is a charity. FOE Limited is a company limited by guarantee and not having a share capital.

The RJC is normally overseen by the head of legal. The intern and advice line are managed within the legal team. The training provided by the RJC is shared between the lawyers and planners.

The RJC has 3 lawyers, 2 planners and one intern. FOE provides administrative support. The number of lawyers has fluctuated between 2-3 over the years.

This model (hosting the RJC within FOE) has pros and cons. FOE has a public profile – and the RJC gains clients as a result of this. E.g. in relation to FOE's campaigns – the profile and campaigning work of FOE can be very useful in this regard.

The difficulty of this model is that it is possible for the RJC to be overlooked within FOE. It is important to ensure that the RJC's work is properly recognised within the organisation.

Generally, the campaigning work and strategic priorities of FOE do not conflict with the work of the RJC in providing clients with legal services – albeit this is possible in theory. The RJC is able to find other forms of legal support for clients where the RJC is unable to support them.

In the past, the RJC's important cases were often drawn in as a result of FOE's larger public profile – the RJC's cases have then fed into FOE's campaigning work. FOE can give greater heft to cases where it takes on cases on an organisational basis, and adds its campaigning and planning experience to the legal services provided by the RJC.

There is scope for tension using this model. The RJC can either deal with issues and queries from the public itself on a one-off basis, or if it is a larger case there is enough free legal support available elsewhere then the RJC can pass the client onto another lawyer who will be able to help them. However, if this model operated in a jurisdiction lacking the provision or network of professionals who provide free legal support enjoyed in E&W – then this would be much more difficult as the organisation would not be able to refer out to other organisations. Tensions with this model would be more likely to rise to the surface under such circumstances.

In relation to regulation, all of the RJC's lawyers are qualified and regulated in the normal way in E&W. The RJC enjoys an exemption from regulation as a non-profit which reduces the regulatory burden on the RJC – this disapplies part of the SRA rules (under the Legal Services Act 2007).

11.5 Funding Arrangements

The RJC is funded by FOE – with the exception of the internship. A fundraising campaign was undertaken for the internship – the RJC created the 'Phil Michaels memorial fund', supported by his family. The RJC organised drinks events to fundraise for this, and invited individual donations from lawyers and people who had worked with Phil.

The main costs of the RJC are staff time, plus some resources. FOE is heavily funded by individuals and donations (see annual reports for details of funders).

11.6 Partnerships

The RJC is part of various kinds of environmental law groupings – including LINK and the UK coalition on Access to Environmental Justice. It is a party to the ongoing environmental PCOs judicial review case (which is being brought by several environmental organisations).

11.7 Innovative features

The RJC was innovative when it was set-up. It was one of the first free or affordable legal services organisations in E&W when it was set up. The advice line was innovative in the area of environmental law.

It is different to the Environmental Law Foundation – the RJC is able to go further in terms of its ability to take on cases. Whereas ELF has to refer cases to external organisations at the point where a member of the public using its services could be taken on as a client; the RJC can take on clients and run cases itself. Being able to provide this continuity of service can be beneficial for clients – helping to guide them through what is often a confusing and sometimes hostile legal system.

The RJC takes an early intervention, comprehensive approach when challenging harmful developments. It combines the legal services of the RJC with FOE's wider campaigning expertise to challenge at an early stage. In this way, planning, legal and campaigning expertise is used at an early stage to avert bad decision-making.

11.8 Achievements

First, the RJC was involved in a successful challenge to a plan for a huge incinerator in South Wales. This has been the only plan for a nationally significant piece of infrastructure to be turned down under the Planning Act 2008. FOE's planners and lawyers came together working with local campaigners and counsel to prevent planning permission ever being granted for the project. It would have had massively harmful environmental impacts and was going to be imposed on a relatively deprived community. The planning application was turned down.[12]

FOE provided more than just legal services in this case – the RJC does a lot of work before planning permission or regulatory consent is granted – because (a) litigation is always a last resort, (b) the outcome of litigation is inherently uncertain and (c) it gives the RJC the opportunity to work with local campaigners while they are engaged and the RJC can support them. There can also be a further opportunity to challenge the project if the decision is flawed. This has been a successful model for the RJC.

Second, the RJC made an intervention in Sussex to change the way that the Environment Agency regulates fossil fuels – this involved limited legal time and resources**.** Cuadrilla applied for permission to carry out test drilling at Balcombe in West Sussex. The RJC intervened by writing to the EA to request that Cuadrilla be required to have environmental permits when doing so. The EA had not been requiring environmental permits up to that point. The EA now requires such permits to be issued for test drilling – and has acknowledged that this intervention by the RJC changed the way it regulates fossil fuels.[13]

11.9 Challenges

Resourcing – both in terms of people and money. The advice line is staffed by qualified volunteers and it has been challenging to ensure that there are enough volunteers at all times. The RJC carries out a rolling programme of recruitment and needs to constantly work on this.

The head of legal position is currently vacant – there have been difficulties in recruitment. However, this does not require the RJC to completely stop its work. There is no problem in attracting qualified staff in general.

[12] See https://www.foe.co.uk/resource/press_releases/merthyr_tydfil_24102011.
[13] See https://www.foe.co.uk/page/standing-your-right-have-say-balcombe.

There have been times when it has been difficult to get back to clients promptly – e.g. during summer break; or where a person needs immediate advice or representation and these needs are not met by the timing of the RJC's advice line sessions.

11.10 Advice

Providing a combination of skills and services for clients can be very useful – e.g. FOE's use of planning, legal and campaigning expertise. However, if the FOE model is adopted (i.e. embedding a legal organisation within another organisation), then there needs to be a very close alignment between the legal unit and the organisation – otherwise the relationship between the two could be very difficult.

The ability to rely on a wider network is useful. The RJC can go to a network of experts for pro bono legal support. This allows the RJC to field a wide array of questions.

Early intervention can be much less intense in terms of the legal resources which are required. This is able to generate just as much of an impact at litigation (albeit it is not as flash and eye-catching).

12 Jamaica Environment Trust

Website - http://www.jamentrust.org/

12.1 Foundation Details

The Jamaica Environment Trust (JET) was formed in 1991 by a group of citizens concerned about the state of Jamaica's natural environment. It is a non-profit, non-governmental membership organisation based in the Kingston and St. Andrew area of Jamaica, but its projects are implemented all over the island.

After about 10 years of educational work – JET became frustrated because environmental laws kept being breached. Jamaica's main environmental law was passed in 1991. One of JET's staff applied for and held a fellowship for 10 months in Washington, Seattle – and was exposed to environmental law and learned about early US environmental law victories.

The staff member returned and was determined to start a PIEL programme for Jamaica. Elaw had also been in contact with JET at this time. The MacArthur foundation had a 3 year project cycle – they gave JET funding which allowed JET and elaw to work on a proposal for environmental law on Jamaica. This work was funded for 9 years, it ended in 2013. JET needed some sticks as well as carrots.

12.2 Purpose

JET's mission is to protect Jamaica's natural resources using education, conservation, advocacy and the law to influence individual and organizational behaviour and public policy and practice.

12.3 Activities

Under the Macarthur programme JET has benefited from fellowships – its staff members have visited Elaw and received training in environmental law and general support for capacity building. JET has worked with elaw to participate more fully in public consultation processes. JET has been involved in the review of EIA processes, attending public meetings, receiving complaints from communities on environmental problems, reviewing state policies and taking legal action for communities.

JET has received support from elaw when it has needed experts for reviewing EIAs.

JET took its first judicial review case in 2006. This case concerned the approval of a development in a wetland area. There are no 3rd party rights of appeal in Jamaica – so JET had to use JR. The land had been cleared for the development before a public meeting had been held to discuss the development. The judge quashed the permit – this sent shockwaves in relation to standing for environmental NGOs in Jamaica, and ensuring that environmental laws have 'teeth'.

JET has used the Jamaican access to information law (passed in 2002) to make hundreds of information requests (often on behalf of communities). JET can use the experts at Elaw to review the data.

JET has carried out a number of pieces of environmental law research, such as a large access to information study to see how well the law was working, and a report on best practices for the bauxite industry.

JET does not charge for its legal services for communities – unless the issue is a private dispute JET will often investigate it and will not charge a client. JET uses a set of criteria to decide whether it takes a case to court. The community or complainant must be prepared to join in the lawsuit, and must be at the head of the suit. There must be some legal principle to the case – allowing JET to build Jamaica's environmental law jurisprudence; and there is also a success test to avoid unsuccessful cases.

12.4 Governance arrangements

JET is a registered company limited by guarantee under Jamaica's Companies Act (as a non-profit). JET is also a registered charity under Section 12(h) of the Jamaican Income Tax Act, meaning that donations to JET in Jamaica are fully tax deductible.

JET has a board with between 7-9 members – elected annually. JET's CEO reports to the board. JET has a deputy CEO and a group of project coordinators. JET's staffing fluctuates according to funding. There has been a lawyer on staff since 2003. Jet has 8 staff members.

The board meets 5 times per year – it approves salaries and makes board reports – staff performance appraisals are done in house.

There has been new charities legislation in Jamaica, imposing more rigorous requirements. This is part of a push-back against civil society groups. Charities must now produce audited financial statements every year.

12.5 Funding Arrangements

JET has a paid-up membership which fluctuates between 100 and 500. JET has approximately 80 corporate sponsors and a full-time staff complement of six.

JET has grant funding which covers about 40% of its core costs.

JET is a membership organisation. It has individual private members – usually about 100. Fees are low. JET does not follow this up too much. It is a struggle to make donations easy for people.

JET does not have a written policy on funding. It approves funders on a case-by-case basis – the test is whether JET thinks the funder should exist. Total Jamaica is a funder of JET. JET tries not to become reliant on any one organisation. JET has only refused funding once. It has spoken out about certain funders and this does not affect its activities.

JET runs fundraising events – 2-3 per year. It also sells merchandise.

JET has a capital sum which it earns interest from. It owns a property which it rents out. JET pays less rent on its current premises and earns more from its rented property this way – generating net income for JET.

JET's annual budget (in $Jamaican) – admin budget of $20.5m (~£125,000); projects budget of $66.4m (~£400,000).

