GOVERNANCE MATTERS

Consultation Draft
The Environment and Governance in Scotland

Contents

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As the third term of the Scottish Parliament draws to its close, LINK has cause to pause and review the way in which the environment is protected and enhanced within the current arrangements for Scottish Governance. This review will cover the legislative, administrative, judicial and civic areas of governance – and will attempt to provide an understanding of the experience of LINK and its members over the last decade. The paper builds on LINK's recent review of the effectiveness of environmental legislation in the Scottish Parliament - **Scotland's environmental laws since devolution – from rhetoric to reality**. It also follows the LINK contribution to the debate on the reductions in the Scottish Budget – **Protecting the Environment in a Time of Cuts**. The LINK board has agreed the series of questions to be asked. The paper is written principally to inform debate and any recommendations, policy positions or commentary arising from the way these questions are answered must be approved by the Board and Network before they become the views of LINK.

Introduction

The discussion in this paper is, by and large, limited to the Scottish dimension, but where principles are discussed they could be related to all of the European, United Kingdom and local levels of Government also.

Developments of great importance to the Scottish environment have happened from the local to the global levels in the years since the establishment of the Scottish Parliament in 1999 – but in Scotland they have, for the first time in the modern era, been shaped largely by the new legislature and newly accountable executive in Edinburgh. The Parliament has debated major Acts on nature conservation, environmental assessment, climate change, the marine environment and a wide range of similar issues. The Scottish Government has worked on implementing the legislation and governing the country as we all struggle to cope with climate change and the changes it will bring in its wake. The Courts have handed down a limited number of decisions on environmental concerns, and civic society has played a fuller part in all of this progress than was possible before devolution.

LINK and its members have found the experience of government being brought closer to the people, in the spirit of true subsidiarity, a positive and beneficial development for our environment. The Scotland Act (1997) has brought a major increase and improvement of the breadth and depth of involvement of environmental Non-Governmental Organisations (eNGOs) in Scottish governance. We note that this is as it was meant to be throughout the years of discussion in the Scottish Constitutional Convention and the Consultative Steering Group. Scotland chose a participative form of government and greater participation has resulted.

If 1999 saw a revolution in the branches of Scottish governance and a major recalibration of power and influence in the Scottish policy community, however, things have not remained static. We have witnessed the further devolution of both minor and major powers (such as those over transport and the marine environment) to Scotland since 1999 by Orders in Council. Following the reports of the Calman Commission and the National Conversation, we are currently seeing the passage at Westminster of the Scotland Bill (2011), increasing significantly the powers of the Parliament. The Commission on the Future of Public Services (the Christie Commission) is due to report this summer. It is against this background that LINK has decided to review governance arrangements in

Scotland. We do so in the belief that the review can be a contribution to the development of yet further improvements in governance and to identify priorities within governance where improvements should be pursued.

As the paper has developed, however, it has become clear that the LINK experience of Scottish Governance is far from unique. Many of our observations and concerns are widely shared throughout the Scottish policy community. The debate to be had is much wider than simply the relationship between governance and the pursuit of sustainable development. It is a continuance of the national debate about how we order our affairs – not in the sense of the international status of Scotland, but in how we run our own affairs in our own ways.

In the course of our discussion of these issues and priorities for change will be decided by LINK and its members, but might the process be shared with other parts of civic society in Scotland? Is there a desire for a comprehensive review of our governance? The paper will certainly be published and widely distributed. If interest in the issues discussed is significant, LINK is strongly minded to lay a petition before the Scottish Parliament requesting that consideration be given to the establishment of a Parliamentary Commission on Scottish Governance, to review the matter of our governance comprehensively and to place recommendations for change before the Scottish Parliament. So our question to all parts of the policy community is as follows.

Would you or your organisation support such a petition?

Part 1 - Legislative Questions

The experience of LINK and its members in the field of legislation is very considerable and a reflection of this experience can be found in the recent publication **Scotland's environmental laws since devolution – from rhetoric to reality**. This paper notes that large number of laws relating to the environment have been passed, many of which were, in our opinion, major steps forward – but suggests that the implementation of those laws by the executive has been less than satisfactory in several instances. The paper gives insight into the wider issue of our experience of the Parliament as a whole in respect of legislation and governance. There are, however, some further, crucial questions which require to be asked and the answers added to a generally positive and satisfactory experience.

1(a) Is the legislative performance of the Parliament satisfactory? Are there ways in which it might be improved? Has Holyrood attempted to pass too much or too little legislation? Are there arguments for a more participative model with regard to setting the legislative agenda?

The experience of LINK and its members has been that the Scottish Parliament has performed commendably as a legislature, with a series of highly significant environmental bills being passed in the 12 years since its establishment. With an excellent basis in the recommendations of the Consultative Steering Group (CSG) the new Parliament built an admirable legislative ethos and practice, consulting widely, building expertise and avoiding its committees being turned into servants of the executive.

With the Coalition government of the first eight years of the Parliament, however, the legislative timetable was kept incredibly full. Parliament operated as a legislative machine on a familiar Westminster model, with exceptionally full legislative programmes from year to year. The Parliament was attempting to forge its own approach to legislation, and new developments such as

the carry-over of Bills from year-to-year throughout the four year session were immensely valuable. Many of the Bills introduced by the Executive appeared, however, to have the purpose of "making a point" rather than fundamentally improving the law. There was sometimes a sense of Bills for the sake of activity. Furthermore, the Parliamentary Committees existed under huge pressure, and on many occasions gave the impression of rushing their work. We note that "laws to make a point" can have an impact, but if their purpose is administrative change inside government our preference is that the problems be tackled directly.

A major difference with Westminster is, however, the size of the Scottish Parliament. With only 129 MSPs, Committees have been handed the work of both the "Standing" and "Select" committees in the UK Parliament. Westminster's Select Committees work, scrutinising the Government, however many bills there are being dealt with concurrently by Standing Committees. At Holyrood, the Committees have benefited from their all-encompassing remit - in that experience of both legislation and administration has proved of value – but the balance between the two has favoured legislative work.

In the third session of the Parliament, with a minority government and therefore against expectations perhaps, this pressure was kept up and it became apparent that Parliament has, in vital respects, conceded that the legislative timetable has become largely the property of the executive branch. There was little if any increase in the number of Members' Bills dealt with; no Bills arising from the Committees; and no Bills introduced by opposition parties. The Consultative Steering Group's (CSG) hopes that legislation might come from several sources appeared to evaporate. This is, once again, familiar within a UK context.

Recommendations:

- *We should carefully consider the amount of time devoted by each Committee to legislative work and seek to redress the balance of this work with the job of scrutinising the Government.*
- *We should seriously consider the issue of whether Parliament has been presented with legislative programmes too heavy for its numbers.*
- *We should re-visit the opportunities (and process) by which legislation can be proposed by individual MSPs, Committees, opposition parties and even civic society.*

1(b) Can Parliamentarians be persuaded that 'balancing' the interests of 'stakeholders' is not always the wisest course of legislative action?

In considering legislation, we have heard from several MSPs of all parties (and in other areas of their work) of "balancing the interests of all the stakeholders" in debates. During the passage of the Marine (Scotland) Act 2010, for example, Parliamentarians listened carefully to the views of fishermen, environmental campaigners and the renewable energy industry (amongst many others) and, laudably, recognised that these groups all had a vital interest in shaping the legislation. The understanding that the marine environment was fundamental to the well being of many long-term economic and social interests was highly apparent in the work of MSPs on the Bill, but there were occasions when this understanding of the fundamentals came perilously close to being seriously undermined by the need to "look after" the shorter-term interests of stakeholder groups. In the final analysis, the legislation as passed is ecologically sound in our view, but its passage demonstrated the tensions between sticking to essential scientific principles and seeking to satisfactorily placate all those involved. As the legislation is implemented, Marine Scotland will face similar challenges.

This experience reflects on the excellent access of the various stakeholders within the legislative process – but as a doctrine, it can, on occasion, sidestep the need to bite the bullet and take a baseline, radical view of legislation in some fields. Legislation founded on the basis of simply

balancing all the interests involved might be open to criticism as avoiding critical issues and might be a reflection of weakness and indecision on the part of the Parliamentarians.

Recommendations:

- *We should carefully consider the effects of "balancing the interests" of the stakeholders in the approach to legislation.*
- *We should debate the opportunities and means by which Parliamentarians (and others) can acquire a greater awareness and understanding of the challenges of sustainable development (where "living within environmental limits" means genuinely respecting those limits, as opposed to simply splitting the difference between them and other interests).*

1(c) Does the Parliament carry out its scrutiny functions at an adequate level? Does the Parliament carry out post-legislative scrutiny at an adequate level? Does Holyrood succeed in scrutinising the work of the Scottish Government adequately? Are the Scottish Government's arms-length agencies held to account properly?

