



REPORT ON LINK MEMBERS’ CONGRESS 18 NOVEMBER 2010

THE ENVIRONMENT AND THE LAW

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WELCOME
DEBORAH LONG, LINK CHAIR

Deborah welcomed everybody and explained that this year’s theme came out of the dawning realisation that LINK has built up a wealth of experience in lobbying for environment law that looks good on paper but may not be delivering on the ground; that some recent laws (since 1995) have wording that looks as if great strides forward will be made post enactment whereas these have progressed rather in a series of stumbles, some more graceful than others.

This Congress would explore:

- How should Link and Link member bodies be responding to the challenges ahead?
- What opportunities are there out there that we are not taking full advantage of?

The presentations would elaborate on the contexts for this. Andrew Thin will examine the relationship between government bodies and eNGOs, offering his perspective on both the current relationships and future needs in the context of

a changing economic environment. He will make a few suggestions, even throwing down a few challenges to us.

Andrew is not alone. We challenge ourselves on a regular basis, no one more fluently than Simon pepper, who said in Michael Scotts, "A *strong, coherent voice*":

"It is time to encourage environmental bodies to think and act out of the box, be exciting, take risks, attract attention, challenge shibboleths, expose the bogged down for being bogged down, loosen up the white-knuckle grip on precious old issues and think of ways of generating new alliances of support for fresh, new, creative approaches."

THAT is what today is about.

INTERNATIONAL ENVIRONMENTAL TREATIES: GLOBAL TO LOCAL, DR JAMES HARRISON, EDINBURGH SCHOOL OF LAW

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International Environmental Treaties

Treaties are written agreements between states creating legally binding obligations for states which have accepted them.

Many environmental treaties are "framework" treaties

Treaties depend on the consent of participants. Framework means general objectives that need elaboration at national level. Most treaties create the mechanism *Conference of the Parties (CoP)* responsible for the continuing conversation from that basic starting point.

Convention on Biological Diversity

The Convention was opened for signature on 5 June 1992. It entered into force on 29 December 1992. The United Kingdom became a party on 1 September 1994. The Convention currently has 193 parties

"The Objectives of this Convention ... are the conservation of biological diversity, the sustainable utilization of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."

Cartagena Protocol

Nagoya Protocol

Conference of the Parties (COP) Decisions – states are required to report back and say how they will achieve objectives or justify actions not compatible with the Convention.

Strategic Plan

Thematic Programmes of Work

Other COP decisions

Clearing House Mechanism - Countries have different resources to act and different resources to protect. There is the opportunity for sharing experience and learning from each other.

Reporting Mechanism

The Convention on Biological Diversity was an outcome of the Rio Summit and became binding comparatively quickly. It is fairly weakly worded (typically) and how to achieve the objectives is left to participants.

Other International Environmental Treaties

Convention on Climate Change and Protocol

Convention on the Law of the Sea

Convention on the Ozone Layer and Protocol

Convention on Persistent Organic Pollutants

Convention on International Trade in Endangered Species

Convention on Wetlands

Convention on Migratory Species

Convention on Hazardous Chemicals and Pesticides

Convention on Transboundary Impact Assessment

Convention on Long-Range Transboundary Air Pollution

The CBD overlaps with lots of other treaties, often positively. For example geo-engineering has been prohibited to reduce carbon emissions, unless it is scientifically justified.

Convention on Climate Change

The Convention was opened for signature on 8 June 1992. It entered into force on 21 March 1994. The United Kingdom was an original party

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”

Kyoto Protocol

COP Decisions

Reporting Mechanism

Compliance Mechanism

NGOS and international environmental treaties

Involvement in treaty-making

National lobbying

International lobbying

The importance of networks

NGO influence is important, to have different voices in there and direct participation. Networking internationally is vital, and NGOs should look to strengthen this aspect. Business is far ahead of NGOs here.

NGOS and international environmental treaties

“Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”

Aarhus Convention, Article 3(7)

The influence of treaties on national law and policy

Treaties are NOT binding as a matter of national law (i.e. they cannot be enforced through national courts) UNLESS they have been incorporated into national legislation.

Nature Conservation (Scotland) Act 2004

1. It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.

In complying with the duty imposed by subsection

(1) a body or office-holder must have regard to—

- (a) any strategy designated under section 2(1), and
- (b) the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (or any United Nations Convention replacing that Convention)

Climate Change (Scotland) Act 2009

4. The Scottish Ministers must, when setting annual targets, also have regard to the following matters (the “target-setting criteria”)

...

- (j) European and international law and policy relating to climate change.

NGOS and international environmental treaties

Involvement in implementation of international environmental treaties

Questions covered:

A Treaty is the generic term for any written agreement.

The UK has exclusive responsibility for compliance, Scotland must comply where UK signs up.

Potential for an International Court of Environment Law which NGOs might use in future? Aarhus has a compliance committee. Ireland has used OSPAR Convention to sue UK for environmental information. There could be parallels with Human Rights.

AARHUS IN SCOTLAND – THE OPPORTUNITIES

**Frances McCartney Solicitor, Patrick Campbell Solicitors Glasgow,
Board member & volunteer Environmental Law Centre Scotland**

Linking to the last question, Aarhus is an untapped opportunity. The point is to have a credible threat that will make people take notice.