12.6 Partnerships

JET has a number of partners:

- Elaw
- Donors become partners – JET's biggest project is funded by the Jamaican tourism enhancement fund (a Jamaican state agency).
- Community organisations, associations and NGOs.

- JET campaigns on natural places under threat – from 2013-2016 it ran a campaign to protect the Goat Islands from a transhipment hub which was planned for the area – this was run with other groups.[14]

JET runs a huge beach clean-up operation every year.

12.7 Innovative features

JET is the only environmental PIEL agency in Jamaica – it is one of the very few advocacy groups that speaks out and is in the media on environmental issues. This is a mixed blessing. Silent environmental groups are less effective – but being outspoken brings criticism in Jamaica's conservative culture.

JET keeps the environment in the media in Jamaica – this is an objective of JET. It tracks its engagement with the media. JET often seeks publicity and cultivates relationships with journalists.

JET hosts a number of materials using song, videos – e.g. its 'Nuh Dutty Up Jamaica' campaign on waste.[15] JET uses the Jamaican vernacular to connect with people.

JET uses celebrities in social media to use their following to support environmental campaigns as social media ambassadors. JET uses people with large followings on social media to broadcast its message. JET has just signed Elaine Thompson (a Jamaican athlete) – she is now an ambassador of JET. JET has a formal contractual relationship with its ambassadors – there are certain expectations during their contractual period.

JET seeks to win the battle for hearts and minds. Scientific arguments on their own are not enough to secure change and protect the environment. What is needed is to make people feel something – using artists helps this.

12.8 Achievements

JET filed the first PIEL suit in Jamaica. JET has put the environment on the map in Jamaica. It is now a regular political topic - the environment is now at the table. Journalists now call JET for comments and reactions to certain developments. JET could now call a press conference and journalists would attend. JET has exposed young people to environmental issues.

12.9 Challenges

Funding – grant funding has dried up in certain years. JET has a problem of persistent under-resourcing. JET can struggle with unexpected outlays – such as where computers fail or pipes burst.

[14] See - http://savegoatislands.org/
[15] https://nuhduttyupjamaica.org/

There is a personal toll from standing up and being outspoken in public – JET's staff have experienced some threats and hostility. Some in Jamaica feel that JET's work is anti-development; so there has been some hostility from the state, private organisations and individuals – particularly the state environmental regulator whose work JET often criticises. At public meetings there can be unemployed people who see JET as a threat to developments and potential sources of jobs – this is a dynamic which is set up by developers.

The Government funds JET despite it being outspoken and critical of the state. JET's educational programme started after a tourist went scuba diving and wrote a letter to the press complaining about the litter in the ocean surrounding Jamaica. JET was approached to do underwater clean-ups. The quality of JET's work has made it a trusted organisation – and both of Jamaica's main parties will now fund JET when in Government.

The CEO of the state environmental regulator also supports JET's educational work. There are some who think providing funding will quieten JET, but JET works to avoid this.

12.10 Advice

It is important to take a longer view – think in terms of institution-building and overall objectives. You must have a purpose – must be doing something and stand for something.

There is no such thing as an environmental victory – at some point someone will want to damage land. It is a fight that is never won. In terms of evaluating JET against its original aims – this is a bigger issue than victory at one site – but rather a number of matters which can't be quantified such as standing up for principles, educating, involving and engaging.

Using the law to advance social movements is vitally important – law is our best effort at moderating our dealings with each other and the planet.

Understand the incremental nature of success at a PIEL organisation – you tend to only win small victories – e.g. towards increasing public participation, etc. Understand that it is an incremental process – you are building an edifice. At times you should stand back and get perspective on your organisation's achievements.

13 JustRight Scotland

Website - http://justrightscotland.org.uk/

13.1 Foundation Details

JustRight Scotland (JRS) opened on 2 May 2017.

It was set up to respond to a gap in the provision of legal services in the access to justice sector. It was felt that the traditional law centre model wasn't always a good fit for emerging social justice issues. The traditional law centre model tends to be restricted to a geographic area – or focusses on specific topics (e.g. housing or immigration) – but it has become increasingly clear that some issues are best addressed in a national context, or in finding solutions that require cross-sector collaboration. NGOs or groups working in these areas had limited options when they required legal support or assistance. Many NGOs do work that impacts on legal rights – but this also may not fit with a traditional law centre model. It was felt that there was a gap in available services - the strong response from organisations that have already approached JRS indicates the existence of a pre-JRS gap.

13.2 Purpose

The purpose of JRS is to address access to justice gaps by facilitating collaborations, cross-sector and cross-discipline that harness all the resources available to JRS and its partner organisations. It also aims to share the learning it gains from piloting a range of different collaborative models used. It does not always aim to run projects for long periods of time – but instead to facilitate them in their initial stages; it is more of an incubator of access to justice projects. JRS does not aim to be a large employer.

Vision: 'We believe that social justice is better achieved when lawyers work together with professionals from other disciplines – and across sectors and borders – to pool expertise and resources, with the shared aim of realising human rights and reducing inequality. We believe how we work is as important as what we do. We also believe in evaluating and sharing what we learn along the way.'

Mission: 'A targeted approach to early and accessible information and advice within the social justice and rights sector recognising limited budgets require fresh thinking together with innovative solutions. Strategic collaborations with the legal and non-legal sector at a local, national and international level to ensure meaningful social, economic and structural change.'

Aims:

- Develop the JRS Scotland brand.
- Embed an inclusive organisational culture.
- Identify gaps in the justice and human rights sector in Scotland and deliver specialist legal solutions.
- Build sustainable models of collaborative social justice.
- Empower individuals and organisations to promote and protect human rights through innovative and inclusive education, communication and digital media strategies.

13.3 Activities

JRS provides the following services:

- Specialist and collaborative legal solutions.
- Widening access to early legal advice through helplines, surgeries, casework and advocacy.
- Dissemination of rights based information through public legal education and professional training.
- Contribution to policy, research and innovation at a local, national and international level.

JRS' current projects include:

13.3.1 JustRight for Refugee Children

JRS has been funded to run collaborations with corporate law firms (has a system where specific cases are run by corporate lawyers and supervised by a JRS lawyer linked to a UK-US collaboration Kids in Need of Defense UK) and with the Scottish Guardianship service. JRS for refugee children provides direct legal advice and representation to migrant children and young people, seeks to establish collaborative working pilots, contributes to policy and research and disseminates rights-based information through public legal education and professional training.

13.3.2 Scottish Family Reunion Legal Service

British Red Cross and JRS are providing a free legal information and casework service to refugees living in Scotland who wish to bring their family members to Scotland (launched in September 2017). Funded by Unbound Philanthropy.

13.3.3 JustRight for Refugee Women

JustRight for Refugee Women aims to improve access to justice for, and increase protection of, refugee and migrant women and girls in Scotland who have been affected by violence. It will provide specialist, early and targeted legal casework to individuals in the fields of asylum and immigration law and other relevant legal matters, provide advice to individuals and professionals through specialist advice lines and legal surgeries, and will share expertise at a national and international level.

13.3.4 Scottish Women's Rights Centre

The SWRC is a collaboration between Rape Crisis Scotland, JustRight and the University of Strathclyde Law Clinic. It is funded by the Justice Department of the Scottish Government, administered by the Scottish Legal Aid Board.

By working with a specialist solicitor and an experienced advocacy worker, the SWRC strives to fill the gaps that exist between women's experiences of gender based violence and their ability to access justice.

Informed by its direct work with victim-survivors of violence and abuse, it seeks to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender based violence.

13.3.5 EEA Street Homelessness Project

This is a collaboration between JRS, the Law Service at Shelter Scotland and Streetwork. It provides legal advice and information to EEA nationals who are rough sleeping or at risk of rough sleeping, on their legal rights in relation to their immigration position, destitution and homelessness, and potential exploitation. It also aims to increase professionals' understanding in these areas by providing free training and support to frontline organisations supporting destitute and homeless individuals in Edinburgh.

13.4 Governance arrangements

JRS uses an LLP regulated by the Law Society and a Scottish Charitable Incorporated Organisation. There is a service agreement between the two organisations.

This LLP-charity relationship is the typical set-up for law centres in Scotland. However, there are many differences between organisations in terms of how this relationship works. E.g. whether the LLP partners sit on the charity board, whether there is a written agreement between the organisations, the responsibilities of the board, etc.

JRS employed Brodies to plan and set up its regulatory structure. This was expensive but it was important to get the governance arrangements right at the outset. It also employed a management consultant also to run through the governance and operational issues, and for advice on where to invest its limited start-up funds (e.g. website/IT systems rather than premises). The founders of JRS spoke to many people and other experts in arriving at the position that this was the right structure for its work.

Operating as a law firm in Scotland is expensive, in terms of Law Society requirements. Once the charity is set up, it will effectively be left with three organisations to run: a law firm, an LLP and a charity (all to do one thing). This reflects the limited governance options available for access to justice organisations in Scotland.

JRS' board has members with legal, finance, funding and human resources experience - http://justrightscotland.org.uk/our-board-2/

13.5 Funding Arrangements

JRS is funded largely by funders – a mix of NGO, charitable foundation and grants. Funders include Unbound Philanthropy; FirstPort and the Legal Education Foundation.

JRS will have a social enterprise element too. It will seek to generate own income also – e.g. through running training.

JRS has an ex-funding head on the board who brings very useful experience. It also has a specific funding strategy.

13.6 Challenges

The initial planning of the vision, strategy and governance matters were challenging.

Governance and compliance requirements – you need to keep an eye on this and it can require a lot of work. Human resources and employment can be resource-intensive also – JRS has a member with this experience on its board.

13.7 Advice

Important to get the vision right – this drives the work of the organisation. It must be simple, clear, easily communicable and put at the centre of your organisation's work. The organisation's work must fit with the vision – and the vision should allow the organisation to prioritise.

Funders will fund an organisation with good governance and a good vision.

Take the time to think creatively and strategically. Everything should be set down and agreed to before you start. Think of how you are going to implement your vision – and how each of your staff and the members of your organisation are going to contribute to that.

Think about bringing in a management consultant (~£500/day). This could be funded by a future advice stream from the Legal Education Foundation or FirstPort Scotland. There are funding streams which exist for developing the governance arrangements – e.g. FirstPort.[16]

14 Legal Services Agency

Website - http://www.lsa.org.uk/

[16] See http://justrightscotland.org.uk/2017/08/firstport-funding/.