It has always been the stated aim of the Parliamentary Committees to consider legislation and to scrutinise the implementation of that legislation by government. As all acts and expenditure of the executive branch must be justified in law (and principally on the basis of legislation) it follows that the traditional, broader role of a Parliament – to hold the executive branch to account – must itself be a broader form of this scrutiny.

The experience of the environment sector has been that post-legislative scrutiny by Parliamentary Committees has been seriously limited. As a consequence of the crowded legislative programme, very little time has been allowed by Committees for serious consideration of the implementation of the large numbers of environmental Acts passed (or to perform other scrutiny functions). We believe that this observation is far from exclusive to the field of the environment.

It is well understood that with 129 members, (with an average of 15 appointed to office as Ministers) the ability of the Parliament to establish large numbers of committees is limited – but those Committees must do, therefore, the work of both Select and Standing Committees at Westminster. No serious consideration has been given to formally balancing the legislative and scrutiny functions within Holyrood's all-purpose Committees, and as a result of the enormous pressures of the legislative programme, scrutiny has seriously fallen by the wayside.

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. While the agencies have been called to give evidence to Committees on legislative (and other) matters, neither has ever seen their corporate priorities, individual programmes of work or annual report and accounts scrutinised by a Committee at Holyrood. Neither has any Committee of Parliament reviewed the selection and/or appointments of Chairs or Board Members – either the generic process or the actual decisions. LINK believes this is a serious failing.

In the field of Committee Inquiries into policy matters, we have witnessed few into environmental areas. Positive examples include, however, the ERD Committee's (2003-07) inquiry into the need for marine legislation – which set the scene (and developed cross-party support/understanding) for the subsequent Marine Act - but most much Inquiries have resulted in little action because rarely have they been followed through. For example, the ERD Committee (2003-07) conducted an inquiry into sustainable development and both the 2003-07 and 2007-11 Committees completed inquiries into CAP reform. None of these have been reviewed or followed up, and none of them have had any significant impact on the Government's position on these matters.

Recommendations:

- *We must consider how to radically improve the ability of Parliaments Committees to schedule serious scrutiny work, including the possibility of setting aside specific time or meetings for the function.*
- *As under 1(c) above, we should seriously consider the issue of whether Parliament has been presented with legislative programmes too heavy to allow proper performance of its scrutiny function.*
- *The issue of the balance of constituency, plenary and Committee work recommended by the CSG should be re-examined, whether the balance between them is right, and consideration given to whether more time is required for Committees to work - both during each term and during recesses.*
- *Government Agencies should be regularly scrutinised as to their core work.*
- *Room must be made in the Committee schedules for full Inquiries and follow up as appropriate.*

1(d) Does Parliament (and the Scottish Parliament Information Centre in particular) have adequate recourse to independent, authoritative opinions and advice? Does it pay enough attention to such advice?

LINK applauds the excellent work done by the Scottish Parliament Information Centre (SPICe) and the independent experts appointed to advise the Parliament's Committees. The publicly available briefings produced by SPICe are of particular value to the wider Scottish policy community. We note, however, that by comparison with the executive branch and its agencies, Parliament has very limited access to authoritative independent advice – even after account is taken of the excellent input made by advisers appointed by Committees and the variable but often highly valuable evidence given by civic organisations, civil servants and others to Committee hearings.

Our experience of providing independent opinions and advice to MSPs is that, while we are grateful for the opportunity, they are very grateful for such assistance, but in view of the work and information overload faced by the average MSP this assistance is an essential requirement. In particular, we note that if Committees succeed in expanding their scrutiny activities they will require far greater research capacity than is currently available. This would probably require increased funding.

Our experience suggests that the Scottish Parliament would benefit greatly from a wider and deeper range of policy advice and expertise than is currently available. Expert advisers to Committees have been appointed but this has had little impact in the environmental. Procedures for appointment of such experts should, of course, be carried out openly and in consultation, especially where an area is politically or administratively contentious, or where there are particularly distinct points of from which advice can be offered. Committees might also consider appointing more than one adviser, covering different perspectives in any given debate. Advisers should be drawn, furthermore, from across the policy community, and not limited to academics or ex-civil servants. This use of expert advice should apply in particular to the scrutiny of Government and its agencies, where Parliament is very heavily reliant on the expertise and advice of the Ministers and civil servants being scrutinized – a highly unsatisfactory situation which has on occasion left the impression of a lack of openness and a system dominated by "insiders".

Recommendations:

- *If Parliament is to improve performance of its scrutiny function it will need to allocate more resources to research and independent advice.*

- *The research and advice must be, and be seen to be, open and independent as should the appointment of advisers.*
- *There is a need to utilise a wider range of Scotland's policy community to provide such advice.*

1(e) Is the Parliament satisfactorily accessible to non-governmental organisations? Are there any significant barriers to our participation in the legislative process? Are their ways in which our engagement might be improved?

As an intermediary, umbrella body within the civic sector, LINK has worked closely with Parliament since its establishment. The access promised by the CSG has largely come to fruition, and our colleagues at Westminster (and in other legislatures) are regularly impressed by the relationships of trust and understanding that we have been able to achieve. Access by written and electronic communications from our members has almost always met a good response from MSPs, and meetings have often been held as follow up or on request.

This applies in particular to the ability of organisations such as LINK to assist access for the smaller environmental organisations with few or no professional staff. MSPs have accepted that the views and representations of such organisations are both valid and very helpful to their work. LINK has also worked hard to ensure that "ordinary" members and volunteers of eNGOs have gone to Parliament to explain their work and their points of view. This said, we have noted occasions where the representative nature of our member organisations has been seriously questioned by a small number of politicians. We are strongly of the view that no person, group or groups in our community has a monopoly on representativeness, and that non-governmental organisations should be accorded the merit of genuinely representing the views of communities of interests - which are a legitimate part of Scottish life, alongside communities of place and elected representatives.

1(f) Does Parliament allow for too much secondary legislation? Is the Parliamentary scrutiny of secondary legislation adequate? Should we consider the different types of secondary legislative instruments more carefully?

A criticism often made of our UK and Scottish legislative systems is that the bulk of laws are contained in secondary legislation, which is in receipt of little if any scrutiny in Parliament. Our political culture is largely based in the modern era on an enabling Act which allows vast amounts of statutory instruments under its terms. Perhaps the best example is the European Communities Act (1973) under which huge swathes of regulations have been introduced – including notably, for example, the implementation of much of the Habitats Directive (Great Britain wide) and the entire implementation of the EU Strategic Environmental Assessment Directive for England & Wales. By contrast, the latter was implemented in Scotland by the admirable Environmental Assessment (Scotland) Act (2005). It is suggested that a new fount of massive amounts of secondary legislation has been created with the passage of the Public Services Reform (Scotland) Act (2010).

The threat is that the sheer volume of secondary legislation arising as a consequence of European Directives, Westminster and now Scottish Acts overwhelms the ability of somewhat less than 129 MSPs to cope. The Subordinate Legislation Committee at Holyrood has faced a massive task in attempting to sift vast numbers of instruments across the whole range of the Scottish Government's responsibilities – with the principal task of looking at new subordinate powers in primary legislation and advising lead Committees on whether these are appropriate or not. Secondary instruments are passed for scrutiny to the appropriate subject Committee, but it must be asked if any Committee meeting only a few hours a week on average could, in itself, contain the expertise to address the substance of the vast workload involved in secondary legislation with anything approaching the knowledge, expertise and information required at a substantive level, even if it had the technical,

legal expertise. The subject Committees in the Parliament have very limited time available if scrutiny of the subject matter of an instrument is required, and this must be a very significant constraint on their willingness or ability to refer proposed statutory instruments for more knowledgeable scrutiny for fear of damming the remorseless flow.

Recommendations:

- *We should actively consider whether the scrutiny of secondary legislation is adequate – and if it is found lacking, how to remedy the problem.*
- *If greater scrutiny of secondary legislation is required, the discussion of the work schedules of Committees must take account of this function also.*

1(g) Is the committee structure working? Are there ways in which it could be improved? Can we interact with committees and clerks better, especially outside of formal evidence giving or bill scrutiny? Do the Committees help to solve the problem of "departmentalisation" in both their own work and the work of the Government? Does the current Committee system cope with the task of pursuing truly sustainable development?

There have been considerable advantages in the Parliament adapting its range of mandatory and subject Committees to its numbers at the beginning of each session – and sticking to the model. This practice has provided stability for the system and made the fact that the subject Committee remits cross Government departmental boundaries, an understood and acceptable one. Parliament has demonstrated that it can stick to its roles within the limitations it faces (particularly in terms of numbers of MSPs) and has avoided, within each session, copy-cat following of the varying structures of Ministerial responsibility in the executive branch. It has refined the process over the three sessions it has held so far. The stability has allowed members of the Committees dealing with environmental issues to build up considerably greater experience over their time in post, something that is of great value.

