

Scottish Environment LINK response to the Scottish Government consultation on Developments in Environmental Justice



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Introduction

Scottish Environment LINK welcomes the opportunity to respond to the Scottish Government's consultation on Developments in Environmental Justice. This response is submitted on behalf of the LINK Governance Group.

However, we are disappointed that the consultation does not, in fact, deliver on the 2011 SNP manifesto commitment to consult on options for an environmental court or tribunal. Rather, this consultation seeks views on the current justice system and impact of recent changes to it insofar as they relate to environmental justice matters, and asks whether further changes are required, including specifically whether a specialist environmental court or tribunal should be established.

It is LINK's view that a specialist environmental court or tribunal would be an appropriate response to the growing complexity and importance of environmental law, and an opportunity to provide for an exemplary Aarhus compliant system within our own unique legal framework.

Further, we note that the consultation does not consider first instance environmental decision-making and appeals outside of the court system e.g. the scope of DPEA. While we appreciate that a review of Scotland's planning system is currently underway, this excludes a significant portion of the environmental cases. Indeed, from an Aarhus Convention perspective, the planning system is where civil society has the most opportunities to engage in the area of environmental law and decision-making.

LINK has had sight of and endorses the responses of Friends of the Earth Scotland, the RSPB Scotland, WWF Scotland and the Badenoch & Strathspey Conservation Group therefore we respond only briefly here.

Consultation questions

1. What types of case, both civil and criminal, do you consider fall within the term 'environmental'? Please give specific examples. Which processes are currently used to deal with those cases you have identified? Do you consider those processes are sufficient? Please provide reasons for your response.

The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters provides a useful starting point for defining civil 'environmental cases' in its definition of 'environmental information'.¹ The Scottish Government's Environmental Crime Task Force defined environmental crime in language echoing the Convention as "*an act or omission which directly or indirectly damages the environment (or has the potential to damage the environment) and which constitutes a breach of criminal law.*"

It is clearly possible to define environmental cases: perhaps the more pressing question to answer here is, in considering the potential for an Environmental Court or Tribunal in the context of the need for Aarhus compliance, what should its jurisdiction be; should an ECT have jurisdiction over all disputes impacting on the environment or should its role be within specified limits?

It is LINK's view that where Aarhus Compliance is most deficient is in relation to raising challenges to environmental decisions, which, under the current system is generally done by way of judicial

¹ See http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf, page 50

review or statutory appeal. The creation of an accessible environmental court or tribunal could go some way to remedying this.

We note that for certain environmental cases, the criminal court system can act as a powerful deterrent, therefore we do not necessarily see that the scope of an ECT would include these.

2. This paper outlines the improvements to the justice system that this Government has delivered in relation to environmental justice. Do you agree that these changes have improved how environmental cases, both civil and criminal, are dealt with in Scotland? If you do not agree, please explain why.

The consultation paper describes a number of changes to the civil justice system. We would note that only one of these – the introduction of Protective Expense Orders – was implemented in order to respond to the environmental justice requirements of the Aarhus Convention. PEOs can be a useful tool in limiting the exposure to costs of citizens and NGOs taking public interest challenges in the Court of Session but it is too soon to judge their success.

While broadly speaking the 2014 Court Reform Act is welcome, its impact on key areas of Aarhus compliance, particularly costs and substantive review, is very limited. Indeed, the Scottish Parliament's Justice Committee in its Stage 1 report on the Court Reform Bill noted: *"the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law. The Committee is sympathetic to calls for the introduction of an environmental tribunal for Scotland."*²

LINK welcomed the creation of specialist wildlife and environmental crime prosecutors in 2011. However, better training and resourcing within the Sheriff Courts is essential to ensure these cases are prosecuted in the most effective way. We also welcomed the introduction of new penalty powers for SEPA under the Regulatory Reform Act 2014. While certain offences falling within SEPA's remit will continue to be heard in the criminal courts, the new powers appear to be part of a shift towards civil penalties, thus strengthening the case for an independent, specialist tribunal to handle appeals.

3. Given the extensive changes that have already been delivered to the justice system (as outlined in this paper) and the need to ensure that any further changes are proportionate, cost-effective, and compatible with legal requirements, are there any additional ways in which the justice system should deal with both civil and criminal environmental cases? If so, please detail these. In particular, do you consider that there should be a specialist forum to hear environmental cases? If so, what form should that take (e.g. a court or tribunal)? Please provide reasons for your response.

As detailed in FoES, RSPB and WWF's responses, further changes are clearly required in order to comply with the Aarhus requirements that citizens and NGOs have access to justice challenge the 'substantive and procedural legality of decisions, acts or omissions', which provides effective remedy and is 'fair, equitable, timely, and not prohibitively expensive'.³

The Scottish Government has an opportunity to think innovatively about how to establish a world-class environmental justice system within our own unique legal framework, and an obligation to comply with the Aarhus Convention. We urge the Government to establish an expert working group to look into options for a world class ECT that provides for affordable access to justice, reduces costs to the public, speeds up decisions and creates a more level playing field.

This LINK response is supported by the following member organisations: Association for the Protection of Rural Scotland, Badenoch & Strathspey Conservation Group, Friends of the Earth Scotland, Planning Democracy, RSPB Scotland, Scottish Wild Land Group, WWF Scotland.

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² Justice Committee 5th Report, 2014 (Session 4) Stage 1 Report on the Courts Reform (Scotland) Bill
<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/76275.aspx#v>

³ Aarhus Convention Article 9 (4)