14.1 Foundation Details

The LSA was founded in 1989. There was a view that there were some fundamental human rights which weren't being addressed by the legal profession at all - such as defended evictions, homelessness, mental health and dementia. When the LSA was set up there was virtually no-one doing representation for people being detained under mental health legislation; there were lots of people going without representation in appeals.

14.2 Purpose

The company's objectives are to tackle the unmet legal needs of those in disadvantage in a human rights compliant fashion. It also aims to provide education to assist organisations with similar objectives to the LSA and create systemic change.

Vision Statement: "LSA's vision is to provide access to social justice through the promotion of legal rights provided, for instance, by human rights and equalities law. This it does by undertaking high quality casework, education and campaigning and policy engagement. We aim to do this in an innovative, effective and sustainable fashion. We aim to make our services accessible so that no-one is left out: tackling unmet legal need, revealing injustice, challenging the system."

Aims:

- Develop legal remedies, not only by case work but also by ensuring that the lessons we have learned are spread throughout the community by education, seminars or campaigning.
- Undertake its work in a fashion that enhances the fulfilment of the community as a whole, as well as of the individuals involved. Change for everyone as well as our individual clients.
- Carry out its work fully mindful of human rights and the principles enshrined in the Universal Declaration of Human Rights to the effect that a pre-condition of peace is that all obtain their rights.

14.3 Activities

The LSA provides advice and representation to clients with unmet legal needs from offices in Glasgow, Edinburgh and Greenock. It provides education by organising a range of seminars, workshops and conferences and also contributes to law and policy development (e.g. responding to consultations).

14.3.1 Advice and representation

The LSA provides advice and representation to clients on asylum and immigration law; housing – focussing on evictions and homelessness; mental health; criminal injuries compensation. The LSA does not adopt a

classic strategic litigation focus – it tries to do as much litigation as possible. It finds that this gets better strategic outcomes for the LSA's aims than a more selective approach would.

14.3.2 Legal Education

The LSA organises seminars, workshops and conferences on most areas of legal practice. These are aimed at people concerned with the law and legal rights - including practitioners, anyone in the private, community, charitable or statutory sectors, policy makers, managers, campaigners and students.

14.4 Governance arrangements

Legal Services Agency Ltd. is a company limited by guarantee (and not having a share capital) and a charity. It employs ~20 solicitors to do its work through a Limited Liability Partnership (named 'Brown and Co. LLP').

Brown and Co. has insurance liability under this structure. Only a legal firm can apply for legal aid. Any legal aid income made by Brown and co. is assigned to the LSA.

The LSA has a board. The board members have legal, advice, local authority politicians, and academia experience. The CEO of the LSA sits on the board.

Whilst Brown & Co. is professionally independent from Legal Services Agency, they operate within policies set down by Legal Services Agency in general (but not with reference to the conduct of any individual cases).

For the purposes of the work of a solicitor in Scotland, all the staff of Legal Services Agency are employees of Brown & Co. However, for all other purposes, all staff of Legal Services Agency, including the Principal Solicitor/Chief Executive, transact with the public as employees of LSA. All income from all their work is the property of Legal Services Agency.

14.5 Funding Arrangements

Roughly ½ of its funding is from legal aid fees and ½ comes from grants. The LSA does some private work also - e.g. executries. Having a mix of funding has given the LSA some stability, meaning that it has been able to provide secure employment for its staff.

It receives grants from public bodies such as the Scottish Government and Glasgow City Council. The LSA's work – which can involve making legal challenges to the work of the Council and the Government – has not led to any significant problems with funding. It is important to be sensible and ethical in terms of the cases taken on. One senior council official thanked the LSA for 'trying to keep us honest'.

The LSA's funders include the Scottish Government (for violence against women work and an in-court advice desk), Comic Relief, the Paul Hamlyn Foundation, local authorities in Glasgow, Inverclyde, Edinburgh, West

Lothian and Midlothian, the Social innovation fund and the Strategic Legal Fund for Vulnerable Young Migrants,

In some ways government funding can be easier to manage (compared to funding from trusts or foundations) given that it is usually just a matter of meeting certain criteria. Whereas for trust funding the criteria are often much broader and the outcomes are more uncertain.

There are some advantages to government funding in that public bodies are much more exposed to the work of the LSA. For example, a grant decision-maker may be exposed to the LSA's work on a daily basis – (s)he may sit close to a colleague who is regularly involved with (or confronted by) the LSA's legal services, such as a council staff member who works on housing issues. In this way, government funders might be better able to appreciate the LSA's work than a trust, which tends to be more removed from the LSA's work.

Trust grant applications can also be very complex and involve a great amount of work. Trust grants tend to come with greater reporting requirements – which is additional work.

14.6 Partnerships

The Scottish Women's Rights Centre has many partner organisations. Merging these has been challenging, due to there being too many different traditions and identities involved. E.g. promoting campaigning interests versus clients' interests – there is a tension between campaigning work and providing legal representation which can lead to problems. Lawyers working there had a situation where they felt they had two masters - and felt the Rape Crisis approach (broadly one of providing legal services with an emphasis on campaigning) was preferable to the LSA's approach.

The SWRC is a separate charity. It gets a grant which is given to the LSA to provide legal services, to the Rape Crisis centre for providing the advice line and doing advocacy and public relations work and to the Strathclyde law clinic whose students staff the advice line.

14.7 Challenges

Maintaining the LSA's vision has been challenging – it has been difficult to expand enough to meet the existing legal need. The LSA has always been on the edge in this regard.

There have been internal discussions about moving the LSA to a more grant-funded model which have created tensions.

14.8 Advice

Work out what the objectives are – avoid having a jumble. Think through the issues you want your organisation to address in advance, rather than jumping in at the deep-end and working things out as you go.

Think 'what do we want to achieve' and work backwards from there, ask 'what organisational structures and objectives should we have in order to achieve that objective'?

Consider whether your organisation will be client or objectives-focussed.

Don't call it an 'environmental' law centre – people will think of the big book that has environmental law written on it. Environmental law may look a bit academic to someone involved in a nuisance case, a planning matter or a compensation claim. People might not recognise that their case is an environmental one.

Don't focus your publicity on natural landscapes – focus on more human, relatable environmental problems. People know that environmental law relates to the countryside, but they don't know that it relates to the urban pollution problem beside their house.

Getting the name right is important – with a strapline with a more academic strapline. LSA has an uncatchy name – was set up by the 'Technical Services Agency' which is a tenant-led architectural practice. Could use 'Natural Justice – Scotland's National Environmental Law Centre' instead.

15 New South Wales Environmental Defenders Office

Website - http://www.edonsw.org.au/

15.1 Foundation Details

Lawyers met in 1981 to establish a legal service that would be on call to protect the environment. The EDO NSW was the result of four years of planning and fundraising. It was founded in 1985.

EDO NSW was preceded by progressive planning reforms in NSW. The Land and Environment Court Act 1979 established a specialist court in NSW to hear environmental, building and planning cases.

It has gone through several phases: (i) planning and fundraising 1981-1985, (ii) tough, tenuous, tenacious early times in the latter half of the 1980s, (iii) steady consolidation through the 1990s, (iv) 2002-2012 was a period of development, stability and growth, (v) there was a backlash from 2012 as funding was cut and uncertainty increased. The EDO has faced a long and difficult process of establishment.

There was an initial conflict between a cautious board and the EDO's litigious principal solicitor when it opened. The EDO was a radical experiment, and was initially very vulnerable financially and politically. It started reactively and conservatively.

15.2 Purpose

Aim - 'To help people to protect the environment through law'.

15.3 Activities

15.3.1 Advice, representation and litigation

The EDO NSW provides preliminary advice to communities. It operates an accessible public advice service, 9-5 - Monday to Friday. It can then vet issues – if it's a private matter and the client is wealthy, then the client may need a private lawyer. Initial advice is free, but is capped at 15 minutes - in very limited circumstances the EDO may be able to provide more detailed advice and/or representation (e.g. public interest cases may be taken on by the EDO NSW).

At one end of the advice service are everyday cases – then at the other side are cases concerning enormous corporations and extractive projects of public significance. The EDO litigates according to a set of case selection criteria.[17] In a normal year – EDO NSW deals with ~1500 advice line matters, hundreds of written advices, and dozens of cases – only a handful are litigated. The EDO has promoted early engagement initiatives to ensure clients approach them early with issues.

A large part of the EDO NSW's work is access to justice-type work. It is an environmental law-focussed, 'community legal centre'-type body. It helps communities to protect the environment. EDO NSW does not take cases in its own name, it represents communities.

In terms of means testing – the first phone call and initial advice is free. EDO NSW receives funding as a community law centre from the state to provide free legal advice. It is only when taking a matter further, that any means-testing is carried out. If litigation occurs – the EDO NSW may then require a contribution from the client. This depends on the importance of the case. The EDO's guiding principle on means-testing is to never refuse legal assistance where there is need but the client cannot afford it – this commitment to access to justice is central to the EDO NSW.

[17] See http://www.edonsw.org.au/legal_advice.

15.3.2 Law reform

The EDO NSW applies a multi-disciplinary model. The law reform arm has an advocacy component. Whereas the role of staff acting in providing legal services is to act as officers of the court, and they are required to act in accordance with their professional legal duties, according to clients' interests; the law and policy reform work allows the EDO to be expert advocates involved in advancing laws. It uses casework experience to promote and advocate for improvements to environmental laws. It is important to be credible in this type of work – experience of using the law in practice with communities provides this.

For example, if the EDO NSW loses a case – and the case demonstrates a legal deficiency – it can use that as a case study to seek reform. The result of this mode of law reform work is compelling because it is based on real-life experience – it allows the EDO NSW to tell a story. EDO NSW has built up significant environmental law expertise which also supports this.

The law reform work has several components – it is reactive using casework and responding to parliament. There is a proactive component too, where the EDO actively looks for policy absences and flaws. EDO NSW will put out law reform thought pieces annually. E.g. in 2016 there was no NSW climate policy – this led to developments being approved which had negative climate implications. EDO wrote a paper with 13 recommendations on climate policy for NSW – and was able to get responses on this to develop the paper. EDO was then invited by the government to discuss this. Because it is not a campaigning group, the government will sit down to talk to them. The EDO is listened to – they have a certain leadership and influence role.