Where stability of remit has worked, however, stability of membership has been less certain. Particularly during the first and second Parliaments, the regularity of ministerial re-shuffles lead to large amounts of knock-on changes of membership of Committees. In addition to this relative instability, few individual MSPs have developed a long-term political specialism due to a combination of personal interest and lack of ministerial ambition. Due to the relatively small numbers of MSPs, we have not seen the development of many career-long specialist backbenchers. Given the size of the Parliament, even with time, only a few issues are ever likely to be covered by such specialists. This relative lack of specialist back-benchers could only be covered by the appointment of greater numbers of permanent specialist advisers to the Committees.

As has been mentioned earlier the Committees (and in particular those with environmental responsibilities) have faced what has sometimes amounted to a legislative log-jam. This has seen their scrutiny, and other, functions suffer, but has also given the impression that their work programmes are impossibly full. This should not be confused with or blamed on the structure for the Committees.

The fact that the responsibilities of the Parliamentary Committees remits have not been coterminous with those of the (far too often re-organised and shifting) departments of Government should have had an effect in "depolarising" governance. It was always hoped that the Committees might look across all other departmental responsibilities and offer insight in this process of scrutiny that assisted the creation of "joined-up-government". In the crucial, environmental area this has happened only in a very marginal way. The environmental Committees have had very little chance to operate outside their primary field. Rarely have they been able to ask questions of the economic and social parts of government. Even worse, they have, on occasion been treated as distinctly

secondary in importance to the economic and social committees. For example, the Rural Affairs & Environment and the Transport & Climate Change Committees were asked their views on the 2011 Budget Bill. They called for and took evidence, but when their views were submitted to the lead Committee (the Finance Committee), they were almost without exception, ignored. This is, sadly, far from an isolated example.

Despite the rhetorical commitment of all the parties to the principles of sustainable development, time after time, economic interests are put first and economic development has been given primacy. This has been the case particularly in the last four years when the mantra of "sustained economic growth" has been intoned at every opportunity as a version of sustainable development despite its basic failure to tackle the core questions.

- Are the required environmental questions asked when primarily economic or social matters are decided upon?
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As was suggested earlier we should debate the opportunities and means by which Parliamentarians (and others) can acquire a greater awareness and understanding of the challenges of sustainable development (where "living within environmental limits" means genuinely respecting those limits, as opposed to simply splitting the difference between them and economic or social interests).

Only when these fundamental questions are being asked – in Government and in Parliament - and the issue of sustainable development being truly and fully addressed in a structured fashion will we make serious progress towards achieving sustainability. The Committees of Parliament can play a vital role in this task. From an environmental point of view, there is no Committee in the Scottish Parliament playing the crucial role of the Environmental Audit Committee at Westminster, where all manner of economic and social policy issues are effectively audited for their environmental consequences. Equally, there are no Committees at Holyrood performing the equivalent audit function in the economic and social fields. Governance remains, therefore, in "silos". "Joined up government" is still rhetorical.

Recommendations:

- *We should commission academic research to establish the efficacy of the uncoupled Committee/Department structure in achieving depolarised scrutiny of government.*
- *Consideration should be given to the appointment of permanent specialist advisers to the Committees*
- *We should consider how the barrier to sustainability represented by Parliament's apparent inability to ensure the cross-auditing of social, economic and environmental policies can be overcome.*

1(h) How successful is the three stage legislative process – without a revising chamber?
Can we engage better and more successfully at certain stages? Do we exploit the potential for Private Members Bills or the possibility of Committee Bills fully?

The unicameral nature of the Parliament has, over its life, offered us the opportunity to analyse the effect of the lack of a "correcting chamber", such as the House of Lords at Westminster. No major complaint about the lack has become an issue – although some in legal circles have criticised the

quality of the legislation produced, and one or two clear problems have arisen with the sometimes almost arbitrary effect of Stage 3 votes on amendments, particularly in the last four years.

In LINK's experience, the effectiveness of the three stages is greatly enhanced if there has been good debate on the issue of policy intentions and the engagement of a wide range of stakeholders before the introduction of a Bill. Such pre-legislative processes might include one or more consultation papers, a well-constituted stakeholder forum, or a draft bill. For example, the Marine Act was preceded by extensive discussions and a consensual approach within AGMACS and the ERD inquiry. Similarly, the Nature Conservation Act was beneficially shaped within the discussions and debates of the Expert Group on SSSI reform and the legislative sub-group of the Partnership Against Wildlife Crime.

The three stage legislative procedure has been largely successful in creating the proper distinction between first debating the principles and broad policy involved, then attending to the detailed amendment of the Bill followed by a final debate and 'polishing' of the legislation. At Stage 1, the Committees have, in most cases, been able to assert their prerogative of indicating the need for major changes in policy direction (and the Government has mostly responded helpfully). Stage 2 has seen the Committees cope reasonably well with the large number of amendments promoted by the parties and by interested stakeholders. Stage 3 debates have rarely failed to focus attention satisfactorily on the major remaining issues to be resolved.

Problems with the system have been apparent in the last four years, particularly in relation to:

- the length of time for reflection between Stages;
- the speed with which Stage 2 is often pushed forward (causing problems particularly in the time between lodging amendments and debating them - and the possibility of amending amendments following discussion and agreement between the parties); and
- the possibility of contradictory amendments being passed at Stage 3 (as happened during the Stage 3 Debate of the Flood Risk Management (Scotland) Bill (2009), without recourse to a corrective amendment procedure to tidy-up the final Act.

These problems were, however, extensively addressed by the 2003-2007 session's Procedures Committee, who considered these problems and made a number of recommendations. While many of the recommendations have been implemented, the problems are still evident. LINK believes that there remains potential for significant improvements, but there is a suspicion that parties in Government may dislike such changes because they would slow the legislative process and "clog-up" the legislative production line. They might also increase the possibility of the passing of non-government amendments.

[Having checked the report, it was actually fairly modest in its recommendations – even though it discussed wider changes!]

LINK and its members have exerted every effort to be of assistance by providing our own policy agenda and the requisite briefing and amendments to back up our ideas. We have never felt excluded from the process. Only rarely have we felt that we were taking the legislative initiative by promoting Members' or Committee Bills, however, and although this is principally an argument concerning the setting of the legislative agenda, it is also a reflection of the huge pressures put on the system by the sheer amount of legislation introduced by Governments.

Recommendations:

- *We should commission research into the legislative workload of similarly sized, unicameral Parliaments – and how they organize their Committee work.*

- *We should revive the report of the Procedures Committee from the 2003-07session and pursue its recommendations.*

1(i) How successful are "general duties" within legislation?

LINK has been instrumental in pursuing amendments to legislation inserting clauses laying down general duties on government and "public bodies". General duties on sustainable development have been successfully inserted into several bills, including the Climate Change (Scotland) Act 2010 and improved the general biodiversity duty in the Nature Conservation (Scotland) Act 2004. A general duty to protect and enhance the marine environment was inserted into the Marine (Scotland) Act (2010). Government has almost always opposed the insertion of such duties, often using the argument that they are not required in legislation because they arise from international obligations and are, therefore, part of both the normal legal and administrative processes. LINK's response has been to argue that setting the duties within Scots Law adds clarity and real political weight to them as opposed to lack of clarity we have witnessed in relation to our pursuit of the substance of, for instance, the Aarhus Convention obligations of the Scottish Government.

The very small numbers of cases involving environmental law to come before the Scottish Courts means that we have little if any case law to test the meaning and efficacy of general duties. They are an undoubted advantage as we pursue policy objectives, providing the desired clarity and political weight that might persuade Government to avoid a legal conflict, but the question must be asked as to the real outcome of the pursuit of general duties in legislation. Have they been a successful means of pursuing policy change and progress? If so, how effective have they been and are other strategies required?

One alternative strategy we should consider is the use of preambles to each piece of legislation, adapting a European model. This goes against the Westminster model that laws are there primarily to give powers to the executive and that the insertion of statements of the principles upon which the legislation is based is something akin to anathema. Considering the ability of our Courts to provide decisions based on the EU's Directives, which already contain fully justiciable preambles, the time may have come to ask what benefits are obtained by following the English parliamentary and legal tradition. As EU law is directly applicable by our own courts and a fundamental principle of Scots Law is that it is based on legal principles, there may be advantages to changing course.

Recommendations:

- *We should continue to monitor the effect of general duties in legislation.*
- *We should consider the use of preambles to Bills.*

1(j) How successful are 'action plans' or other administrative strategies in comparison to legislation, and does Parliament properly scrutinise these non-legislative strategies?