OVERVIEW OF AARHUS

- International treaty promoted by UN Economic Council for Europe
- Three Pillars concentrating on procedural rights
- Termed “most ambitious venture in environmental democracy undertaken by UN” [Kofi Annan]
- Recognises links between environment, human rights, participation and greater environmental protection
- Signed by both UK and the EU
- By Article 15, a Compliance Convention was set up, which can accept complaints from the public. It is hard work to get a successful outcome here.
- Three Pillars: Access to information, public participation and access to justice
- Access to information - broad, few exceptions, compliance largely done via Scottish Information Commissioner’s office.
- Public participation - Annex 1 lists the activities where there must be consultation. EIAs is the main bit, due to EIAs Directive, there may be problems about developments on the ground but the framework is there.
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ACCESS TO JUSTICE & AARHUS

- Most controversial & challenging part - Article 9. Convention provides access to justice in 3 contexts
- review procedures in respect to information requests;

- review procedures with respects to specific (project-type) decisions subject to public participation decisions and
- challenges to breaches of environmental law in general
- Article 9 (1) and (2) deal with challenging decisions regarding information and public participation
- Article 9 (3) creates independent rights to access justice, whether or not challenge relies on breaches of other procedural rights
- Article 9 (3) In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
- Article 9 (4) In addition, and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.” Scotland does not comply.
- Issues - scope - can it be done by an internal review or must there be a court?
- Provisions of national law - does it require to be connected to the rights of the Convention or even to EU law?
- Is administrative procedures sufficient & what would this cover?
- Scope - all national environmental laws, whether or not EU law - misconception - membership of UNECE wider than EU
- Article 9 (3) wide - refers to both public and private bodies
- Clear that is without prejudice to the rights created under Articles 9 (1) & (2) - means stand alone rights
- No limits when referring to “national laws”
- Aarhus Implementation Guide This is usable, the judge is looking at it in the Hunterston case
- Produced by the Secretariat with UNECE
- Referred to as an authority by a number of Information Commissioners in UK & Ireland, and also the Advocate-General (EU)
- Likely to illustrate the interpretation the Compliance Committee will take
- Implementation Guide states: “Under the Convention, members of the public have the right to challenge violations of national law relating to the environment, whether or not these are related to the information and public participation rights guaranteed by the Convention”
- Clear that access to justice has wide scope

- Guide also advises “the provision covers a wide range of administrative and judicial procedures, including the ‘citizen enforcement’ concept, in which members of the public are given standing to directly enforce environmental law in court”
- No absolute definition of what environmental law covers
-

ACCESS TO JUSTICE IN SCOTLAND

- Number of problems – standing (your right to get into court), cost of litigation, (sheriff court cheaper, court of session most expensive) scope of judicial review (JR can only be taken in court of session). Scope is a problem, does not examine the merits of the case. Aarhus talks about a full merits review)
- Could administrative complaints system - SPSO allow compliance?
- Standing - some alterations to the rules were made re EIA & IPPC cases
- No general changes made on signing of the Aarhus Convention
- Title and interest - pre-occupation with private interests - excludes public & NGOs at large
- Clear that Aarhus includes NGOs
- Gill Review changes - sufficient interest? The ELC made a submission to that recommending that title and interest be abolished. New test of sufficient interest status of Gill Review considering the position, indications they will change the test but no timescale.
- Costs - earlier arguments centre on Aarhus just being limited to court fees
- Now recognised that costs are wider & include liability to other side and own costs
- Use of Protective Costs Orders in England has gone at least part of the way to allowing access to justice
- Use of Protective Costs Orders in Scotland approved in McArthur, but not granted in M74 litigation by Friends of the Earth Scotland & others
- Finally granted in McGinty v Scottish Ministers (Hunterston case) but at £30,000 (in England recent cases where cap was c£15k)
- Recently approved by the Gill Review but no specific suggestions for how this would be enacted
- Gill Review specifically links reform to Aarhus
- Rules Council apparently considering a rule
- Scope of judicial review
- Substantive or procedural?
- Complaint lodged to Aarhus Compliance Committee on this point by ClientEarth (Port of Tyne)
- Draft response from Committee not particularly strong on that issue
- Role of SPSO - could this meet requirements?

- Procedures must be fair, equitable, timely and not prohibitively expensive
- Must give adequate and effective remedies, including injunctive relief
- SPSO - problems as decisions not binding, and cannot grant interim interdicts
- Unlikely that SPSO meets requirements
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CONCLUSIONS

- Requirements of Aarhus are challenging for a number of countries within UNECE
- Signing by EU may create direct effect - case before ECJ on that point
- Reform to standing and costs for judicial review required for environmental issues
- Protective expenses orders helpful, but only part of the picture - legal aid needed for individuals or cheaper way to litigate
- However, UK Government does not consider changes required DEFRA report of April 2008 to Compliance Committee includes words "Scotland advises us that their system complies with Article 9 (4)"! UK is not only country facing challenges, there has been assumption that there are no problems in west.

Questions

If McGinty wins, claims are limited to costs of one QC and one solicitor, less than the opposing side.

Do you detect Scottish courts moving to greater willingness to take up judicial review? This is the first time we are seeing a public law culture.

Has any country adopted Access to Justice in a positive way? Very difficult to do direct comparisons, some academic work exists. On Costs and Standing, some are better than others.

NGOS AND GOVERNMENT - ACHIEVING GOOD LAW AND MAKING IT WORK

ANDREW THIN, SNH CHAIR

LINK has provided a very useful forum for NGOs in Scotland, and increasingly is beginning to provide the platform for leadership. LINK's role during the passage of the Marine Bill enabled key figures in the NGO sector to provide leadership for all, and increased the influence of all on the Bill as a result. There is scope for LINK to do more to encourage effective leadership in the sector. The environmental movement in Scotland is very fragmented, and needs clear leadership from time to time. SNH can provide some of that, but LINK has an essential contribution to make as well.

Environment and Democracy: ultimately, in democracies at least public policy and legislation must have the consent of the people to be sustainable – a fourth pillar of sustainability – environmental, social, economic, political. Too little attention has sometimes been paid by the environmental movement worldwide to this key issue.

In Scotland and wider policy makers increasingly 'get' the importance of addressing biodiversity and other issues, they feel powerless to take necessary action because they cannot sustain the necessary political support. Voters are not yet willing to take the pain.