The EDO has developed a 'just say it ourselves' mode, moving from only adopting policy positions when commissioned by clients – to one of taking its own policy proposals.

15.3.3 Outreach work

EDO NSW goes into communities to provide services – the bulk of NSW's population lives in urban centres and on the coast. There are significant needs in rural areas. EDO NSW reaches out to those communities to help them to understand environmental laws and to empower them understand the impact they can have in protecting their environment. There are significant public participation rights in NSW. A broad recognition exists that decision-makers may not have the requisite local knowledge to make effective decisions - local people often have important substantive contributions to make. EDO is the interface between decision-makers, courts and the community in this type of work.

15.3.4 Aboriginal engagement programme

Aboriginal cultural heritage laws are intertwined with environmental law – aboriginal communities have unique and diverse needs. EDO NSW has to serve them in a way which is culturally appropriate – the EDO has a tailored programme for this work, and a specialist committee which directs this work. This provides the EDO's legal services to Aboriginal people and communities.

15.3.5 International programme

The EDO NSW works with similar civil society organisations who are pacific neighbours – such as Papua New Guinea, Solomon Islands, Fiji and Vanuatu. This work is funded by US and European foundations. The EDO assists those organisations to do similar work to itself. The EDO helps to build capacity, working with the lawyers of organisations in these countries. Can visit these countries or help remotely, and engage barristers to assist with litigation.

15.3.6 Scientific expertise

Environmental law intersects law and science – EDO NSW employs an in-house scientist. All of the EDO's work is informed by science. The scientist has access to a register of technical experts in certain areas who are able to assist the EDO. E.g. when the EDO requires an expert to examine an EIA, or to appear as an expert witness in court. The register has around 180 experts.

The EDO NSW started this list of experts by contacting certain associations and organisations of experts – it approached professional bodies and societies. Now the EDO very rarely has to actively look for experts – scientists will often approach the EDO. The key to this has been using experts professionally and building a reputation for doing so.

15.4 Governance arrangements

EDO NSW is a company limited by guarantee. It has a board subject to a constitution – the board is required to have not less than 6 and not more than 11 members.

It has a CEO, a principal solicitor who is responsible for litigation. 2 outreach staff. It employs several solicitors. It employs (on average) about 20-25 staff – these are mainly legal staff with 3 administrative staff, and a director of operations (who works on HR and finance with the CEO).

15.5 Funding Arrangements

EDO NSW currently has a $2.2m annual budget.

It receives funding from the public purpose fund. This is administered by the law society – it is derived from interest earnings from clients' monies held in solicitors' trust funds. This money is distributed to community legal centres and organisations delivering public interest legal services. This used to account for ~82% of the EDO NSW's funding – it is now about 30%.

The NSW government gives some funding. Receives project grants from the environment arm of NSW govt. This normally goes towards outreach work.

The rest of the EDO NSW's income is from donations and trusts. Pre-2012, these sources accounted for ~5% max of the EDO's income – it is now about 60% of its income. Since 2012 – the EDO had a radical shift on income generation. It used to get money from the Commonwealth Government. This was cut following the 2014 election.

Some donors do not want to be named. One source is AEGMN – Australian Environmental Grant Makers Network. This is a fund developed by philanthropists to coordinate environmental donations, to make environmental donations more strategic. EDO NSW receives funding from members of this network.

15.6 Partnerships

Works in bilateral relationships with other Australian EDOs. EDO NSW is the largest and most resourced of the Australian EDO network – it helps the other six EDOs and carries out certain programmes with them.

It partners with environmental organisations and law associations – regional and national environmental law associations such as the Fiji, Papua New Guinea and Vanuatu Environmental law Associations.

It has worked collaboratively with environmental campaigning NGOs - providing expertise to these organisations.

15.7 Achievements

EDO NSW has helped to put public interest environmental law on the agenda – it has been a 35 year journey. Its biggest achievement is not one particular case or individual victory – but the development of a sustained body of environmental jurisprudence through its strategic, consistent and long-term approach to the development of public interest environmental law. The EDO has become a function of democracy and the rule of law in Australia.

15.8 Challenges

Funding - there were funding changes in 2012-2013 for EDOs – following a mining industry backlash relating to a challenge to the Carmichael coal mine. Finding enough money to do its work and pay staff properly is challenging.

Being able to survive through periods of sustained attack from very wealthy vested interests has been challenging.

There is a constant challenge and tension with public interest environmental lawyers wanting to become environmental campaigners. There is a 'rockstar appeal' of becoming famous. There are already a number of campaigning organisations in Australia. It is important to recognise that the EDO is not a campaigning organisation. Communicating that distinction to the public can be challenging – this goes back to the EDO's greatest achievement of becoming a rule of law institution.

Distinguishing campaigning and law reform work – a law reformer looks at ways to improve the law, and takes influence from substantive features of good laws which are internationally recognised, and can be used domestically. Law reform is informed by evidence-based work – there is a degree of cross-jurisdictional legal analysis.

15.9 Advice

Jurisdiction is important – aim to be number one in your jurisdiction in terms of leadership and influence. Seek to operate in the most conservative location, operation and context. Law is slow and conservative by nature. The rock star approach will get one result every 100 years. The slower, more conservative approach which seeks to make a sustained contribution to PIEL will have better outcomes.

Seek to push the boundaries as a clever lawyer – give judges something to hang their hats on. The EDO would target key establishment figures (e.g. judges) to speak at its events on certain relevant topics, such as barriers to public litigation. It could then use influential quotes from these speeches in litigation – e.g. judge X said Y on standing in extra-judicial speech Z.

Protect the environment – do not aim to become a 'legend'. Aim to make a contribution to communities and achieve social change – change the values of society to better value environmental protection.

The multidisciplinary approach works – this area of work needs scientific expertise and support; in addition to legal expertise.

You need resources – both money and committed people – a small amount of money can go a long way with the right strategy.

16 Scottish Child Law Centre

Website - http://www.sclc.org.uk/

16.1 Foundation Details

The SCLC was founded in 1991 as a Limited Company.

16.2 Purpose

Aim - The aim of the Centre is to promote knowledge and use of Scots law and children's rights for the benefit of children and young people in Scotland.

Objectives:

- To provide information, advice and representation (the SCLC does not currently provide representation – it did originally). Advice is given by telephone and email to anyone making an enquiry (by phone, email or using a web contact form).
- To consider, comment and advise on legal issues (this includes commenting on draft legislation for Scottish Government, various working groups reporting to/commissioned by government, external organisations seeking review of policies and procedures, and information posted on its website).
- To provide opportunities for lawyers, social workers and others to keep up to date with legislation, practice and procedure. (This is done through standard and bespoke training and events (seminars, conferences, masterclasses) which provide CPD for legal professionals and others across the public, private and voluntary sector; and also through its legal advice helpline which receives calls from other professionals seeking clarification on legal issues, or in some cases, direct referrals of clients from other services.
- To arrange conferences, lectures and training sessions, publish pamphlets and notes (the SCLC has a series of “Quick Guides to…” various areas of the law aimed at young people). It provides workshops to schools and carries out the regular delivery of sessions to local schools in Edinburgh (e.g. on Children’s Rights, Young People and the Law (including some criminal justice), and Sexual Health).
- To initiate research into legal issues (done by volunteers from Scottish and foreign Universities. The volunteers receive support from the Centre for this work, and the SCLC receives full access to their research in return). The research is child law-focussed. E.g. statistics on children attending court, legal

costs, legal processes, checking current legislation and monitoring changes in legislation. Interns work on an area of research while at the SCLC.

- To provide reasonable advocacy for causes which directly further and which are entirely ancillary to the achievement of the foregoing. This can be through formal channels such as responding to Government legislation (draft or existing), representation on various working groups and committees etc., through events such as conferences and masterclasses, an annual Roundtable table discussion at the Scottish Parliament, and by the values which underpin the SCLC's core services which are the legal advice line and training to external organisations and individuals. The SCLC has a presence on social media but has to operate within the legal professional code of conduct, so tends not to use this for commenting on political or other events. The SCLC will occasionally support a campaign led by another organisation, such as TIE (Time for Inclusive Education).

16.3 Activities

16.3.1 Advice line

The SCLC runs a free legal advice service on Scottish Child law – this has a phone line staffed by solicitors. This helpline is available to anyone seeking information, guidance and clarification about matters relating to child law in Scotland. Runs 9:30-4:00, Monday to Friday. Freecall line for U-21s. Can also email or text for advice. This is the core of the SCLC's service.

16.3.2 Events

The SCLC runs events - e.g. open and external training sessions, school workshops, more general events.

Training is the SCLC's second largest strand, in terms of staff time and turnover. The SCLC runs standard (half and full day) courses open to anyone to attend, and training requested by other organisations, including Local Authorities across Scotland. Regarding the latter, this might be a one-off training session, or a series of sessions for the same organisation who it is working more closely with. A wide range of organisations use its training services and this is an important source of income generation for the Centre.

16.3.3 Publications

The SCLC provides publications on child law topics.

16.3.4 Responding to consultations

The SCLC responds to consultations relating to child law.

16.4 Governance arrangements

The SCLC is a company and a charity. It has a Board of Trustees responsible for overseeing strategic planning and the financial position of the organisation.

16.5 Funding Arrangements

The SCLC receives grant funding from the Scottish Government. This currently (2016-2019) covers about 70% of its running costs.

It also receives smaller grants from various other sources, including several Scottish local authorities, the National Lottery (Big Fund) and Awards for All. It receives income from the provision of training and sale of publications, membership subscriptions, donations and fund raising.

16.6 Partnerships

Various partnerships have formed over the years, generally on a short term basis (1-3 years) for the provision of training or as a joint funded multi-agency project. Examples include a 3-year funded "Family Decision Making" project working with Children 1st and One Parent Families Scotland to provide legal advice and information for separated parents and families; and a "Take Note" 3-year funded project working with Barnardos Scotland to provide legal services for children with Additional Support Needs.