LINK has been instrumental in moving amendments to Government legislation, inserting clauses laying down duties to establish Government strategies – and was particularly successful (working with SCCS) in establishing strategies within the Climate Change (Scotland) Act (2010) such as the Land Use Strategy and the Public Engagement Strategy. Government has almost always opposed the insertion of such strategies, using the argument that they are not required in legislation and that they have always been available, and often delivered, as part of the normal administrative process. LINK's response has been to argue that setting the strategies in law adds permanence and real political weight to them, as opposed to the temporary and non-binding nature of, for instance, the Labour/Liberal Democrat Coalition's Strategy for Sustainable Development - never again heard of under the SNP minority administration. At an even more central level, the SNP's own National Performance Framework was announced with fanfare as the overall measurement of performance,

but has had little Parliamentary scrutiny or debate. Despite this, it has significantly impacted on the operation of Government and its agencies.

It is known that the substance of a "legislative strategy" has little additional weight in a court of law over the administrative version - the only duty binding Government being the delivery of the strategy itself as laid down in legislation, with only the broadest possible limitations as to the substance of the document (and policy). We have no evidence as yet from case law as to the attitude of the courts in this matter – and little if any evidence that the political gain of achieving a successful amendment is great or small. The indications from the two strategies mentioned above suggest that the Civil Service is well aware of this legal background, and unperturbed in producing drafts and strategies that clearly do not meet the aspirations expressed in Parliament during the insertion of the strategy clauses. This was certainly the LINK experience of the Land Use Strategy of 2011, produced further to the Climate Change (Scotland) Act (2010) – and our views were strongly backed by the Rural Affairs and Environment Committee when they called in the draft for scrutiny. It is questionable, even now that the completed Strategy has been laid before Parliament that it fulfils the terms set out in the Act, and in substantive terms is much stronger than the draft but much weaker than was the clear intention of Parliament. The Strategy did not, however, require any positive affirmation by Parliament.

The question that must be asked is, therefore, has the pursuit of policy strategies in legislation been meaningful – other than in terms of providing a focus for Parliamentary debates? A further question with some validity is whether a strategy such as the Land Use Strategy should be taken to the Court of Session for a judicial review to test its fulfilment of the legislative requirements. Only the Court has the power to determine whether the will of Parliament or Government is being observed – and whether a legislative strategy is of any more value than the non-legislative variety. This matter is related to the discussion below of the nature and effectiveness of statutory and non-statutory executive agencies.

Recommendations:

- *We should continue to monitor any differences in the delivery of policy backed by a legislative strategy as opposed to an administration strategy.*
- *We should consider the value of a constitutionally contentious judicial review in order to obtain clarity as to the status of legislative strategies.*

Part 2 - Executive Questions

LINK has had a wealth of experience of working with the Scottish Executive/Government over the twelve years of their existence. A reflection of this experience can be found in the recent publication **"Protecting the Environment in a Time of Cuts"**. This paper notes the consequences for the Scottish Government of the financial crisis and UK Government cuts – and presents arguments for developing Scotland's approach to the satisfactory pursuit of sustainable development. This paper is intended, however, to deal with an overview of the main governance questions which our experience of government has raised since 1999.

2(a) Has Government really tackled "departmentalisation" or "silo-thinking"?

The political shape of government in Scotland has changed considerably since 1997 and the administrative organisation has seen considerable change also – but fundamentally we retain a political structure which is hierarchical and divided on traditional policy grounds, and the same

applies to the administration, with the added complication of a plethora of agencies, pseudo-agencies and other "non-departmental" bodies.

Much has been said about "joined up government", integrated government, breaking down "departmental barriers" and "getting government out of its silos" and this has been the standard response to calls for the removal of the barrier to sustainable development that is departmentalism – where the environment has not been considered by policy-makers in any department other than in a very shallow manner, if at all. Several structural attempts have been made in the direction of integration.

(i) **Non-coterminous ministerial portfolios and civil service "departments":** Since 1999 ministerial portfolios and the units of the civil service have been de-coupled to a limited extent –although it should be noted that the flexibility of the Scottish Office in allocating the content of ministerial portfolios has not significantly changed other than in that there are now more ministers to take on responsibilities. There have been advantages, perhaps, where, for instance, the lifelong learning division of the civil service working with the enterprise divisions and agencies working under a single minister have improved the relationships between universities and colleges and industry – but traditionally the environment division has always worked with the agriculture, forestry and fisheries divisions (other than when there was an "Environment, Transport and Planning" portfolio, and "Rural Affairs" dealt with only agriculture and fisheries in 1999-2001) and if greater environmental awareness has spread in the latter units, it has been the continuation of a slow process that started well before devolution. There is little if any evidence that units sharing ministers have become greatly less silo-like. They remain divisions. Fundamentally, there will always be divisions between the different policy areas in the civil service and, how they co-operate and think outside there specific remit appears to be only marginally affected by reporting to the same minister.

(ii) **Civil Service reorganisation:** The civil service has seen significant reorganisation since 1999, but there is little if any evidence of genuine change from departmentalist attitudes and practices. The departmental structure may be altered and the names changed, but the units remain units, the divisions remain divisions and the attitudes and behaviours show little sign of the development required to achieve sustainability thinking. (There have been two major civil service re-organisations in the 2007-11 period alone. First, in 2007, the administration was reformed into 'Directorates-General' reflecting the remits of Cabinet Secretaries – however, this was almost entirely a change in nomenclature. Now, from April 2011 a further reduction in the numbers of senior civil servants has led to new reforms – between Governments – the effects of which are yet to be seen.)

(iii) **Central policy co-ordination:** It had been hoped that improved cross-cutting, sustainable thinking might be achieved by the creation of a strong office for the First Minister, matched by that of the Permanent Secretary and by the central appointment of the Special Advisers. While these developments have certainly improved the communications of the Government there is little to suggest that co-ordinated policy development has been strengthened. No serious equivalent to the various No 10 or Cabinet Office roles (the Policy, Delivery, Equal Opportunities, Constitutional and other Units, have been established in Scotland. The policy roles have remained largely departmental and have been co-ordinated only insofar as delivering the 'programme for government' has allowed. A feature of the shift to a proportional political system has been, counter intuitively, less fluidity in policy development inside government and greater importance attaching to the merging of the political party manifestos – without any serious progress towards sustainability.

Non-structural processes have had greater success, perhaps, in the fight against departmentalism. It would be wrong to suggest, however, that they have placed the environment at the core of government or that their application has been equal across all parts of the Government.

(a) Strategic environmental assessment (SEA - as transposed from the EU Directive into Scots law in the Environmental Assessment (Scotland) Act,) has begun a slow process of bringing environmental considerations to bear across Government plans, policies and strategies, as the Act begins to take effect. LINK has reservations about the nature of both the will to make SEA work in government and the substance of several individual assessments where it has been observed that framework of the questionnaires used has tended to support government policy rather than strategic environmental considerations. SEA is weakened, perhaps, in that while social and economic considerations retain their apparent primacy within government, they do not have similar, comprehensive frameworks for strategic assessment and mainstreaming into decision making. SEA has sometimes appeared isolated in this respect, and appears to be treated often as a barrier to policy making rather than an aid. Further, the application of SEA across policy portfolios appears to be inconsistent.

(b) The National Performance Framework is a laudable attempt to further the cause of open government and coherence. As has already been noted. However, the project was launched to acclaim but has had little Parliamentary scrutiny. While its structure and potential was welcome, environmental considerations were not central to the overall policy at the time of its establishment, and the centrality of the oxymoronic term “sustainable economic growth” undermined its potential to advance sustainability.

(c) Carbon Accounting has been introduced within the Scottish Budgetary process with early indications that it has the potential to begin to effect decision making towards achieving sustainability, but it is at an immature stage of technical development and relies on the political will of the incumbent Government if it is to grow as an important contributor to the achievement of sustainable development. The early indications are that carbon accounting has yet to be taken seriously by either Ministers or officials.

All in all, environmental considerations remain at the edge of government and not at its centre – and the measures prescribed to tackle this problem have been largely superficial in their design and in their outcome.

Recommendations:

- *We must continue to pursue structural reforms to move towards truly cross cutting government, with the strengthening of central policy co-ordination as the primary goal.*
- *We must find the political will and long-term understanding to fulfil the potential of central non-structural government process in moving us towards sustainability.*

2(b) Is the complex structure of the Scottish Government fit for purpose to deliver sustainable development? How might its performance be improved? What, within the structure of government, distinguishes the functions of central departments and agencies? Can there be any guarantee of the independence of arms-length agencies of government, whether statutory or non-statutory?