SNH has made public and political support for what it does a very high priority in recent years. As a result opinion polls show growing support for SNH and its work among the public and elected representatives, for a free standing SNH with a decent budget. Public support will be a great challenge for the environmental sector at a global, regional, national and local level in future, and deserves more thought and attention from all.

The recent UN Convention on Biological Diversity in Nagoya illustrated the problem at a global level: a real sense that delegates understood how serious the situation has become, with highly persuasive assessments and data from reputable sources; loss of natural capital worth \$ trillions annually, and clear evidence that in overall ecosystem services terms many land use changes make no economic sense. But it was unable to agree serious action, and reported failure to deliver on modest aspirations agreed in Johannesburg. Major democracies around the world were of the view that they could not commit their governments to much, because they could not be confident of the necessary democratic support for doing so.

The situation is problematic in a different way at an EU level. Here the Commission implemented what some see as relatively draconian measures to protect biodiversity, in particular through NATURA. Implementation is being massively hampered by a lack of democratic support at member state level, and at local government level within member states. In Scotland c75% of the designated features on EU sites are currently in favourable condition, and that after a huge effort by SNH and NGOs. Over 25% are NOT in favourable condition, in some cases for good reasons, in others due to a lack of sufficient democratic support. In the wider countryside loss of biodiversity has been (and continues to be) much more severe. Attempts to designate new EU sites are often met with serious democratically based opposition, eg establishing an SAC in the Sound of Barra met major local opposition and almost complete indifference at a wider regional and national level. Likewise Mingulay Reefs, despite being beside a major NGO landholding.

These cases illustrate a real problem. Ministers are asked to implement EU legislation for which there is apparently no significant democratic support locally – and too often indifference nationally. These tensions are being played out all over Europe, increasing as the EU expands. It remains to be seen just how sustainable NATURA proves to be if we cannot significantly increase levels of democratic support for its continuing implementation.

At a Scottish level the entire democratic framework has changed from a situation where 50 million people called all the major shots to one where only 4 million do. The clout of certain groups within Scotland– notably rural dwellers – has increased markedly and the key marginal seats that determine every election have changed entirely.

The impact on SNH has been immense, just as it has on NGOs. That impact is evolving as Scotland adapts. Public policy in Scotland is much more directly democratically accountable at a Scottish level, with elected representatives closer to the delivery end of public policy. Cross party support for “localism” means that increasingly public policy will be formed, tailored and applied in a manner that is determined at a democratic level well below that of Scotland as a whole. The impact of this on SNH has already been huge, often exciting, and sometimes challenging. Scottish Ministers are hands on, better informed, closer; a great opportunity in many ways to have a real input to Ministerial thinking, but quite threatening for some who would rather not have to justify everything they do to an enquiring government Minister.

SNH’s work is under much greater scrutiny by elected representatives of all kinds. Many of the ways of working have been challenged already; getting rid of SNH altogether as a free standing public body has been, and continues to be, investigated. SNH had to adapt rapidly to this changing context to maintain its influence and effectiveness. Benefits are that it has forced it to think hard about how it engages and communicates with the electorate, in particular with rural voters and those with most influence over relevant policy areas. SNH’s relationship with politicians is steadily improving, and with that so is mutual understanding. That is good for the environment, because decisions made by them, far more than those made by SNH, have a real impact on the ground.

The same applies to key groups who use SNH’s services or are otherwise affected by its work - farmers, fishermen, landowners, windfarm developers, gamekeepers, stalkers, housebuilders, etc. All means that SNH is becoming more influential, and democratic support for its work and statutory purpose is growing – evidence in opinion polls and from anecdotal feedback.

The impact on LINK and on individual NGOs of this political change has also been of major significance. All, especially those perceived to be rooted in an English middle class support base, had to radically adapt in order to remain relevant. Democratic support for the environment remains fragile in Scotland. But support is there, as evidenced by a range of legislation enacted by the Scottish Parliament. There is a risk that styles of campaigning that work well at a UK level may not always go down well with a Scottish audience, due to cultural differences. Rural voters hold far more power in Scotland now. All sectors need to think hard about the ways in which the democratic context in Scotland is changing; focus on the vital need to understand how things look through the eyes of Scottish voters; to articulate messages in terms that are relevant to their concerns and priorities. All need to be even more politically astute and other-centred, and work with and through the grain of public opinion to succeed.

The next few years will be a time of massive change and disruption within government in Scotland and much of Europe. SNH will inevitably get caught up, and may not exist as a free standing body in a few years time. Some will argue that this does not really matter. What certainly does matter is to continue to have within government in Scotland an expert body of knowledge and a respected voice for that knowledge, to ensure that policy makers have all the necessary facts about the natural heritage that they need in order to do their job.

That job will depend on the priorities of the Scottish people, so it is vital to have an effective and well led environmental NGO movement in Scotland to help change the way people think about environmental assets, to change the level of priority that voters attach to them, to change public attitudes to the kind of sacrifices that sometimes have to be made in order to look after them properly. That will not be achieved by facts and science alone, however effective SNH is in its role as advisor and provider of this information. We also need real and effective leadership in the political arena, people with real charisma; arguably the single most vital factor in determining where our society goes from here.

Due to various factors a gulf has developed between SNH and LINK and the main NGOs in Scotland, damaging for both sectors; SNH has lacked vocal support from the NGOs at key moments and NGOs have suffered from a perception among many politicians that they have not kept up with the new political context in Scotland post 1999. Both Chairs aim for closer collaboration and a closer partnership between SNH and LINK; this agenda will be taken forward with assistance from Simon Pepper (on SNH's Board), recognising that one is a public service organisation and the other a group of independent charities.

Comments

NGOs have large and growing memberships which fund them because they support them. Some of these have high penetration in rural areas. A lot of the environmental legislation has been supported across the political parties, which shows good political support.