16.7 Achievements

The SCLC's major impacts have been the numerous positive outcomes it has helped to facilitate for individuals and families facing difficulties, conflict and uncertainty. Often the SCLC is the first or only service where people have found the answers and information they need to allow them to understand their legal rights and take appropriate actions in what might seem like a hopeless or intractable situation.

16.8 Challenges

The biggest challenges have been staff turnover (the SCLC has been short staffed for long stretches), and the capacity to respond to the increasing volume of enquiries to the advice service which is both a long term trend and seasonally variable. Funding from local authorities is increasingly difficult to obtain as budgets are cut and limitations are placed on funding running costs.

16.9 Advice

Select a high quality staff team – qualified, skilled, personable, hard-working, and with a shared set of values.

If you are a charity, many people will support your work in small ways for free; exploit this potential and network widely. Free support has been sought for a number of things, mainly things the SCLC cannot afford to do or which are not covered by core funding. These include providing meeting room space given for free by various law firms for training, website development, speakers for conferences, and volunteers which help run the SCLC and assist at events. Always ask for charitable discount from suppliers etc and - SCLC usually gets it even if it is not offered.

Being a small team presents its challenges but it also allows you to be flexible and more responsive to change. Adopt the best of business practices without having to operate for profit in every area of operation.

17 West Coast Environmental Law

Website - http://www.wcel.org/

17.1 Foundation Details

West Coast Environmental Law (WCEL) was founded in 1974. It was founded as a summer centre for law student volunteers – not in response to any particular conflict or issue, but to provide support for environmental legal issues generally. WCEL was set up a year or two after the Canadian Environmental Law Association was established in Canada.

WCEL is based in Vancouver in British Columbia (BC), Canada. Its work focusses mainly on BC, but it also works at a national level.

17.2 Purpose

WCEL has two main mandates:

- Support and responsive role: to help people to understand what law says and how it applies to their situation (legal aid role). Uses some means-testing in relation to access to services. Watchdog function – helps the public to understand what the government is doing or could do.
- Advancing environmental law: more positive role. It directly advocates for stronger environmental laws in BC and nationally. WCEL collaborates with movements to provide them with legal support. WCEL does little litigation – its support role is more of an enabler of litigation.

WCEL funds litigation; it tends not to carry out its own litigation. It provides Information, support and advocacy.

From website: “West Coast Environmental Law is a non-profit group of environmental law strategists and analysts dedicated to safeguarding the environment through law. We believe in a just and sustainable society where people are empowered to protect the environment and where environmental protection is law.”

17.3 Activities

17.3.1 Responsive role

WCEL gives advice to people. It answers phone calls and emails from members of the public seeking advice on environmental law. It helps people to understand the law – or identify the areas of government with the capacity to help clients.

If a query goes beyond advice, WCEL can also refer clients to its Environmental Dispute Resolution Fund. This provides money to hire lawyers outside the WCEL office, to carry out legal work, including litigation, for clients.

Initial advice is not means-tested. It can offer advice on a private problem – often queries concern a public environmental matter where it is not appropriate to means-test. The dispute resolution fund uses means-testing and the private nature of the dispute can be considered. Identifying to what extent the dispute is private or public in nature is important. If a client is able to demonstrate that his/her case is part of a broader discussion or wider environmental issue – then a less intensive means test is applied. The fund is prioritised towards legal work concerning broader public interest issues – not private disputes.

WCEL runs an environmental law alert blog which provides comment on emerging environmental law issues in BC.

WCEL responds to government consultations in environmental law – prepares its own submissions and also encourages the public to respond.

17.3.2 Proactive role

WCEL creates a strategic plan every 3-5 years for its work – this is designed to advance environmental protection proactively. Its runs a number of programmes which are staffed – providing support to allies, e.g. to local government to promote resiliency, it has a programme on challenging pipelines to tar sands – and is working with communities to challenge social licence of fossil fuel companies. One colleague appeared as counsel to challenge a pipeline – this was a rare piece of work for WCEL in litigation.

WCEL has responded to the rollback of environmental laws at a federal level in Canada.

Relaw project – in its new strategic plan – WCEL is working with indigenous governments on issues they have identified, to look at how indigenous laws can be identified and recognised by legal audiences and legal systems, to advance the objectives of indigenous communities and deal with their priorities.

Climate work – WCEL is looking at the responsibilities of corporations in relation to climate change – raising questions on these through campaigning. This work emphasises local climate impacts.

Communications – WCEL has an e-letter and a social media presence.

WCEL is the biggest it has ever been.

17.4 Governance arrangements

WCEL is made up of three incorporated societies:

- West Coast Environmental Law Association – not a charity – some staff time is funded by both. This is a provincial society.
- West Coast Environmental Law Research Foundation. This is a registered charity, which means that it is limited in the activities that it can carry out (there are limits on its advocacy activities). It focusses on education and law reform. Think-tank-esque in nature; rather than an advocacy organisation.
- West Coast Environmental Dispute Resolution Fund Society – this administers cash – historically was a charity. Would not qualify as a charity now based on recent advice from Revenue Canada. Not enough use of it as a charity to continue as charity status.

Two WCEL organisations are key – WCELA and WCELRF. There is some overlap between the two – but they do not have the same board. Independence between the two is necessary. Meetings are held at the same time. Members involved in discussions across the two organisations.

17.5 Funding Arrangements

Historically a huge portion of funding has come from the Law Foundation of BC (albeit this has reduced recently). This receives the interest on lawyer trust accounts in BC. The provincial Government passed legislation requiring this interest to be collected – and for it to be used for certain purposes. Equivalent schemes exist across Canada, Australia and US. In the US, state bar associations often administer the funds.

This used to account for 50-60% of WCEL's budget. WCEL viewed this as too high a level of dependence on one source of funding, and sought a greater diversity of funding. The rest of its funding comes largely from private foundations.

WCEL has also made efforts to increase its individual donor base.

The law foundation has had trouble. The economy tanked in 2008 (at the time of the global financial crisis) – meaning that there was less client money going into trust accounts. This funding was reduced – a large proportion of funding was cut in half. Now the Law Foundation funding accounts for about 20% of WCEL's budget. It funds much of the responsive side (~$100k p.a.).

Law Foundation of BC fund small amounts of other programmes. They are always concerned about the means test.

Bulk of funding for the proactive side comes from donations and private foundations. This has resulted in controversy. There is some perception that WCEL receives its marching orders from funders, particularly foreign funders (US-based mainly). It is difficult to build an organisation initially without the use of private foundations, i.e. solely using individual donors. The previous Canadian Federal administration attacked charities as foreign funded radicals.

Individual donations go to the research foundation – there are charitable tax receipts benefits for donors. WCEL have questioned this – providing greater choice to donors could give individuals more of a choice to the activities that they fund.

Core expenses – the law foundation used to be proud to fund these – provided flexibility to WCEL. This changed more than a decade ago – the law foundation wants to fund certain projects or particular staff. WCEL has had to change its grant seeking accordingly – i.e. including administrative fees in applications to foundations to help fund its administration costs. This type of work is less attractive for private foundations and individual donors, and it has been challenging to gain funding for core expenses.

17.6 Challenges

The Law Foundation funding cuts caused a budget contraction for WCEL. Dependence on one funder or source of funding is dangerous. General market changes as all funders reduced their funding in 2008/09 as the global financial crisis hit meant there was less cash available.

There have been political challenges around a hostile federal government which publically attacked the campaigns WCEL was involved in. Allies of the Government attacked the WCEL by name. This had pros and cons. Being under siege from a hostile Government Increased WCEL's public profile, but was stressful for the staff and organisation.

The Government sought to carry out an audit of environmental charities' compliance with charity laws. This was recently suspended by the new Federal administration, and there are recommendations for reforming charity law now being considered which would give greater flexibility.

Being able to explain its mandate relative to other environmental law organizations has been a challenge for WCEL. It was the first environmental law organisation working in BC in the 1970s. It helped found EcoJustice in Canada, in the 1980s. There is now also an environmental law clinic at the University of Victoria. The field is now occupied – people are confused about what the WCEL does differently from the other organisations in this field.

People think of environmental law work as being solely about litigation – but WCEL often works behind the scenes. E.g. it has multiyear relationships with certain organisations. Its involvement can be invisible, because its visibility would take away from clients' campaigns. This creates difficulties for WCEL's 'brand', for fundraising and explaining the importance of its work. There are challenges in working 'behind the scenes'.

17.7 Advice

Think about your 'theory of change'. Other organisations may not have one beyond 'provide support and write reports and the environment will improve as a result'. WCEL thinks about advice provision in relation to how it will strengthen the environmental movement. It prioritises its support for long-lasting groups; it participates in campaigns that oppose pipelines and bring cases to increase risks to builders of pipelines. It thinks about how lawyers can change what we want campaigners to do.

Environmental lawyers may challenge projects on administrative grounds – if it does this and wins, then the government may just do the same again but cure the original defect to have the project passed. This may achieve only a delay – need to use this delay otherwise such action is pointless. Creating additional risk for certain projects can be useful, but PIEL organisations should try to understand how such acts fits within their theory of change.

It is important to think about 'the box' in relation to your particular national context. If there are lousy environmental laws in a particular jurisdiction, then the enforcement of environmental law is not helpful. However, if environmental laws are strong on paper but unenforced in reality, then the traditional approach may be very useful for securing better environmental outcomes.

WCEL does some work using communities' own legal authorities to challenge the legitimacy of projects they oppose (similar to CELDF's ordinances). The Canadian courts are still exploring scope of indigenous laws, which gives an opportunity to get out of 'the box' of traditional environmental law.

Working within the box allows the exploitation of natural resources and communities - understanding the limits of the current legal system is a powerful and convincing critique of traditional environmental law. How can you go about leaving the box?

While West Coast's current work does not emphasize environmental legal rights, the interviewee emphasised that these can be thought of as substantive public rights (e.g. rights to clean air and water) which are being taken away by industry, and environmental legislation and resource legislation should be interpreted as promoting those rights.

The traditional environmental law narrative is that industry has rights – and that these need to be balanced against wider public interests. Whereas the conception of substantive public environmental rights – e.g. at common law – would hold that such private rights need to be interpreted by the courts in accordance with public environmental rights (i.e. a company can only exercise its rights insofar as it does so in accordance with public environmental rights).