Since the establishment of the Scottish Office in 1895 government in Scotland has grown in size and complexity. It has been a slow process, rarely viewed on a comprehensive basis, with departments and agencies being added in the iterative, British manner. Even within the debates

and legislation on constitutional change, rarely have we seen much discussion of the overall structure of government within Scotland.

Now, significant re-organisation of executive government and its agencies appears to be coming. It is being driven largely by financial concerns as a result of the global economic situation. LINK is determined to pursue substantive outcomes which benefit people and their environment. We are not of the view that specific government structures are the only way to achieving such outcomes. We remain open to any well-thought out, structural reform that may generate savings and still deliver for the environment. Our approach will remain that we need a long-term, strategic and participative approach across the public, private and voluntary sectors to achieve sustainable development, and this will be aided by effective and efficient structures inside government. The delivery of substantive environmental outcomes is, for us, the central issue rather than the architecture of government – but re-organisation of Government must be done very carefully if it is required - and in a way that does not damage our environment.

In **Protecting the Environment in a Time of Cuts** we noted in discussion of the size of government and the division of responsibility between the public, private and voluntary sectors that, unlike many areas of social policy, the environment, its protection and enhancement, are not heavily reliant on the provision of "public services", but rather on the development and use of legislative, regulatory and other governmental tools. In particular, environmental policy is a matter of setting out to change attitudes and behaviour in all sectors of our community. Heavy dependence on these tools of government for progress places civil service and agency resources at a premium. Our views were refined in recent submission to the **Christie Commission** on the future of public services.

Some environmental policy delivery is, of course, provided directly in the form of public services. This is particularly the case in our important marine environment, which has seen the creation of Marine Scotland and the passage of the Marine (Scotland) Act within the last year. We hope that the efficiency savings already involved in the merger of the Scottish Fisheries Protection Agency, Fisheries Research Services and other divisions of the civil service will be a consideration as we move forward, and that every effort will be made to continue the radical improvements offered by the new legislation. This is essential in our view given the rapid pace of development in the marine environment, particularly in relation to marine renewables.

Scotland's international image is dominated by impressions of a high-quality environment – and many major private sector industries such as tourism, whisky and agriculture depend upon maintaining and improving this image. The policing of the regulations which have, by and large, been the main drivers in delivering improvements in the quality of our environment have been the responsibility of NDPBs such as SEPA and SNH – and the "branded" parts of the civil service such as Historic Scotland and Marine Scotland.

The Public Services Reform Act gives the Scottish Government considerable powers to reform, merge or restructure the NDPBs in the interest of efficiency and government simplification. The recent merger of the Deer Commission for Scotland and Scottish Natural Heritage is an example of this reductive process in operation. LINK members have considered these issues and are of the view that, while there is scope for further efficiency and best value gains via the SEARS approach, any hasty and major re-arrangement of the environmental Agencies would have detrimental impacts on the work that they do, and quite possibly incur greater cost (particularly bearing in mind that some mergers and major re-organisations have taken place quite recently).

Any such restructuring must ensure also that the resultant architecture of environmental governance avoids confusion as to function and conflicts between different functions. For example

quasi-judicial functions should not be mixed with commercial duties, or independent scientific advisory functions should not be shared within a single body with duties entirely dependent on governmental direction. The functions of government require to be distinguished – and to be held separately, where required.

LINK and its members will play a full part in any consultation on proposed restructuring of agencies. We have already held a brief preliminary discussion of the matter with the Scottish Government and we call for consultation to take place at the earliest stages possible, in order that any restructuring achieves the confidence of civic society.

LINK will continue to discuss the issue of what the core substantive functions of environmental government are, but our listing these substantive functions would not necessarily be helpful and we believe that to be government's job – but broad outlines as to the identification of key outcomes will be made – starting with international obligations and statutory requirements. The corollary of this is that LINK will also be willing to consider areas that might be identified as non-core functions.

LINK will also take a serious view as to the separation of executive, quasi-judicial, auditing, advisory and other functions within any hierarchy proposed. We reserve the right to comment on any examples of where core functions were inefficiently performed by government and its agencies.

LINK also offers the suggestion that the time has come for the complex structure of the executive in Scotland to be sorted out by defined functions of government. These functions might include the following list and each function should be assessed against any requirement that it be performed independently of political control – by either politicians or the central civil service.

Purely executive functions: These functions, in the straightforward delivery of the legislative requirements placed on government by Parliament, are delivered by a bewildering variety of departments and agencies. The Scottish Executive, the civil service, deliver a wide range of regulatory, licensing, and other functions, such as the designation of protected environmental areas, in direct exercise of the powers given to Ministers. They also do so through indirect "client", statutory agencies such as health boards, police boards or NDPBs, where a defined and limited independence of decision is granted to appointed boards of individuals.

Quasi-judicial functions: These functions, such as Ministerial decisions in planning cases or prisoner release, are carried out by politicians on the advice of civil servants, relate to private individuals (including legal individuals) but are specific to an individual minister and are considered to be taken outside the normal party political policy structures, even though there consequences might be deeply political.

Regulatory and licensing functions: These functions are often carried out within Government but are also frequently handed to "arms-length agencies as part of a mix with other work. The statutory regimes to be regulated do not, however, necessarily require independence from central government.

Inspectorate functions: Inspectorates are established to monitor and report on the delivery of government and regulated private or social functions. To perform they must be separate and independent of control by those delivering the services to be inspected.

Fiscal functions: These functions are largely carried out directly by the civil service under direct ministerial control – but can be devolved.

Policy formation functions: The formation of policy is performed largely by the central civil service but often after considerable consultation with supposedly "arms length" agencies, operating quasi-independently as the deliverers of current policy.

Advisory & Expert functions: Bodies established by the Government for the purposes of giving expert advice on an independent basis remain, nevertheless, a part of the executive branch, carrying out this function often in conflict with other functions such as those of a purely executive nature.

Auditing functions: Formal auditing the performance of the executive branch has, by and large been allocated as a function to independent bodies (clearly separated from executive functions). As in the case of the Sustainable Development Commission (SDC), this independence is no guarantee of the survival of this function.

Crown functions: These functions, such as the Crown Office and the Procurator Fiscal Service are performed by the executive branch as part of the judicial process. They extend into the functioning of the Crown Estate, however, and other residual duties, prerogatives and rights of the Crown.

Ombudsmen & Commissioner functions: These functions are, properly, the responsibility of Parliament but are included here for purposes of completeness.

LINK is strongly of the view that we need a better, clearer understanding of the framework of functions and the rationale behind their combination in the roles of different agencies. Without such an agreed understanding, we and the rest of the public are left bewildered by the apparently arbitrary way in which government is structured. Why can Historic Scotland market itself and be "branded" as independent – when it is just a part of the civil service, but SNH, a non-departmental public body can't? How can SNH be considered an independent, expert, advisory body, when it is tightly controlled by ministerial direction and grant-in-aid? Is policy formation furthered when most of the "public" responses to a Government consultation are provided by 100% executive agencies? Why should Ministers determine quasi-judicial appeals to decisions by NDPBs, when the decisions are taken by NDPBs subject to directions and funding from the same Minster?

At the same time as the functions are performed within this confusing framework, with its mixing of functions, we can observe also that there is no clear coverage of each within large areas of government. Regulation and licensing can be carried out directly or by agencies, without any logical, consistent distinction as to why. As a result of the piecemeal establishment of the organs of the executive branch, not every part of government is subject to an independent inspectorate or an expert advisory body. (The same certainly applies to ombudsmen and advocacy functions under the Parliamentary Commissioners.) Auditing functions have been largely curtailed within the financial field and auditing of measurable economic, social and environmental data has been dispersed across Audit Scotland, the abolished SDC, ill-resourced Parliamentary Committees and NGOs of the voluntary sector.

Recommendations:

- *We must strive for a better common understanding of the functions of government and their allowable combinations and required separations within government and its agencies.*
- *Where an agency is established to exercise independent judgement, the agency should be provided with clear terms of reference and accountability, and its independence be respected.*

- *We should comprehensively analyse the way that each function of government (in isolation) is carried out across the executive branch as a whole.*

2(c) Is the Government satisfactorily accessible to non-governmental organisations? Are there any significant barriers to our participation in the administrative process? Are their ways in which our engagement might be improved? Is the Government's consultative model adequate? Are we satisfied that we are listened to effectively (alongside other stakeholders) in Government consultations?

We are fortunate and live in a very open, democratic system. All parts of the policy community have access to Government ministers and civil servants. Public administration is carried out under the law, and the scrutiny of the public and the media. LINK and its members experience of the last 12 years has been of far greater openness and access to Government than was the case beforehand, and, in the small polity that is Scotland, we have benefited greatly from government being "closer to the people" in this respect. With this participation, based upon greater access, has come greater understanding – and we have learned that there are aspects of open, participative still to be perfected. We have experienced this participative ideal in the two principal forms discussed below – stakeholder groups and consultations.