PANEL DISCUSSION CHAIRED BY DUNCAN MCLAREN,

What should strong effective leadership look like?

On the Marine Bill LINK provided leadership and a platform for it, attracting others to the case.

NGOs are good at detailed discussion on policy.

Corporates have a more focussed collective interest on economics, NGOs are more diverse in their agendas.

Wooing versus hard hitting – wooing needs improving though frameworks need to be there to give people the opportunities to participate. Lots of people do care. Currently the odds are stacked against them, they are alienated from the process.

The fight against wildlife crime, pursuit of Sustainable Land Use Strategy is entirely down to NGOs leadership and robustness. NGOs have done a lot and there is a lot more to be done.

eNGO core values are shared with other sectors, the debate is not happening beyond the usual suspects, gap in leadership. We need to get out of the environmental box and not be put back into it.

Should SNH and NGOs cooperate better in response to pressures from the corporate sector?

Politicians are swayed by 'silent majority' who value nature more than big business, though the Trump case argues against this. The outdoor recreation lobby has strong political clout in Europe, less so in Scotland with fewer members and could be supported to grow.

Where to put resources?

We have to be adaptable depending of what we want to achieve. Build on TEEB report, evidence there that what is good for environment is good for economy. Articulate the value better and promote.

It is harder for SNH to woo, case in point Sound of Barra fishermen jobs issue, LINK bodies are better placed, though HIE should have seen it coming and prepared earlier (a silo approach to directives by Government).

There is a lot of scientific information on websites, including Scotland's Environment Website coming soon, which SEPA is leading on, and LINK has a place on the steering group (through SWT). There is an issue with getting information that is applicable, also a question of resources.

NGOs need consistent core funding (from SNH and others) if they are expected to contribute and be gateways for public participation.

Final remarks from Panel

James H: States are supposed to have a national Clearing House, whose purpose is to share, to feed into the international one. Do we have one? Nobody knows. They need people to be working with them. Ask for one.

Andrew T: Scotland has very well developed media and internet, is not short of platforms, is short of people feeding into it. Be the voices.

Frances M: NGOS are working in the public interest, for the silent majority. Take point in relation to funding for NGOs for their role of public interest champion.

WHAT HAVE NEW LAWS ACHIEVED FOR THE SCOTTISH ENVIRONMENT SINCE DEVOLUTION?

TAMSIN BAILEY, REPORT AUTHOR

National Parks (Scotland) Act 2000

Land Reform (Scotland) Act 2003 - Part 1

Water Environment and Water Services (Scotland) Act 2003

Nature Conservation (Scotland) Act 2004

Environmental Assessment (Scotland) Act 2005

Planning etc (Scotland) Act 2006

Environmental Liability (Scotland) Regulations 2009

Marine (Scotland) Act 2010

NATIONAL PARKS (SCOTLAND) ACT 2000

The National Parks were welcomed but there was concern about the perceived failure of the Cairngorms National Park

LAND REFORM (SCOTLAND) ACT 2003 - PART 1

- More people are enjoying access and enjoyment of the outdoors; access takers have greater confidence exercising their rights.
- Access Authorities are reluctant to take action against those who obstruct access; insufficient action is being taken where access creates a threat of wildlife disturbance.

WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) ACT 2003

- It is too early to judge the success of the River Basin Management Plans.

- There is widespread concern about lack of progress with CAR reviews, and the lack of action to tackle diffuse pollution; stronger enforcement action is needed.

NATURE CONSERVATION (SCOTLAND) ACT 2004

- Scotland is failing to halt the loss of biodiversity.
- "The biodiversity duty has been dwarfed by process - re-arranging the deck-chairs on the Biodiversity Titanic, adjusting the methodologies for reporting and surveying..."

ENVIRONMENTAL ASSESSMENT (SCOTLAND) ACT 2005

- SEAs are having some impact on the content of plans and policies - but so far it is limited and some plans are not subjected to SEA.
- "The SEA process has not caused the seismic shift in decision-making in Scotland which we might have hoped."

PLANNING ETC (SCOTLAND) ACT 2006

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- Scotland does not yet have a transparent, participative planning system in which communities feel they can influence decisions which affect their future.
- "...the public are still left disillusioned, frustrated and cynical..."

ENVIRONMENTAL LIABILITY (SCOTLAND) REGULATIONS 2009

- The Regulations have not been - and are unlikely to be - used as their scope is so narrow and the cost of taking action so high.
- "...the damage has to be so significant, and to have damaged such an important (EU designated) site..."

MARINE (SCOTLAND) ACT 2010

- Progress so far is promising, but it is too early to judge implementation. Watch this space.
- Cross-cutting issues
- The Parliamentary rhetoric has not yet become reality.
- Scotland needs genuine sustainable development - economic growth alone will not bring better lives.
- Scotland needs a strong environmental champion at the heart of government.
- Scotland is failing to protect its most important nature sites.
- Scotland needs a more strategic approach to land use.

DUMMIES GUIDE TO LAW: ESPECIALLY ITS CREATION, IMPLEMENTATION AND ENFORCEMENT

Lloyd Austin, RSPB Scotland/LINK Trustee

The law exists as a means to formalise and create a system to 'govern' the interactions between individuals and one another, and between individuals and the state. Any understanding of how such laws operate requires an understanding of their constitutional origin. Thus, we must start with the three pillars of the constitution (as exist in the UK and most "advanced democracies"):

(Monarch)

Legislature

Executive

Judiciary

In many jurisdictions, there are definitive statements of law to ensure separation of these three pillars. In the UK, however, no such constitutional separation exists, just a convention that some separation should exist while (at the same time) there is some overlap.