Aarhus rights (classically liberal and substantive) these would be useful to enforce law. But are not substantive like common law (or constitutional, where available) rights could be. There is a limit to what procedural environmental rights can accomplish.

It is important to consider what the public thinks about environmental rights. Often people think that there are rights to clean air and water, not just that they have a right to be consulted on it. Often citizens are surprised about the ability of certain actors to pollute – they trust the government to protect goods like clean water, and think that they have substantive rights.

The usual environmental law narrative does not give strong procedural rights. E.g. in air pollution – procedural rights are limited – there are no legal grounds for challenges on this basis. Substantive legal rights to a clean environment brings in arguments for stronger procedural rights also (as ways to enforce substantive rights).

18 University of Strathclyde Law Clinic

Website - https://www.lawclinic.org.uk/

18.1 Foundation Details

The clinic was founded in 2003. It was driven by Professor Donald Nicolson. He had experience of law clinics in South Africa, and had set up a clinic at Bristol University.

The driver was the need to plug the gap in legal need in Glasgow - to provide a service to people whose income is just above the legal aid threshold and to those with a legal claim who were ineligible for legal aid and cannot afford a solicitor

18.2 Purpose

The aim of the clinic is to provide access to justice in Glasgow and the surrounding areas. A by-product of this is providing education for law students (who run the service) – but this is not the aim of the clinic.

18.3 Activities

18.3.1 Advice and representation

It largely focusses on employment and housing cases. The rest is a mix of consumer issues and issues which do not fall into convenient categories. No family, criminal or personal injury law claims are taken on.

There are three streams to the clinic's advice and representation work – (i) clients can contact the clinic, and arrange appointments to visit the clinic to meet student advisers (ii) clients can fill out an online advice enquiry form; (iii) there are two drop-in surgeries per month where local solicitors and trainees give advice – clients can attend without an appointment.

Clients must meet rough financial criteria. Single persons earning <£25,000p.a. or couples with incomes of <£40,000 are eligible. This ties in with the legal aid rates – people earning over these thresholds should be able to afford a solicitor. Savings are taken into account also.

Clients tend to find the clinic through referrals from CABs, courts, tribunals and word of mouth.

18.3.2 Public legal education

Students from the clinic give talks at schools on issues affecting young people – e.g. cyberbullying, drugs and alcohol and stop and search. There is a project in prisons also – on educating prisoners on the declaration of convictions.

18.3.3 Collaborations and projects

There are a number of these:

(a) The clinic helped to set up the Scottish Womens Rights Centre with Rape Crisis Scotland and JustRight Scotland. There is Scottish Government funding for this project. Students from the clinic assist with the SWRC's helpline and provide casework support (e.g. taking statements and carrying out research).

(b) Immigration Unit – this is a collaboration with the Refugee Survival Trust and the Scottish Refugee Council. It provides a service for destitute asylum seekers. Research had shown how destitute asylum seekers can fall through the net – students have the time to research their cases and develop fresh asylum claims.

(c) Criminal Convictions Unit – this is for people who have allegedly suffered a miscarriage of justice. Works with the MOJO organisation on this.

(d) Small Business Law Unit – a visiting entrepreneur has provided funding to research and pilot this. It is intended to provide support to people who want to develop social enterprises or charities but do not have the resources to employ lawyers for start-up advice. Legal advice is provided by DLA Piper.

(e) A social security project – this is for students to be involved in appeals. This has recently started and is under review.

18.4 Governance arrangements

The clinic does not have separate legal personality. It is part of the university. The law school pays for some staff, admin and capital costs.

The clinic employs supervising solicitors – these are key to the work of the clinic and dictate the numbers of cases that the students can take on as students must be adequately supervised.

There is a committee with appointed students and elected students. Elections are held within the student membership of the clinic at the AGM. The appointment process is done by a team of staff and students. This committee makes decisions on policy direction and operational matters.

A smaller management committee makes the day to day decisions on other issues – this is made up of staff and student directors.

Overseeing the clinic is a supervisory committee of academics and members of the community (from advice agencies, alumni, etc.). This committee handles complaints at an appeals stage.

18.5 Funding Arrangements

The clinic received a legacy of ~£200,000. Other funding and support comes from the law school, private donations and donations from solicitors firms (DLA Piper). Collaborations pay for some supervisory time and administration costs – Refugee Survival Trust and SWRC.

18.6 Challenges

Money – resourcing is the biggest challenge.

Expansion brings challenges also – the number of students involved in the clinic has expanded massively in the last few years; bringing supervision and management challenges in ensuring the quality of service is maintained.

18.7 Advice

Ensure that your initial structure is carefully designed and appropriate to your aims and activities.

Ensure that you have enough resources to meet your aims.

Think about whether you will be providing advice only, or advice and representation. Be strategic about what type of cases you take on. Think about filling a gap in legal need.

Report on the Feasibility of an Environmental Rights Centre Scotland

Appendix two – Access to environmental justice case studies

This document presents ten case studies of individuals and organisations facing environmental problems in Scotland, and their struggles to access advice and secure their rights. Those interviewed reviewed and consented to their case study being published.

Contents

1. Greengairs, North Lanarkshire – landfill, opencast coal mine and waste incinerator - odours, lack of enforcement of planning conditions and approval for development contrary to local development plan

Ann Coleman lives near Greengairs, and ~700 yards from the Greengairs Landfill site. The site covers 40 hectares. It is the largest landfill in Scotland, and reportedly the largest in Europe.[1] There are opencast coal mines in the area, and planning permission was given to a waste incinerator near to the landfill in 2009. Professor Robert Bullard described the area as a 'sacrifice zone' due to its concentration of these facilities.[2]

Landfill

The landfill site has created a number of problems for Ann and the local community. In 1998, 40 lorry loads of PCB-contaminated soil were brought from England to be disposed of at the site. Due to licensing differences, the soil could only be disposed in Scotland. The community opposed this.

Following a campaign – it was agreed that the site operator would pay for an independent assessment of the site. This led to a number of operational changes being made.

In 2002, SEPA decided that the site should dispose of a beached whale. The odour from it was so strong that it would wake Ann up. Speaking to the Guardian at the time, Ann said, "We have lost our environment. The land is contaminated. You are living with the very real effects of the nauseating smells, the plagues of flies".[3]

Opencast coal mines

There are two opencast coal mines in the area. They also create unpleasant odours. Ann is concerned that the planning conditions which apply to the mines' planning consents are not enforced. For example, there are conditions to work within certain hours only, yet the community has witnessed operations taking place at all times of day and night. The community has been unable to secure enforcement of this condition by the local authority.

On one instance during a holiday weekend excavation work was carried out on the mine in the area surrounding a local resident's house and garden. This left the resident's garden bordered by a precipice,

[1] SEPA, 'List of waste sites and capacities in Scotland' (SEPA, 2015), available here.
[2] Bob Bullard stated that, "If you look at the pattern, it is usually poor people, working class communities that don't have a lot of resources to hire lawyers or experts and the political clout to block these kind of facilities… And once you get one landfill or an open cast mine it tends to attract other types of similar land use. What you get are these sacrifice zones, like Greengairs. It is an unfair process but it is allowed to happen. A common sense approach would dictate that if the community is already overburdened by such facilities, why would you want to put another one in?". Kirsty Scott, 'Victims of burgeoning waste crisis', The Guardian, 29th July 2002, available here.
[3] Ibid.

and a public road was lost. The opencast operator did not have the requisite permissions. This situation remained for months before any remedial action was taken.

Incinerator

In 2009 planning permission was granted for a waste incinerator to be built beside the landfill site. This was contrary to the local development plan which the local community had helped to create. There were concerns that a full strategic environmental assessment was not carried out prior to consent being granted.

Ann and the community had help from a lawyer from the Environmental Law Centre Scotland to challenge this decision. As they were preparing to launch judicial review proceedings, their lawyer received a letter from the developer asking for the names and addresses of each and every individual involved in the case. The developer told them that if a legal challenge was to delay the development, it would sue them for any costs caused by the delay. Ann and the community felt unable to continue and gave up their challenge at this point.

Ann says that these activities have occurred in Greengairs because: “We don’t have the means to challenge them… the public have no power – none, it’s just not there… the law doesn’t exist as far as I’m concerned”.

2. Cauldhall, Midlothian - opencast coal mine – landscape, traffic, air pollution and climate change

Malcolm Spaven lives in Midlothian. In 2012 he and some other residents found out Scottish Coal was seeking planning permission for a large opencast coal mine at Cauldhall, near Penicuik.

Malcolm and the other residents were concerned about several features of the proposal and a number of potential impacts. These included the impact on the local landscape, the associated traffic and dust from the mine, the effect on the surrounding land and on homes on the proposed site, the questionable economics of the proposal due to the declining value of coal at the time and the climate impacts of extracting coal. Further, they felt that it ran contrary to the local development plan because only a small part of the proposed site was within a designated ‘search for coal area’. They formed a campaign group – ‘Stop Cauldhall Opencast’ – to lobby against the proposal.

Scottish Coal went into administration in 2013. The development was then taken on by Hargreaves Services PLC, which proceeded with the application. Midlothian council granted planning permission for

the 500 hectare opencast mine in 2013, subject to a Section 75 planning agreement being reached between the developer and the Council.

Malcolm and the group felt that two aspects of this decision were questionable. First, there were inadequacies in the environmental statement which was used in the process. These concerned the economics of the project due to the proposed demand for the coal given its declining price at the time and the overall declining demand for coal; and there were questions over where the coal was going to go and the transport economics involved in delivering to anywhere more than a short distance away from the site.

Second, the decision to grant planning permission may have been defective. They felt that statements made in the meeting by council officials may have been misleading. Additionally, they felt that the decision to grant consent was made on the basis of a consideration that had been specifically excluded by the chair as a 'material consideration' at the start of the meeting (this related to the potential jobs the mine would bring).

They sought legal advice from a planning lawyer they had a personal connection to, on an informal basis (i.e. pro bono and not as a formal client). The lawyer advised that they may have grounds for making a legal challenge. They were advised to write to the council's head of planning to inform him/her that there were grounds for a potential legal challenge, explaining these grounds briefly and asking the council to respond.

The Council took two months to respond and rebutted their grounds for challenge. By this time the time limit for challenging the decision had expired.