Scotland has a long and distinguished history of discursive, argumentative, consultative and, latterly, ameliorative debates being carried out within the policy community, as the shape of our society has developed. In the centuries without kings or parliaments, indeed, the professions, the churches, the lairds, the trade unions, the academics and others developed a relatively sturdy approach to ensuring that their contribution to public life was heard. We did not have to invent the idea of participative government or power sharing in 1999. This tradition has, without doubt, been a major contributory factor in ensuring the stability and operative success of the newly devolved constitutional arrangements.

But if the constitutional settlement encouraged independent voices inside the policy community, it also placed great power in the hands of politicians and officials. The distance of the legislative and executive centres of power from Scotland itself, together with the major aspects of Scottish life that were specifically protected by the Treaty of Union, created a uniquely Scottish administrative model, where very considerable political power was placed in the hands of Ministers and civil servants, without being balanced by a nearby Parliament. Some of the executive habits and attitudes to power sharing developed with this model remain with us. These include the tendency found in almost all government to jealously retain power, and despite the principles guiding the work of the CSG, it is possible to see these habits and attitudes still at work.

Key Principles (from the Report of the Consultative Steering Group)

2. We adopted the following key principles to guide our work:

- *the Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;*
- *the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland;*
- *the Scottish Parliament should be accessible, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;*
- *the Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all.*

3. These key principles were an invaluable benchmark against which to test our emerging conclusions. They also served as a basis for the consultation exercise and have been broadly welcomed and accepted by the wide range of bodies and individuals who have responded to us. We invite the Scottish Parliament to endorse them, to stand as a symbol of what the Scottish people may reasonably expect from their elected representatives.

LINK and its members experienced power sharing, at its Scottish best perhaps, when the first coalition Government established the Advisory Groups on Marine and Coastal Strategy (AGMACS). Over the years of its existence (and that of its successor bodies), genuine debate managed to iron out a huge range of problems related to the marine environment, its protection and even its enhancement. Fishermen, the extractive and power industries and environmentalists sat around a table with ministers, civil servants and scientific experts, and the end product was the devolution of significant administrative powers from Westminster and the Marine (Scotland) Act (2010), in our view one of the best and most farsighted Acts of the Parliament so far. Our experiences in other areas of policy have been less felicitous – and even within the overall AGMACS process there were problems.

An issue arising from our experience is the matter of when a 'stakeholder group' is a desirable mechanism of governance. At present the decision on the establishment of such groups appears to be almost entirely arbitrary and dependent on the individual Minister. Not all Ministers feel the need for a long-term, ameliorative approach. Some might have policy solutions they are determined to impose. Stakeholder groups are also largely established and kept going at the instance of a Minister, and when the individual politician inevitably departs his or her post, a new Minister might mean a completely new approach is taken. Even within the environmental area alone, there is no consistency in the establishment of such mechanisms. The Government has so far, for example, refused requests for a stakeholder group to underpin the development of the statutory Land Use Strategy arising from the Climate Change (Scotland) Act (2010).

Another concern is the matter of choosing the membership of stakeholder groups. No set mechanism exists for this and the criticism that one set of interests (particularly economic interests) might be seriously over represented on a group has been frequently made. The decisions about appointments to such groups appear to be entirely in the hands of a Minister and his or her advisors, and are rarely discussed prior to the announcement of the establishment of the group. Such a close system is open to the criticism that groups or individuals are specifically excluded because they don't fit in easily, giving rise to the possibility that the group is seen as the client of government rather than genuinely representative of the stakeholders involved. For obvious reasons, a stakeholder group in this position is likely to be less effective in securing consensual policy positions.

A similar problem can arise when a Minister decides that a large number of non-departmental government bodies (NDPBs) and other bodies established or fully funded by the Government, should be represented within a stakeholder group. The accusation can be made in these circumstances that the executive branch is dominating or neutralising non-governmental stakeholders, thus lessening the effectiveness of the group.

After all of these considerations there remains the question of the willingness of the Minister and officials to accept and follow the advice of such groups. It is not unknown that after the expenditure of considerable time and energy, stakeholder groups find the decisions being made are exactly those that might have been expected before the group had even met.

This is a criticism which has, on occasion, been made also of formal Government consultation exercises. The cause of participative government has not been well-served where the views of those consulted appear (or are perceived) to be ignored. As with stakeholders groups, the value of consultation is lessened where there is a widespread perception that the views of one specific group of those consulted have been dominant (or if the bulk of responses have been from non-departmental bits of the government in their various forms).

The consultative process has also been damaged where the respondents perceived the presentation of the subject to be to strictly by the form of the questions asked. Where questions are considered leading or closed and there is no space provided for alternative positions to be reflected (save by their being forcibly inserted) doubts are inevitably cast upon the value of the consultation.

Much has been made by the executive branch in recent years of their willingness to set out consultation papers for response from the public as a major part of participative government. LINK and its members have had cause on many occasions, however, to question whether the sheer number of consultations in the environmental field alone can be justified. The resources of the eNGOs have been stretched remorselessly by involvement in consultation exercises and the result has been to promote a certain cynicism about their value. This problem has been noted amongst our colleagues in other NGOs. Similarly, criticism has been levelled against the sometimes very technical and narrow fields consulted upon.

Other significant questions have arisen around consultations, such as the issue of how consultation responses are analysed and how Government responds to such a process. There have been instances where LINK and its members have heard of “campaign” responses being lumped together as a single contribution to a consultation for the purposes of analysis – where on other occasions it has been clear that well-organised campaigns have had mass submissions counted separately. This matter was taken to a ridiculous extreme when the Government itself mounted a campaign to solicit individually counted responses to the smoking ban consultation. If the analysis of respondents is inconsistent from one consultation to the next, so too is the way in which Ministers have reported the findings of the consultations. Some have been brief to the point of banality. Others have been more detailed but rarely have any sought to explain why Ministers rejected alternative propositions to their own. In addition there is no standard Parliamentary procedure for responses to consultations and it is never clear whether they will be debated.

From these experiences, a serious issue arises as to whether the CSG principles are indeed being observed within the executive branch.

Recommendations:

- *We should discuss guidelines for Government on the criteria, establishment and appointment of stakeholder forums.*
- *We should discuss the number, scope, openness, range and processes of Government consultations*

2(d) Does the Government have adequate sources of independent advice, particularly with regard to scientific matters?

An important part of the pursuit of sustainability is using the best available science to create properly evidence based policy. As with many policy making requirements, it would be impossible to expect Ministers and officials to be expert in the necessary scientific areas which by their very nature are sometimes narrowly specialist. Achieving evidence based policy requires, therefore, excellent sources of robust, independent scientific advice.

As is described above in the discussion of the framework for the functions of government, the structures for obtaining this advice are largely ad-hoc and inconsistent across the policy area, (although the coverage of the environmental field can be supplemented by seeking the advice of UK advisory bodies) and much dependent on the two principal agencies – SEPA and SNH. The agencies are, however, as has been noted, burdened by a combination of policy advisory, expert scientific and executive roles. In this situation, the dominance of finance through the grant-in-aid and the ability (and occasionally tendency) of Ministers and officials to give often detailed direction, undermines the independence of the scientific advice offered. This is not to say that the integrity of the advice given is in any way in doubt, but to suggest that other considerations might play a very major part in decisions as to which scientific research is undertaken. It might also mean that the way and tone in which advice is offered might be affected by other considerations. These influences have been observed to include a dislike of the agencies being publicly criticised as their performance is closely monitored by central government – and uncertain future of any agency within an environment where threats of "bonfires of the Quangos" are regularly heard.

Before the 1980s, Westminster and Whitehall would sometimes resort to the establishment of Royal Commissions of Inquiry to look at distinct policy questions where great expertise was required. This mechanism has been used more rarely in recent years, and the Scottish Parliament and Government have used Commissions but rarely in the way that they were originally intended. But if ad-hoc commissions have faded from usage, the longer term, permanent, expert bodies such as the Royal Commission on Environmental Pollution and the Sustainable Development Commission have fared little better – with both bodies being abolished.

[We should say something about the abolition of "permanent" sources of independent advice – eg RCEP (UK) and SDC (UK and Scotland).]

Recommendations:

- *We should consider means by which independent scientific and policy advice to Government might have the independence of its sources assured – including the possibility that expert advisory groups would be better established under the Parliament rather than the Government.*

2(e) Will any changes to the fiscal powers to be granted to the Scottish Parliament and Government be of benefit to the environment?