THE LEGISLATURE : TWO PARLIAMENTS

UK: Bicameral - Houses of Commons and Lords

Scotland : Unicameral – Scottish Parliament

(European Parliament and Council Chambers)

THE EXECUTIVE : TWO GOVERNMENTS

UK : Downing Street/Whitehall

(& Agencies and NDPB's)

Scotland : Bute House, St Andrew's House, &

Victoria Quay, etc

(& Agencies and NDPB's)

(Council of Ministers/Commission, and Local Authorities – Executive members and officials)

THE JUDICIARY

CIVIL :

Land Court and other tribunals

Court of Session

UK Supreme Court

CRIMINAL:

Sherriff Court

High Court

Court of Appeal

NB:Role of Crown Office and Procurators Fiscal

THE 'NON-STATUTORY' SECTORS

Business – individual firms and representative bodies

NGO's – Churches, Health, Education, etc (including the 'service charities')

eNGOs

The 'quasis' off balance sheet part of the public sector. To what extent should they be scrutinised by legislature.

Companies Act, Charity law etc

Influence legislation (lobby, vote, etc) NGOs have had a certain degree of influence on legislation. Lot of secondary legislation from these Acts. Question whether procedures for secondary legislation are open enough for input

Enforcement

ISSUES FOR DEBATE

Regulation? - More/less/better?

Framework or prescriptive?

Outcome or process?

Role and rights of citizens and NGOs, especially w.r.t environment (a public good)

Debate between those who fear Nimby's charter, need for efficiency versus participation and involving people. The threat of litigation can keep authority on its toes.

Insider/outside?

Who acts for environment?

Purpose/structure/implementation of legislation?

Are purposes clear/achieved

What can be done, if purpose not being achieved?

Scrutiny of Executive happens in theory by Parliamentary Inquiries. All happens in limited time, eg through PMQ. Two motions are binding, the budget, and a vote of no confidence. Any other motion can be ignored.

Actions can be raised under judicial review. Same politicians making speeches at Stage one of legislation, shouldn't Parliament hold them to account? but it does not, it moves on. Like ourselves, we need to set aside more time for scrutiny.

Public sector landscape = Executive governance structure (as defined in legislation)

Is it as we'd want?

Executive + public sector, which can act under powers they have. Past legislation has given them scope so broad to do what they like. To what extent do the laws define what they are trying to achieve, where the outcome is written into the legislation?

Should it be altered? Why?

WORKSHOP REPORTS

THE CHALLENGE OF THE BETTER REGULATION AGENDA

Facilitated by Duncan McLaren, FoES, with expert input from Rob Morris, SEPA

SEPA doesn't believe better regulation is necessarily about the quantity of legislation. A better question is – is what we have what we need?

There are around 300 – 400 provisions of legislation for SEPA to enforce. This produces a very complicated picture. What is the best way to integrate these pieces of legislation? How do we make sure the regimes are fit for purpose over the next ten years?

A consultation document on simpler, more integrated, more proportionate and more effective regulation was launched by SEPA on 1 December and runs until the 14 February – available at

http://www.sepa.org.uk/about_us/consultations.aspx

It sets out the changes SEPA thinks are necessary, setting out high level principles. SEPA are working towards a more outcome based, risk based and proportional system.

Low risk is seen as standard operations, with a narrow ability to effect environmental quality and human health.

Money is an important driver. There is a need to change attitudes and behaviour across society, resources are required to achieve this.

SEPA stated we have to be careful of unintended consequences and overly onerous regulations. Onerous regulation can put people off 'doing the right thing' and contacting authorities where problems arise.

Questions of discretion and trust will become important as SEPA's resources are squeezed. There will have to be a balance of incentives and tough compliance mechanisms. Convincing criminal and civil sanctions are necessary to complement incentives. It was suggested there was too much focus on incentives at the moment. Incentives often involve direct spend, would better use of regulation and enforcement be more cost effective? People should be paid for actions which provide wider public goods that they do not directly benefit from. Actions with a criminal/negative environmental impact should be punished.

The group agreed credible threats were important, stiff penalties which are advertised so the punishments act as real deterrents. There may well be a need to step up the consequences of environmental crimes.

SEPA suggested investment is required in training for auditing so inspections are better, rather than more frequent.

SEPA can serve statutory notices, but they do not have civil sanctioning powers. Across the group there were mixed experiences with environmental fiscals. Many fiscals are not getting the experience that they need in order to properly determine environmental cases. This problem is heightened as these fiscals are often faced with defence teams who have lots of experience.

'Citizen science' will also become more important as resources are squeezed. SEPA suggested technology could better used to support public involvement and citizen science evidence.

There is a need to consolidate amended legislation to make it more user friendly. Systems also need simplification and SEPA hope to move to single site licences.

SEPA would like to see outcomes defined in legislation where possible. However, much environmental legislation stems from Europe, so we are often constrained in this by the original Directive. Each regime is administratively very different. Regulation could be streamlined through simpler toolkits, and looking at the intent of the regime.

It was suggested 'better regulation' = simpler, more integrated regulation. But this would need support from the wider community.

SEPA also clear there is a need to look at their business model There is a need for a common framework for risk and hazard across the regimes, in order to achieve a more holistic approach.

SEPA are considering a 'pick and fix' approach, pooling data and evidence to set priorities. There should be a harm led approach, which is intelligence led.

The dual role of SEPA as policeman and enabler is often difficult to balance.

Good enforcement can actually help companies who operate good practice. It should make good business sense to report the 'bad guys'.

2. IMPLEMENTING AARHUS.

Facilitated by Lloyd Austin, RSPB, with expert input from Frances McCartney

This small workshop discussed priority issues for campaigning, closely related to Frances's presentation. Frances outlined, in more detail, some of the benefits to Scottish eNGOs of better Aarhus implementation. Members discussed their interests in environmental justice and/or Aarhus, as well as how or what they may benefit from such changes.