The group considered making a legal challenge – but at this stage, the case might not have been accepted due to being over the time limit. They knew that a legal challenge would require raising a large sum of money in a short period of time. Even if they were able to get a 'protective expenses order' they would still have to fund the procedure for its application, which can cost up to £20,000.

In 2016 Hargreaves announced that it was pulling out of the project and withdrew its application due to changes in the demand for coal.[4]

Malcolm explained that,

"It was daunting having to raise that kind of money. It was a major factor in terms of deciding this – we just couldn't see how we could raise that kind of money…

[4] See https://www.midlothianadvertiser.co.uk/news/delight-as-opencast-mine-plans-for-midlothian-are-withdrawn-1-4268154.

We were not really able to access enough legal advice. It would have been good to be able to afford professional advice – but cost was a major factor, so this was not really a route we could go down. It was not sufficiently clear, when we got the advice, what the next steps should be – how threatening should our initial letter should have been – what we should have done with the response (and in reaction to the council's delay in responding). We were unclear as to what to do next."

3. Torry, Aberdeen – waste incinerator – air pollution and planning process irregularities

Aberdeen City Council granted planning permission for an incinerator/energy from waste power station in the Torry area of Aberdeen in October 2016.[5] When operational, it aspires to burn ~150,000 tonnes of non-recyclable waste per year from the North East of Scotland (Moray and Aberdeenshire City Council are also involved in the project).

Air pollution levels in Torry currently exceed EU legal limits. Wellington Road, which runs through Torry, was the third most polluted street for nitrogen dioxide in Scotland in 2016.[6] Rates of hospitalisations as a result of Chronic Obstructive Pulmonary Disease in Torry are more than double the Scottish average.[7]

Residents are concerned about the air pollution that will be emitted by the incinerator. It will also create ~200 extra vehicle journeys per day (a large proportion of which will be heavy goods vehicles). This extra traffic will create additional air pollution. Residents are anxious that further air pollution will be harmful to their health, and will increase already dangerous and unlawful air pollution levels. The financial viability of the project has also been questioned.

Additionally, there are a number of concerns surrounding the planning process. In particular, that there may have been:

- Conflicts of interest held by the planning decision-makers and council employees who have been involved in the process.
- A general lack of objectivity amongst the decision-makers and a number of comments made throughout which indicated that the decision was predetermined.
- Irregularities concerning the way that the decision was made, the process which was followed and the ability of local residents to participate in the decision-making process.

[5] See https://www.eveningexpress.co.uk/fp/uncategorized/we-will-continue-to-challenge-this-project/.
[6] Nitrogen dioxide levels were 46mg/m3. the EU Ambient Air Quality Directive sets a limit of 40mg/m3. See http://www.bbc.co.uk/news/uk-scotland-38623508.
[7] Community Planning in Aberdeen, 'Torry Strategic Assessment 2016' (Community Planning in Aberdeen, 2016), p33.

Torry resident Simon McClean and a number of others sought legal advice on this development. They got legal advice and their lawyer wrote a letter to the Secretary of State to ask him to call-in the application. This was refused, as the project was not deemed to be of national significance.

The group's lawyer advised that they had strong grounds for a judicial review to challenge the decision due to the alleged planning irregularities. However, they were told that if their challenge was unsuccessful their likely adverse costs liability could be up to £65,000 (this estimate assumed that they were able to secure a protective expenses order) - and that one of them may lose their home as a result. They were unable to pursue a legal challenge due to the costs of doing so.

4. Sykeside, North Lanarkshire - housing developments on greenbelt land and air pollution

Kathleen Weetman lives in North Lanarkshire. She is concerned about two proposed housing developments in her area.

The first of these, near the edge of Sykeside, is a proposed development of 160-180 houses. This would reach into land which is designated as being in the green belt. The land covers a section of the local canal path, and is a popular area for walking and bird spotting.

The council refused planning permission for this development. The developer has appealed the decision. The appeal is currently being considered by a planning reporter. The community is awaiting the reporter's decision.

The second of these developments concerns a proposal for 2,600 homes and 50+ commercial units in a nearby valley. This development would also be on land which is designated as being in the green belt.

Chapelhall – a village near to the development - is designated as an 'air quality management area' and Chapelhall's Main Street has been reported as being one of the most polluted streets in Scotland.[8] Kathleen is concerned that the additional traffic from new residents living on this development, and from the businesses that will be located there – will worsen the area's air pollution problem. Kathleen also feels that the housing being proposed is largely luxury homes which will not serve the people living nearby, who will be unable to afford them. This development is currently in the pre-application consultation stage.

Initially, Kathleen did not know where to ask for help on how to engage with the planning process and raise objections against the development. She was able to find online resources to help her with this and

[8] See https://www.dailyrecord.co.uk/news/local-news/chapelhall-street-named-one-most-4978770.

when the first development reached the reporter stage she contacted Planning Democracy, which has given her advice.

If either of the developments are given planning permission, Kathleen would like to look for legal help to challenge them. However, a lack of financial resources will be a barrier to this. Kathleen explained that:

"We have a problem – this is quite a poor area so the money isn't there to fund any legal challenges. We will have to look for pro bono help because there is no money. If this was a well-off area we would be able to raise a fighting fund – but that's not possible in an area like this."

5. Monklands, North Lanarkshire – incinerator proposal and associated effects on air pollution, human health

Maggie Proctor lives in an estate beside an old landfill area in Monklands, North Lanarkshire. Monklands is a former heavily industrialised area - and is ranked within 5-20% of the most deprived areas in Scotland on the 'Scottish Index of Multiple Deprivation'.

In 2009, Maggie and other local residents received a consultation leaflet informing them about a proposal for a pyrolysis plant (incinerator) on the old landfill area. A number of locals were concerned about this and formed their own group 'MRAPP' (Monklands Residents Against Pyrolysis Plant) to oppose the proposal. A number of other groups were formed in other communities nearby.

They were concerned about the health impacts of the plant, the lack of effective regulation of other similar plants elsewhere in Scotland, its effect on local wildlife and that the development would remove a large buffer zone between the community and the M8 road – increasing noise and air pollution. North Lanarkshire has the second highest rate of patients hospitalised with chronic obstructive pulmonary disease in the UK.[9] There were concerns that the health impacts in the nearby areas could be particularly severe due to this, and also that baseline data is not available to enable a comparison of before and after to ascertain health impacts.

Planning permission for the plant was initially refused by the North Lanarkshire council – the developer appealed this to the Planning and Environmental Appeals Division of the Scottish Government (DPEA) and then eventually the Court of Session, which eventually ruled in the developer's favour.

[9] http://www.nhslanarkshire.org.uk/Services/Respiratory/Pages/default.aspx.

A section 42 application was then made to the local authority to amend the original planning conditions, increasing (almost doubling) the throughput of waste and increasing the chimney's stack size.

Maggie and the Monklands community have not looked for legal advice to help them to challenge the development. She said that she felt it was "pointless – there was no clear route to show us the best way to take it forward… we didn't know where to go and wouldn't be able to access anything like the legal and scientific experts that the developer could. Local and national government urge us to engage in issues which affect our community, and then they effectively ignore our contributions."

The community has not been able to access expert advice to help them. Maggie feels that their lack of access to experts and money within the community mean that there is an imbalance between the community and the developer – because the developer "has access to pay people to do studies or give opinions against us". She also feels that there is an imbalance between the community and more affluent communities in Scotland which are able to resist these types of developments by hiring lawyers and scientific experts.

Maggie feels that her area has been treated like a "sacrifice zone – because who cares what happens here… it's very demoralising to experience such a high level of engagement from a community, but that engagement and enthusiasm can turn to apathy due to lack of support or resource, it's absolutely appalling".

6. Caw Burn, West Lothian – water pollution and the duties of SEPA

Tom Ullathorne lives beside the Caw Burn. Tom, his partner and their three children often play in the Burn in the summer. His neighbour's dogs often go into the Burn.

The Burn runs through the Houston Industrial Estate in Livingston and through the village of Pumpherston before it passes Tom's house. It also passes through old shale deposits left from past industrial activity in the area.[10]

Tom and his neighbour are concerned about regular episodes when the Burn becomes visibly polluted. When this happens the Burn can turn milky white in colour, oily residue may be visible on the sandy

[10] The Pumpherston Works included a crude oil works and refinery which operated from 1882 - see here. The oil works closed in 1926 and the refinery closed in 1964. Further industrial activity continued at the site after this date.

sections of the riverbed and there can be industrial and sewage-type odours. Tom is concerned about the safety of his children when they play in it.

In 1996 SEPA installed a 'sustainable urban drainage system' – comprising a pond and wetland. This was built to remediate pollution of the Burn by runoff from the Houston Industrial Estate. A 2005 study noted "a long history of polluted surface water runoff from the Houston Industrial Estate… The principal source of these pollutants is diffuse pollution from the Houston Industrial Estate due to washoff from impervious loading areas, car parks and highways. Observations of visible pollution in the Caw Burn headwaters suggest that from time-to-time wrong connections or disposal of waste to surface drains have resulted in pollution incidents."[11]

When there have been problems with the Burn, Tom's neighbour has phoned Scottish Water. This has happened on at least four occasions. Scottish Water investigated and reported back the first time this happened as they had been able to identify a problem with drainage from a particular company in Houston Industrial Estate. This did not resolve the issue of episodic contamination of the burn.

Tom says that, "the problem is that we don't know if it's been resolved – we don't know if each instance is a different problem, or if the problem is intractable". Without this information, it is difficult for Tom and his neighbour to know what to do about this.

There is also a tarry pond near Pumpherston (leftover from the Pumpherston works). Oily residue from the pond leaks onto a nearby path – the residue has reportedly burned the paws of dogs which have walked through it.

SEPA have been contacted about this, but they informed Tom's neighbour that because the pond was not directly affecting a watercourse, it was not their responsibility. Tom is unsure if SEPA's response was correct in terms of its remit or whether SEPA should be investigating this issue. Without Tom being able to access information or advice on this, SEPA are able to dismiss these types of concerns – and Tom is unable to challenge them.

Tom and his neighbour would like to have a clearer picture of what pollutants are in the Burn, what Scottish Water's and SEPA's findings and actions taken have been when the pollution incidents have been reported and what their duties are in these circumstances.