The Scotland Bill recently introduced at Westminster proposes devolving landfill tax to the Scottish Parliament. It also follows the recommendations of the Calman Commission in that in Clause 24 it allows the Scottish Parliament to create other "devolution" taxes, which we interpret to include the environmental taxes Calman suggested. The aggregates tax has not been devolved, however, and in the spirit of the reserved powers model, no hypothecation of the landfill tax is imposed together with its devolution (a matter we hope that the Scottish Parliament will rectify).

The Scottish Parliament's only experience of "green taxes" came in the form of the debate over the plastic bag levy, proposed in Mike Pringle MSP's Members Bill. Amongst other things, the debate demonstrated the problems of attempting to use the fiscal lever through 32 local councils. This will be rectified by the current proposals.

LINK has decided that it takes no position on broad issues of constitutional change, and notes that the vast bulk of fiscal tools that might be used to environmental ends remain reserved to Westminster. We note the slow progress there towards using fiscal weapons, as in the modifications to Vehicle Excise Duty. We believe that vastly more can be done to tax the things that are destructive to our environment such as pollution and greenhouse gas emissions, as well as

use fiscal measures (such as tax cuts and tax rebates) to incentivise positive environmental actions.

Recommendations:

- *We call on all parties to commit themselves to the hypothecation of landfill tax to environmental purposes.*
- *As per our comments to the Calman Commission, we believe that if the aggregates tax is devolved, it, together with landfill tax should be properly hypothecated for environmental purposes.*
- *We call on the Committee responsible for the environment in the next Scottish Parliament will mount an inquiry into the use of fiscal means to improve environmental sustainability in Scotland*

2(f) What should be the ethos of the executive branch in Scotland?

In its recent consultation, the Christie Commission asked the important question for our governance, "What shared values and ethos should underpin Scotland public services, and how best can they be embedded in the delivery of public services in the future?" LINK responded that "the four key principles in the 1997 report of the Consultative Steering Group have served Scotland exceedingly well – and should apply not just to the Scottish Parliament but to all of Scottish public life. The original words are given below but they should be expanded, perhaps, to apply to all public bodies and services."

- **Sharing the power** - the Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;
- **Accountability** - the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland;
- **Access and Participation** - the Scottish Parliament should be accessible, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;
- **Equal Opportunities** - the Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all.

In addition to these key principles LINK suggested the following principles should be applied to the services provided by government, its agencies and the services it funds.

Consistency: The tools of government should be applied proportionately. For example, if regulation (and indeed the criminal law) are used as tools to order the use of cars and other vehicles because of their importance (and dangers), we believe that similar tools of government should be used for land management, which is of huge importance to our sustainable future. But at present, mandatory regulations and laws are applied to the one while the other is governed by inefficient subsidy, fiscal and other incentives, and often ineffective voluntary codes of practice.

Sustainability: Duties of sustainability (using the UK Government's accepted definition) have been attached to a whole variety of legislation and services. This should be spread across all government and public services, the alternative being further inconsistency but more tellingly the massive squandering of our natural resources by government in its activities. A start has been made in this direction with the new Public Bodies Climate Change Duty under Part 4 of the Climate Change (Scotland) Act 2009, which came into effect on the 1st Jan 2011. It requires public bodies, to exercise their functions, in a way:

(a) best calculated to reduce greenhouse gas emissions;

(b) best calculated to adapt to the impacts of climate change;
(c) that it considers is most sustainable.

We believe that sustainable options will benefit and enhance the natural environment with knock-on benefits for society and the economy. The delivery of this duty must be carefully and rigorously monitored – and consideration given to its extension to all services funded by public monies.

Openness and honesty: The services provided by government, its agencies and services funded by government should not be ashamed in any way of acknowledging their true nature. That they are 100% (or lesser percentages as appropriate) funded and directed by government should be openly acknowledged and stated up front. Government should not hide behind masks such as by establishing trusts and other "arms-length" organisations which all too often allow (or create) the impression that they are non-governmental. Nor should government agencies or parts of the central government be allowed to sell services disguised as "memberships" as though of non-governmental bodies.

Independent Voices: Where government at local or national level is providing services through contracts with non-governmental organisations it is essential that the representative voices of such are NOT silenced by the threat of the withdrawal of funds. The steady pressure of officials and ministers to curtail such independent voices has been a pervasive – and often unacknowledged – part of Scottish life for many years, despite protestations to the opposite effect.

Recommendations:

- *We should fully review the ethos of the administrative branch and consider bringing it into line with the ethos established for the legislative branch.*

Part 3 - Judicial Questions

LINK, mainly through its members, has some experience of governance issues in Scotland's courts and police forces. This paper comments on the broadest of these issues.

3(a) In civil matters, are the Scottish Courts prepared to assert their rights to rule on Government actions?

Prior to the establishment of the Scottish Parliament, the Scottish Courts were notably reluctant to review the activities of government. The mild relaxation of this tendency since 1999 cannot be described as comfortable, but with executive powers being exercised more visibly in Scotland, there have been increasing demands for judicial review of government activity and the Courts have begun to hear more such cases. To this must be added the "devolution cases" being dealt with since the passing of the Scotland Act (1997) in the appropriate courts.

The growth of numbers of petitions for judicial review has highlighted the issues surrounding unequal access to justice – and environmental justice and the observance of the Aarhus Convention have long been matters of serious concern to the environmental movement. 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.

This inability to gain access to justice has only been partly addressed by the granting of Scotland's first Protective Cost Order (PCO) in the Hunterston judicial review case. The development of PCOs

does, however, mark an important turning point in that first, the Court of Session has begun to act to demonstrate that they accept that there is a public interest in the law being tested, and secondly that the size of the Scottish jurisdiction is highly unlikely to throw up easily affordable test cases. The recognition that it is in the public interest to see the law clarified is welcome - and that this sometimes requires the limitation of liability for litigants is an essential development.

It is, nevertheless, the case that the Scottish Courts remain well behind the courts of England & Wales and many other jurisdictions – and that environmental law cases are at the forefront of demands for review. LINK members campaigning for environmental justice for communities and individuals are only mildly encouraged at the rate of progress. It is far from clear that the Scottish Government has properly and fully implemented the obligations contained in the Aarhus Convention. The Government has resisted every attempt to insert reference to Aarhus obligations in legislation.

Many of these issues have been recognised by the recent Civil Courts Review (the Gill Review) but no significant reforms have been made as yet.

Recommendations:

- *We should monitor closely the number of PCOs granted in Scotland, their efficacy and the compliance of Government with the Aarhus Convention.*

3(b) In criminal matters, do the Scottish police, prosecutors and courts give environmental crime the attention it deserves?

Significant improvements have been made in recent years to the resources applied to combating wildlife crime - in the form of specialist training for Procurators Fiscal and police Wildlife Crime Officers. LINK members campaigning in this field remain convinced, however, that much remains to be done as incidents of badger baiting, bird of prey persecution and hare coursing, amongst other wildlife crimes, are not declining. The statistics remain a problem, however, as wildlife crime has only very recently been added to the lists of reportable crimes and, where government figures were previously largely based on evidence gathered by voluntary organisations, we will now face the issue of new definitions and reporting procedures. The change is however very recent, and the Government crime overviews don't yet include it, as it hasn't worked through system. Increased penalties have, and continue to be, introduced, but without a solid base of reported incidents, the efficacy of sentences is extremely difficult to assess with any confidence. This will apply equally to the vicarious liability for landowners introduced in the Wildlife and the Natural Environment (Scotland) Act (2011). In addition, grave doubts are felt about the willingness of many Sheriffs to hand out truly deterrent sentences, and SNH, one of the government agencies responsible, has made no increased effort in the area of wildlife crime in the last decade and remains wedded to a "partnership" and educational approach to the issue.

In the field of environmental regulation there has been a notable increase in regulations, usually flowing from European Union Directives. At the same time, no additional resources have been allocated to the Scottish Environmental Protection Agency, and indeed the agencies budget will be significantly cut in the current budget cycle. SEPA's development of new thinking as to the application of "smart" regulations and penalties has been welcome, but it remains to be seen how the agency copes with increased regulations as numbers of staff are cut. In addition, it must be noted that there is a strong perception, and possibly a reality, that penalties for breaches of regulations handed down by the Scottish Courts are considerably less than those given out by their counterparts in the rest of the UK.

Recommendations:

- *Research is required as to the efficacy of penalties for wildlife crime.*
- *The Government, Crown Office and SNH should adopt a zero tolerance approach to wildlife crime issues.*
- *New approaches to regulation by SEPA must be carefully monitored.*

3(c) In civil matters, are the Courts fit for purpose in dealing with environmental matters? Is there a case for a specialist Environmental & Land court?

The issue of expenses (see 3(a) above) is but one of the questions that determine the fitness-for-purpose of the Courts. Other matters include access to justice, and the process of whether the merits of a decision can be addressed – as well as whether appropriate and timeous remedies are available.