Members discussed whether their priorities were a narrow (by the letter) implementation of Aarhus, by for example amendments of Judicial Review rules, or wider environmental justice reform to deliver both the spirit and letter of Aarhus. No conclusion was reached, but the pros and cons of both were examined.

There was discussion of Friends of the Earth [Access to Justice campaign](#) and a workshop in early December (an invitation went round to all Congress participants about it afterwards). This has now taken place and details can be found at (FoES website).

3. BETTER IMPLEMENTATION IN SCOTLAND OF EXISTING LEGISLATION

Facilitated by Jonny Hughes, SWT, with expert input from Tamsin Bailey.

The discussion's reference point was Tamsin Bailey's paper for LINK: [Scotland's environmental laws since devolution – from rhetoric to reality](#), an assessment of the outcomes from Scottish environmental legislation how they compare to initial expectations of the legislation.

1. What work is currently being undertaken on scrutinising implementation of legislation?

Politicians advise us that currently there is not enough capacity on committees to undertake scrutiny on legislation (Scottish parliamentary committees act like a second chamber). We need to build interest amongst political parties on the issue of scrutiny. At the moment monitoring is seen as an easy place to cut.

However parliamentary scrutiny of Scotland's Land Use Strategy was built into the Climate Change act. Also, partly as a result of LINK concerns about the quality of the draft LUS, the Rural Affairs and Environment may be opportunities to work with other allies whose job it is to undertake scrutiny e.g. Audit Scotland has a statutory duty to monitor and scrutinise. Also there is a possibility to influence civil servants, not just when we meet them at ministerial meetings, but outside that process too.

LINK committee decided to 'call in' the strategy for pre-consultation scrutiny. Review mechanisms need to be consistently built into legislation e.g. there is a Tri-annual report requirement in the Biodiversity Act.

There needs to think more strategically about where we intervene in the process with regards to scrutiny. How much effort should we be putting in to influencing the agenda as opposed to merely responding to it? e.g. WANE bill which is not something we would have designed. Although we are working at an early stage with regards to legislation we are not always seeing the results we would wish. Should we be pressing for more scrutiny groups and taking part in them? Should we be asking for the creation of a Scrutiny Committee which would be the first port of call for other committees?

Members are not currently identifying new legislation so there is now time to deal with issues concerning existing legislation e.g. there is no point in having Nature Conservation Scotland Act if it is not delivering. The next parliamentary term needs to be about seeing if existing legislation has delivered.

Summary – we are now at the stage where we should be looking back at legislation we have contributed to, reviewing its effectiveness and pressing for more effective implementation.

2. Should LINK Members act collectively or individually on scrutiny?

Do we need to look for funding for joint work?

A consistent message communicated by LINK members can be very powerful. It is easier for LINK members to work jointly on policy and legislative work, case work is harder to cooperate on. Also sometimes there is not enough interest in

membership to justify a joint statement. Campaigning on broad issues doesn't always work, specific issues and topics tend to work better. Having a clear focus and outcome is important.

As committees feel like they don't have enough time to scrutinise secondary legislation, maybe LINK needs to be working more on briefings, for example, Flood Risk Management has potential through implementation of the Act. It could be a case study for politicians as to why the issues LINK campaigns on are important.

It was noted that certain business are now taking a view on environmental issues e.g. flooding and climate change. There may be an opportunity to work with commercial interests e.g. on flooding.

Summary: LINK works effectively together on big, focussed campaigns e.g. Marine. Taskforces are the right places to be taking forward scrutiny of legislation.

3. What should LINK's three year focus be?

Tamsin Bailey's report will be publicly launched at LINK's Festive reception December. Are there next steps for LINK to take following the report's launch?

How can LINK engage with 32 local authorities each with an individual local development plan and single outcome agreement? Should government create a fund to allow civil society to engage at that level? LINK members need to provide training for people on grassroots level issues. LINK could provide guidance as well. We need to take a strategic decision about engaging with councils.

Marine, Nature Conservation and Planning Acts could be three key pieces of legislation that LINK focuses on to scrutinise, asking what do we want from each Act by picking three issues from each.

River Basin Management Plans – we need to put pressure on how the scrutiny will happen. However there are currently no resources for LINK to engage.

4. Methods

Training/guidance produced by LINK to encourage engagement

LINK needs to broaden it's linkages to other sector still further e.g. social and health impacts, ecosystem service provision, Natural Capital

RERAD research programme – is there a way scrutinise the programme?

Parliamentary Committee scrutiny – LINK was asked to provide topics for committees. LINK should do this consistently every year

Monitoring: to get reporting methods to work effectively. Concern expressed that monitoring was increasingly weak

Flood risk management consultation process is working. The government has set up a layer of consultative committees to help write the legislation.

LINK needs to challenge every piece of legislation and ask; what is your scrutiny process?

4. FUTURE PUBLIC SECTOR LANDSCAPE.

Facilitated by Ian Findlay, LINK Trustee, with expert input from Michael Scott.

Focus on landscape as it relates to environment and law – ask what we want a reduced sector to deliver and how do that effectively

The workshop was a wide-ranging, and times fairly unstructured, discussion around this topic. However, this allowed for a great diversity of points to be aired. The discussion highlighted that this is a complex topic with no easy answers. Being clear about the respective and unique roles of the public and third sectors was a recurring theme, as was the need to develop good partnerships.

Below are the note-taker's notes, which give a flavour of wide-ranging discussion and demonstrates that we came up with as many questions as answers!

Any NDPB whose role is to regulate, needs time freedom and capacity to do so. Budget cuts drain time away from keeping eye on real work. Most / all NDPBs have been restructured.

Do we help to ensure that what happens now does not prevent necessary protection of the environment, or do we want to think about more fundamental changes.