They have thought about getting legal advice, but it wouldn't be affordable for them. Tom stated that, "a body (one stop shop / website) to offer advice, advocacy and signposting would be welcome."

[11] Kate Heal et al, 'The Caw Burn SUDS: performance of a settlement pond/wetland SUDS retrofit' (2005), p1-2, available here.

7. Old Town, Edinburgh – luxury hotel development - effects on heritage, air pollution and use of public land

Edinburgh City Council granted planning permission for a small 'boutique' hotel at the India Buildings site in the heart of the Old Town in 2008 – this was broadly welcomed by the local community.

In late 2015 a further planning application was submitted for the site. This covered land incorporating three other public assets (the adjoining building of 11-15 Victoria Street, the Cowgatehead Church and the gap site of the Cowgate – which had been set aside for the benefit of the Central Library).

The local community was concerned about the effect of this larger hotel development – in terms of gentrifying the area, inappropriately using public land and adding to pre-existing air pollution problems (the proposed access road is designated as an 'air quality management area'). A campaign group was set up called 'Let there be light' (taking its name from the motto on the main entrance to the Edinburgh Library) – to challenge the development.

A public local inquiry was held on the development in May 2016 – planning permission was then granted in November 2016. LTBL wanted to make a legal challenge to this development.

They were unable to afford legal support. They attempted to secure pro-bono representation by standing outside the Court of Session and handing Christmas cards to those going in, with the message 'all I want for Christmas is a nice QC'.

Eventually they found pro bono legal support through Planning Democracy, which referred them to an advocate. The advocate provided representation to seek a judicial review of the decision to award planning permission in 2017. LTBL were awarded a protective expenses order for their challenge, but had to raise £27,000 for the court fees and other costs associated with this. They managed this through crowdfunding.

The initial judicial review was unsuccessful. LTBL was unable to raise the money necessary to secure representation for an appeal. One member of the group, Simon Byrom, then self-represented as a 'party litigant' to take the appeal to the Inner House of the Court of Session in 2018. He was denied a motion to sist the case to allow him additional time to prepare for the case, and an attempt to gain a protective expenses order for the appeal was unsuccessful. He faced two QCs in the appeal – one representing the respondent (the City of Edinburgh Council) and one representing the interested party (the developer).

His appeal was unsuccessful, leaving him liable to legal costs of thousands of pounds.[12]

[12] See http://www.thenational.scot/news/15827503.Tree_protest_man_loses_appeal_in_bid_to_block_hotel_development/.

Simon commented that:

“I exist on £200 per month – these guys get paid £250 per hour!”

“I am profoundly disappointed by the current process of judicial review and question the independence of the Judiciary when the Court defers to the planning judgement of planning officials who rely on the biased assessment of developer's submission. This doesn't allow for any meaningful scrutiny of the process in safeguarding the public interest.”

8. Anonymous development - light and noise pollution, forced eviction, traffic problems and loss of greenbelt contrary to the local plan

The interviewee did not wish to be identified for this case study.

The interviewee was involved in opposing a proposed industrial development (including - amongst other features - a biomass power station) in a greenbelt area of Scotland. The interviewee and several members of the local community fear that it may have the following impacts:

- Loss of greenbelt land due to development – which is contrary to the local development plan for that area.
- Light and noise pollution from the development.
- The forced eviction of a person currently living on and using the land.
- The loss of ‘grade 2’ agricultural land.
- There is no utility connection to the site – so this would have to be added and would add disruption to the area.
- Lack of suitable roads to access the site, creating the potential for localised traffic problems.

The development was initially refused by the local authority. It was then ‘called in’ by the Scottish ministers, due to it being of national importance – and it has since received planning permission in principle.

There were concerns that during the planning process there were irregularities in terms of (a) the proper procedure not being followed for the application for planning permission for building a large energy

generation plant, and (b) different companies applying for the original planning permission and then appealing the refusal of planning permission.

The interviewee and some other locals sought legal advice when they heard of the proposals. They wanted to send a letter to make the case against the development to the Scottish Government's Planning and Environmental Appeals Division (DPEA). The DPEA handles call in applications – it creates reports and issues recommendations to the Scottish Ministers on such applications.

The lawyer they saw told them that this letter would require some research. The lawyer estimated that it would cost £6,000 to carry out the necessary research into their issue and send the letter. This would be the minimum fee they could expect – and would require them to do a significant amount of preparatory work in terms of providing and organising the relevant documents. On hearing this proposed fee, the interviewee reported feeling, "gobsmacked – we were just shocked". They were unable to pay this fee and had to seek advice elsewhere from another lawyer they were fortunate enough to have a connection to. They were able to secure this other lawyer's services, but only because these were provided on a reduced fee (i.e. pro bono) basis.

9. Markinch, Fife - biomass power station/incinerator - noise nuisance and lack of enforcement of planning conditions

In December 2008 a subsidiary of energy company RWE applied for planning permission for a 49.9MW biomass combined heat and power station in Markinch.[13]

This plant was initially part of a larger paper mill site – which previously had an onsite combined heat and power station fuelled first with coal and later with gas. The Tullis Russell paper mill was a large local employer, it went into administration and closed in April 2015.

After securing planning permission for the 49.9MW plant from Fife Council in May 2009, RWE approached and secured a further planning consent from the Scottish Government's Energy Consents Unit in 2012/13, which allowed it to increase the permitted generating capacity from 49.9MW to 65MW. Commissioning of the plant started in February 2014 - it took around two years for it to operate consistently.[14] It burns waste

[13] Section 36 of the Electricity Act 1989 requires that consent for electricity generating stations with capacity above 50MW is granted by the Scottish Ministers.

[14] See http://www.rwe.com/web/cms/en/429434/rwe-generation-se/fuels/location-overview/uk/markinch-chp-biomass-plant/.

and virgin wood, and is currently the UK's largest dedicated biomass power station and also Scotland's largest waste incinerator.[15]

The plant has caused problems for residents nearby due to the noise levels arising during operation.[16] Noise levels were the most problematic when the plant was in its commissioning stage and was being frequently shut down and started up. Power station shutdowns are associated with particularly loud noises. Since then noise levels have remained more constant, but high.

Biofuelwatch (BFW) were approached by a local resident for help. Using her own noise monitor, the resident had recorded regular night-time noise of above ~45dB, the maximum noise level set out in a planning condition issued by Fife Council. The noise has disturbed her sleep and caused health problems.

The resident had been told by Fife Council that the original planning condition concerning noise no longer existed. The Council claimed that it had been superseded by the later permission granted by the Scottish Government's Energy Consents Unit. BFW contacted the Energy Consents Unit who confirmed that this had not happened, i.e. that the condition limiting noise remained effective and that the Council was responsible for enforcement.

Neither the local Council nor SEPA have accepted the local resident's noise monitor readings (they show that the 45dB threshold is regularly exceeded). SEPA carried out a limited period of noise monitoring, but there are concerns that on the days their investigations took place, the noise levels of the plant were intentionally lowered.

Fife Council has not taken any action to enforce the planning condition or to follow up on complaints that noise levels are habitually higher than what is permitted.

Biofuelwatch cannot see how to take any further action to enforce the planning condition. They have not looked for legal advice because they do not have the resources to engage a solicitor.

[15] The plant burns large quantities of chemically treated waste wood and thus falls under permitting regulations for waste incineration - the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/360).

[16] See https://www.fifetoday.co.uk/news/environmental-issues-raised-as-markinch-biomass-plant-gets-up-and-running-1-3353121 and Biofuelwatch, 'RWE's biomass power station in Markinch: What might the environmental and public health impacts be?' (Biofuelwatch, 2014).

10. Grangemouth, Falkirk - biomass power station – air pollution

The Scottish Government granted Forth Energy Ltd planning consent for a 120MWe combined heat and power biomass plant for the Port of Grangemouth in June 2013.[17] In March 2014, Forth Energy announced that it will not go ahead with the development, and was instead looking for other developers to take the project forward.[18] The planning consent will expire in 2018 if the development does not commence before then.

In 2017, Biofuelwatch was alerted to the fact that a Contract for Difference was granted to a start-up company 'Grangemouth Renewable Energy Ltd'. The plant is set to be delivered by 2021/2022[19], although there are no indications that the new developers have finalised the financial arrangements to implement the project yet.

Grangemouth and Skinflats Community Council wrote to the Scottish Government's Energy Consents Unit to ask if there had been any applications to alter any of the planning conditions, or transfers of the consent to another entity. The Energy Consents Unit merely replied that no application for a transfer of the consent had been made, without informing the Community Council that an application to extend the period during which development must commence was in fact being considered by Ministers. This was disclosed after a specific further query by Biofuelwatch.

There is a large oil refinery already located in Grangemouth. Small particulate matter (PM 2.5) in the air in Grangemouth has been recorded at levels close to 10 micrograms/m^3,[20] which will become the new legal limit in Scotland from the end of 2020.[21]

BFW and the Grangemouth and Skinflats Community Council have many concerns about the biomass plant proposal. One of these is that the additional particulate emissions it will create could lead to breaches of the new air quality objective for PM2.5.[22] Biomass power stations are significant sources of particulate emissions and most of their particulates tend to be in the PM2.5 range.

BFW and the Grangemouth Community Council cannot see how to take or find out about any possible legal action to challenge any decision to extend the period during which development can commence.

[17] https://news.gov.scot/news/grangemouth-biomass-station-approved.
[18] https://www.falkirkherald.co.uk/news/forth-energy-pull-out-of-grangemouth-biomass-project-1-3356167.
[19] http://www.bbc.co.uk/news/uk-scotland-scotland-business-41226164.
[20] Falkirk Council, '2016 Air Quality Annual Progress Report (APR) for Falkirk Council' (Falkirk Council, 2016), table 10 at p49.
[21] The Air Quality (Scotland) Amendment Regulations 2016 (SSI 2016/162), Regulation 2(5).
[22] PM2.5 is a particularly harmful air pollutant since it crosses the blood-lung barrier, and according to the World Health Organisation, no safe levels exist.

A member of Biofuelwatch remarked that,

“In 2013, we'd certainly have wanted to explore the option of judicial review but none of the local people we worked with, nor ourselves, could afford that. And now, it would be great to get expert legal advice in both cases.”