For the Courts to be fit for purpose (and compliant with the spirit of the Aarhus Convention), they must be accessible to all with an interest (defined widely) and not prohibitively expensive, as well as offer merits-based reviews and timeous and effective remedies. Such a Court system has a crucial role in ensuring good governance – and sustainable decision-making. Without it, citizens and their representative bodies in civic society have no means (other than elections) to hold Ministers and their agencies to account. With such genuine checks and balances in place, Ministers, their officials and agencies will be incentivised to ensure that decisions are of high quality. At present, it is clear that the civil Courts do not meet these tests (see 3(a) above, the Gill Review, the findings of the Aarhus Compliance Committee and the confusing quasi-judicial roles of Ministers).

In some jurisdictions, many of these issues are addressed by the establishment of an environmental court. Indeed, for some matters (SSSI appeals under the NC Act 2004), Scotland has an "environmental court" in the form of our Land Court.

Recommendations:

- *The Scottish Government and the President of the Court of Session, as appropriate, must act to ensure full compliance with the Aarhus Convention.*
- *We should consider the establishment of a Commission on Environmental Justice to consider whether piecemeal rule and legislative change (as above) is sufficient or whether more fundamental change, including the establishment of an environmental court, is needed.*

3(d) Do we need to engage with the legal establishment better, and if so, how?

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).

Recommendations:

- *We should encourage the development of environmental law and its enforcement as a specialism and cooperate fully with practitioners where practicable.*

Part 4 - Civic Questions

Governance cannot be seen fully if only the classic legislative, executive and judicial branches are reviewed. Properly, these are the branches of "government' and governance covers the fuller operations of the policy community – comprising its component sectors as set out tentatively below and with each sector having a part in the governance and direction of that society. LINK believes that this is a large part of the meaning of participative government. Each sector has some power or influence over "policy" – the decisions and actions of the *polis* and the machinery of government. The sectors might be described as:

- politicians;
- the media;
- academics;
- bureaucrats;
- faith groups;
- financiers, businesses and corporates;
- trade unions;
- professions;
- hereditary power brokers;
- military; and
- the civic sector.

The divisions and definitions are not exact, and the distribution of power and influence between the various sectors varies widely as time passes and Scotland develops.

Versions of this policy community can be seen in action in villages, cities, regions, nations, states, countries and at continental and global levels. Each sector has structures which allow it to express its opinion in the negotiations that are at the core of how decisions are made. The structures vary widely in form - and the effectiveness with which they play in the negotiations.

LINK and its members, the environmental NGOs, belong in the civic sector. At any level though, the "civic sector" seems to be the least easily identifiable and the worst defined (and organized) sector in terms of its ability to exercise power and influence. Its mandate is comparatively new and, often, weak – and its structures are complex and fractured. In historical terms, the civic sector appears as the newest player on the policy community block, and its claims to be there are still contested or dismissed by many of the established actors. In addition to this, the civic sector is, by its very nature, fragmented and disparate. It covers almost every interest that needs a voice, every activity that needs an organizer and every task that requires a volunteer – and it covers the whole amorphous mass of voluntary organisations, non-governmental organisations, social enterprises, civic societies, charities, pressure groups, single issue campaigns or whatever you want to call them.

4(a) Is the independence from government of the non-governmental organisations in Scotland great enough to ensure they are an effective voice in providing policy debate and alternatives?

To be effective in wielding influence, any sector of the policy community needs to have a relationship with the different parts of government and the rest of the policy community. If a civic sector organisation is largely funded or dominated by a part of government or another part of the policy community it is, however, unlikely to be able to represent itself well and likely to be strongly influenced in itself by its funder. Influence will be brought to bear to limit the free expression of ideas and criticisms – particularly where the funder is in the executive branch of government. The

environment part of the civic sector has been amongst the clearest that its independence is crucial to its ability to influence events. LINK and its members have been mainly successful in achieving this independence – and as such have a reputation as one of the more assertive, if not successful, parts of the policy community.

The same cannot be said of all parts of the civic sector, some of which has great difficulty in finding an independent voice in the debates. Government in Scotland has, over several decades been fairly expert in co-opting non-governmental organisations to its own programme, and the relationship between much of the civic sector and government is not one of equals in terms of the policy agenda.

Recommendations:

- *We must create and implement measures to ensure that the civic sector's independent voice is protected from pressure by government and agency funding arrangements.*

4(b) Does Scotland possess adequate structures for the civic sector to operate freely?

Each part of the civic sector in Scotland has its own institutional structures, allowing it to take part in civic life at a broad level. The civic sector's diversity has, however, resulted in the least developed institutional structure. The Scottish Council for Voluntary Organisations (SCVO) has a base which is strong in the area of social issues (where it acts as an umbrella body)nbut with weaker links to, for example, sports, arts or the environmental areas, all with their own umbrella organisations such as Scottish Environment LINK. SCVO might be said to compete with Volunteer Development Scotland and its network even in the limited field of 'volunteering'. The Scottish Civic Forum, founded in the early stages of the Parliament, has collapsed – largely on account of its dependence on Government funding and the insistence of the funder that its role was primarily to deal with social and political exclusion. The Government's own Voluntary Sector Unit is almost completely a stranger to most of the voluntary sector outside social care issues, defining volunteering narrowly with little or no emphasis on the idea that voluntary organisations might be an independent voice for their area of operation.

Recommendations:

- *Scotland's civic sector requires, urgently, to consider the condition of its independence and its institutional structures if it is to play a full part within the policy community.*

4(c) Does Scotland require a forum for the entire policy community to openly discuss and debate the issues affecting Scottish life? Is there great enough communication and debate between the different parts of the policy community?

LINK's experience in the last 12 years, particularly in working with economic and social interests in stakeholder groups and a variety of other ways, has clearly demonstrated the value of clear channels of communication throughout the policy community being of value – especially where gulfs of thinking and understanding can be narrowed to the benefit of the wider community. Scotland possesses no formal or informal forum where such conversations and debates might take place, however, and the Scottish Civic Forum established in the late 1990s may have been intended to perform such a function but clearly never achieved it.

Other countries and regions have such forums, usually in the form of social partnerships. The definition used for these in a recent Scottish Government research paper (Partnership Working: European Social Partnership Models) is drawn from the Copenhagen Centre for Partnership Studies, 2002. Social Partnerships are "a tri or multi-partite arrangement involving employers, trade

unions, public authorities (the state and/or local/regional authorities) and/or others (e.g. voluntary sector). Social partnership is usually concerned with areas of economic and social policy and might be based on a binding agreement or declaration of intent." In this they follow traditionally German models and that of ECOSOC, the economic and social committee of the European Union.

For the obvious reason that environmental concerns are very much in the shadow of their social and economic counterparts, LINK is wary of most forms of this model. Our view is that sustainability involves a balance between social, economic and environmental considerations, and that it is essential that this balance should be sought in such a forum. Accordingly we would prefer to consider the creation of a wider organisation than the social partnership model – crucially, with a better name.

Consideration of adopting this widespread type of European formal institution alongside legislature and executive has taken place in Scotland but without much prominence being given to the discussions. LINK is of the view that such discussion should now be given much greater prominence, and that there are potentially huge benefits for Scotland if a forum, a space around the Parliament and Government for discussion and debate, could be created. We are of the view that discussions and debates between the different parts of the policy community should be held more directly than in the past where many of them have followed initiatives from the government, or developed within the constraints of the stakeholder forums set up by Government as discussed above.

Recommendations:

- *We should actively consider the establishment of a forum for discussion and debate between the various sections of the policy community in Scotland, involving but separate from Parliament and Government.*

Conclusion

In the Introduction to this paper it was suggested that LINK would use the exercise of a review of governance issues to identify priorities for its own efforts to improve matters, and thus the progress towards sustainable development. As our members contribute to these discussions we hope that such priorities shall emerge from the very large area of ground covered.

In the introduction it was also suggested that our observations and concerns overlap with those of many others across the Scottish policy community. The question was asked – "Is there a desire for a comprehensive review of our governance?" This paper will be published and widely distributed. If interest in the issues discussed is significant, LINK remains strongly minded to lay a petition before the Scottish Parliament requesting that consideration be given to the establishment of a Parliamentary Commission on Scottish Governance, to review the matter of our governance comprehensively and to place recommendations for change before the Scottish Parliament. We hope that such a Commission might address the issues covered in this paper and others that arise from the experiences of all in the policy community. So our question to all parts of civic society we ask is as follows.

Would you or your organisation support such a petition?

If you wish to support a petition or make any other comment please send a message to parliamentary@scotlink.org

Draft Wording of a Petition to the Scottish Parliament.