Is Government or Big Society the driver? For 20 years LINK expected government to do more; now the message is that they should do less - do we agree? Should volunteers be involved in building paths, should NGOs address flood management, do we want to be the voice of civic Scotland and have we legitimacy to do so? There is a need for partnerships. Regarding legislation, is our role one of 'special constable' or pushing for backbone for that role, or something in between?

This public sector landscape evolved over many years in response to drivers including devolution, is this just another adjustment and is our best action to think of making it more fit for purpose in relation to legislation? Move into new landscapes?

Is it as it should be?

Litter (our vs government responsibilities), Access (no predictable response and much inconsistency), Structure and Delivery (cuts offer real opportunity, public sector was top heavy, big government vs big society but we felt there is a middle ground about building partnerships – not easy but important, with rights and responsibilities). Is big society ready for a role after many years of big government? Is NGO sector ready to fulfil this role? Lots of volunteers could take on the role but degree of management needed to avoid sporadic approach or inaction. Could spend less and use voluntary sector, but must spend more on voluntary sector to achieve these ends.

Failure to deliver (T Bailey report) – are we agreed that what is done now is not enough? Is performance of public sector inadequate?

We felt it varies on issues and with different authorities; culture and leadership of local authorities and public sector organisations is that some embrace and others reject ambition even where the offer of guidance is available; so for partnerships would need to carefully plan, resources and build expertise. Giving LAs and public bodies confidence to work in partnership, use external advice, draw in wider society and NGOs matters.

Is the NGO sector undervalued in favour of academics in inquiries/ need to reform such attitudes in legal framework. Partners need to be equal/perceived thus.

What kind of society do we want and how £s spent?

Prevention measures eg climate action can create holistic society. Structure to deliver: cutting public and replacing with private sector won't bring accountability – need more cooperatives/action. Links to happiness

measures/long vs short term. Bureaucracy and admin of funding prohibits delivery.

Outdoor recreation remit falls between stools; complexity of public sector creates a problem rather than delivering responsibilities.

Limits of where government should be? In big society will they still want control? No blurring – clear understanding of what is/is not, government

Moving on:

Public sector focussed on job creation and within that focus round wealth there is a disconnect with community function. Politically driven because of 'sustainable economic growth' mantra as much as about how public bodies are set up and structured. We want a public sector that talks of our measures of economic benefit and we must counter GDP as the only one of value, make that case and win the argument. Public bodies can attempt to, but NGOs must.

Comes down to defining role of environment champion and NGOs can be flexible. What is the role for us that builds on strengths and recognises our skills?

NDPBs in environment field can only be really effective where government is being tested and challenged by someone else because government sees most issues as problems to be fixed. NDPBs can also focus on solutions.

Danger of big society if control lies with government

What can only government do and what is it that others can do more effectively? Enforcement and regulation and delivery of policy and funding structures are for government, although others have a role here too. Government also act as advisers though others can too. It's to do with areas of advice/incentives, regulation and enforcement.

Government bodies mainly regulatory making sure legislation is followed? Could 90% of what SNH does be done by NGOs with SNH advising? No, capacity building eg in communities is important part of what they do. Must recognise localness.

Need capacity to coach/mentor discussions so that conventions round decision making tables develops and changes away from just green jobs to much deeper debate. Should government be enabling, not delivery? Need to retain national view as Scottish Biodiversity Strategy has done – need that national picture/champion.

Environment champion to speak up for international and national view of what is important, speak up for communities of interest and not just place – that’s the big society we want.

Can environment champion be same as regulator – would that not be role for eNGOs – or can regulator not be perceived as being a champion for the environment and give rationale for importance of legislation? Regulator can help regulated see how they can meet own ends. Is there too much fear about ‘being government’, fear of vocal folk in communities There is a balance (not currently struck) between saying what is to be done, and letting people have their say.

Beyond that there could be much more in the way of shared responsibilities, with share changing over time depending on relative capacities – and different partnerships for different purposes.

PLENARY DISCUSSION CHAIRED BY DEBORAH LONG

Michael Scott observed how far LINK has moved in 20 years in confidence and competence.

Andy Myles noted that the LINK community of interest, itself a complex idea, plays an effective role in law making, there is now a need to focus on implementation.

Duncan McLaren reflected that Andrew Thin’s presentation did not seem to fully understand the breadth of interest within the eNGOs, with the focus on nature rather than environment in which people live, and that we must be communicate better with him (that is happening); that one voice is not always the answer, there are times when diversity of approaches works better; that we are still learning about the case for citizen law, and a clear gap is emerging in space for citizens to play a role, and reminded people of FoES campaign on access to justice and an event in December.

Deborah Long pondered on James Harrison’s point that the eNGOs are very diverse, a strength, although we have to find a network model that works for us.

Andy Myles noted that some organisations are linked into effective international networks. If we are to succeed we need to speak to business and other parts of civic society. There are great big gaps in the international context here.

Building consent of people. Practical aspects are to fill the postbags with handwritten letters, not the inboxes. SNH often has to provide advice for those answering letters. Much work goes into that, so if a letter is well argued, it is useful, though it may not get as far as influencing a minister.

We need to see how to get a groundswell locally, ideally in every constituency. (NTS trying to get local groups involved in SOAs).

Andy Myles suggested we need to get better at telling the story of environment rather than putting across the message. Getting people talking on social media twitter, boxing clever, will take us ahead of those with greater resources.

Jonny Hughes, commenting on last year's theme of the environment and economics, that it is time to get to grips with that agenda to get our outcome, to articulate our vision at a UK level. Duncan McLaren agreed, reminding us that the economy is the effect of a set of regulations, run from Brussels and Westminster. To get any leverage we need to engage with whole new set of regulatory frameworks.

Dan Barlow commented on the amount done over the years, LINK has done a great job adapting to new ways of working like the marine project, and engagement with the budget proactively. There is a role to be much stronger in bringing solutions in common with other sectors. What kind of Scotland do we want to live in? There are lots of different groups are thinking about it. We need to help step it up to a bigger stage, make it difficult to put us back in the environment box. Innovative alliances such as Stop Climate Chaos Coalition and the mature approach of LINK towards that is good preparation. We need to step up in next five years to show our credibility extends across Scotland.

Rachel Nunn agreed and saw a role for the eNGOs in capacity building.

SUMMING UP HELEN ZEALLEY, LINK PRESIDENT

To echo Michael Scott's observation, we are fantastic, a lot of achievements, and we are well regarded outside the network. Let us hold onto that.

We began with the reminder of steps and stumbles towards implementing legislation. James Harrison reminded us of NGOs critical role, we have been in there, along with big business. One key role of ours is to keep asking 'Why?' Why have these things not happened (as in Tamsin Bailey's report). Thanks to Frances McCartney for her very useful presentation on Aarhus. Thanks to Andrew Thin who wanted to challenge us and to be challenged. His reminder that Parliament can only act with the peoples' consent is a continuing task for the future. Tamsin Bailey's masterful review has given us a platform for the next stage. Thanks to Lloyd Austin for the Dummies Guide, and the reminder of the role of the 4th estate. Thanks to those who facilitated the workshops and to the experts. Thanks to the steering group (Lloyd Austin, Jonny Hughes, Deborah Long) and to LINK staff.

KEY CONCLUSIONS, RECOMMENDATIONS FOR LINK

- TEEB Report – use it, help articulate for Scotland, and promote widely
- Legislation – keep up the pressure for better monitoring, and for scrutiny of implementation of existing legislation via taskforces.
- LINK works best on focussed campaigns
- Access to Justice – members support FoES/ELC campaign to ensure the framework is there for citizens/NGOs to be able to hold authority to account.
- Better implementation of environmental regulations – work with SEPA on its proposals.
- Public sector landscape – we need a strong champion for environmental sustainability within government, however reduced the NDPBs roles become.
- If voluntary bodies take on former statutory roles they need to be resourced to do so, without compromising their independence.
- Develop and improve strategic level relationships with SNH, bearing respective roles in mind.
- Build / consolidate public support for environment, wooing those not traditionally interested in environmental sustainability. Tell stories, not just messages, and use social media. The outdoor recreation public is a relatively untapped voice for the environment in Scotland.
- Consider how to engage as necessary with the Westminster/Brussels generated economic regulatory framework.
- Build alliances with others to articulate a common vision about what kind of Scotland we want to live in – get the environment into the mainstream.
- Consider how to better engage, add voice internationally – there are major gaps in environment and civic society internationally.
- Capacity within our sector is limited; remain flexible, adaptable, noting what is possible when resources are increased (eg marine).

Congress Participants

John Mayhew	Association for the Protection of Rural Scotland
Jonathan Wordsworth	Archaeology Scotland
Beth Strathford	Friends of the Earth Scotland
Duncan McLaren	FoES
Francis Stuart	FoES
Mary Church	FoES
Denis Mollison	John Muir Trust
Peter Pearson	John Muir Trust
Steven Turnbull	John Muir Trust
Rachel Nunn	Keep Scotland Beautiful, Carbon Neutral Stirling
Deborah Long	LINK Chair, Plantlife Scotland
Michael Scott	LINK Honorary Fellow
Helen Zealley	LINK President
Alice Walsh	LINK staff
Andy Myles	LINK staff
Hugh Green	LINK staff
Jen Anderson	LINK staff
Kate MacColl	LINK staff
Lindsay Roberts	LINK staff
Susan Guest	LINK staff
Ian Findlay	LINK Trustee
Beryl Leatherland	Mountaineering Council of Scotland
Hebe Carus	MCofS
Tom Leatherland	MCofS
Calum Duncan	Marine Conservation Society
Vicky Abernethy	North Lanarkshire Council
Alan Barrow	National Trust for Scotland
John Campbell	National Trust for Scotland
John Rosser	National Trust for Scotland
Susan Manson	National Trust for Scotland
Davie Black	Plantlife Scotland
Dave Morris	Ramblers Scotland
Helen Todd	Ramblers Scotland
Bob Elliot	RSPB Scotland
Elsie Ashworth	RSPB Scotland
Ian Thomson	RSPB Scotland
Jim Densham	RSPB Scotland
Julia Harrison	RSPB Scotland
Katrina Marsden	RSPB Scotland
Kelsie Petit	RSPB Scotland
Lisa Webb	RSPB Scotland
Lloyd Austin	RSPB Scotland
Vicki Swales	RSPB Scotland
Veronica Burbridge	Royal Town Planning Institute
Eddie Palmer	Scottish Badgers Trust
Eric Coull	Scottish Wildlife Trust
Jonny Hughes	Scottish Wildlife Trust
Maggie Keegan	Scottish Wildlife Trust
Paul Gallagher	Scottish Wildlife Trust
Tony King	Scottish Wildlife Trust
Roger Powell	SCRA

Andrew Johnstonova	SEPA
Fraser Lovell	SEPA
Rob Morris	SEPA
Clive Mitchell	SNH
John Thomson	SNH
Kat Jones	SNH
Simon Pepper	SNH Board member/LINK Honorary Fellow
Lillian Kelly	Soil Association Scotland
Andrew Thin	Speaker
Dr James Harrison	Speaker
Frances McCartney	Speaker
Tamsin Bailey	Speaker
Professor Chris Spray	UNESCO Cre for Water Law, Policy and Science
Andrew Fairbairn	Woodland Trust Scotland
Angus Yarwood	Woodland Trust Scotland
Carol Evans	Woodland Trust Scotland
Christina Byrne	Woodland Trust Scotland
Tim Hall	Woodland Trust Scotland
Dan Barlow	WWF Scotland