Environmental Governance:
effective approaches for Scotland post-Brexit

Final Report

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A Report for Scottish Environment LINK

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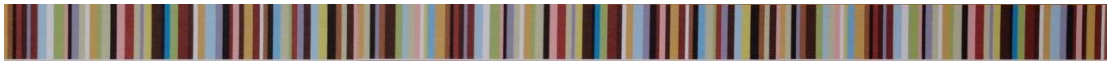

“Our Environment Bill will be ground-breaking and the new watch-dog it will create will have the powers and independence it needs to hold this and future Governments to account so that standards are upheld, laws are respected and commitments are met.”

Rt. Hon. Theresa Villiers MP, UK Secretary of State for Environment, Countryfile Live Speech August 2019

"Scotland’s natural environment is our greatest asset. We must continue to protect it for the future. It supports and enriches our lives and the prosperity of our nation. I believe that EU membership has helped Scotland to achieve high environmental standards. The Scottish Government has committed to maintain or exceed EU environmental standards. EU environmental law is informed by four environmental principles, and we intend to keep these at the centre of our environmental policy making. The European institutions have also provided effective oversight of compliance with EU environmental law. The future relationship between the UK and the EU is still uncertain and the UK Government remains unable to provide much needed clarity about the future. My choice would be to remain fully within EU governance systems. However, as a responsible government, we need to prepare for whatever the future brings. In particular, the Scottish public deserves continued assurance that environmental standards are being applied effectively. In Scotland, we have well established systems and procedures for holding public bodies to account for their performance, and to provide a challenge if duties are not met or legal powers misused. We need to ensure we have robust arrangements for a future where there is no longer oversight from Europe. In addition, we must prepare to fulfil any new obligations to demonstrate compliance with environmental standards. Environmental governance is an important and complex issue, and one that we must get right."

Scottish Government Cabinet Secretary Roseanna Cunningham, 16 Feb 2019, Environmental Principles and Governance after Brexit, Foreword to Consultation.

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1. Executive Summary

1.1 The withdrawal of the UK from the EU and its consequent impact on Scotland will mean that Scotland is removed from the jurisdiction of the European Commission and the Court of Justice of the EU (CJEU). The risks of exit and the continuing uncertainties of the formal position of the UK and Scotland in relation specifically to environment issues are that **"there is a risk of disadvantage without intervention" …in relation to "access to expertise in professional policy and practice networks, access to skills and the value of oversight mechanisms provided by the Commission and the CJEU around verifying compliance with and enforcement of environmental law."**[1] Whilst these remain uncertain and not finally determined at the time of this report, their impact is assessed and the gaps created are considered. Potential models to fill these gaps are considered on the basis of literature research and a set of interviews and discussions with experts in a number of jurisdictions.

1.2 Based upon what is liable to be lost and learning from experience and good practice in other jurisdictions, there appears to be at least a need and a case to be made for, as well as significant benefits from, the establishment of a clear new coherent governance system. This would ideally comprise **an independent parliamentary commissioner for the environment and a dedicated environment court as well as a realignment and better integration of existing components of Scotland's environmental governance arrangements.** This would help not only to deliver the Scottish Government's commitments to environmental standards and policies post-Brexit but would help to ensure appropriate, efficient and effective alignment and coherence between the components of the current set up: implementing agencies and authorities, government departments and ministers, and parliament, business, NGOs and the population at large. With these additions, the environment can be better protected and the laws and policies in place better implemented, enforced and visible to the public. Public bodies and governments can also be held more explicitly accountable.

2. Summary of Recommendations and Conclusions

2.1 Recommendations and Conclusions

2.1.1 Recommendations have, like the subject of environmental governance itself, broad significance, application and ramifications. They generally relate to Scottish Government, politically and administratively, as well as to the Chief Executive, officers and members of the Scottish Parliament and to the Judiciary in Scotland. Specific recommendations apply to a range of public bodies, agencies, local authorities, NGOs and members of the public as well as landowners, land managers and industrial process operators.

2.1.2 The recommendations arise from the research undertaken and reflection upon an assessment of what Scotland aspires to for the oversight of the environment, what is already in place than may endure post-Brexit, what practice world-wide illuminates as being possible and how well that fits with what has been in place and may be needed in future. The cases considered through the report help breathe life

[1] Environmental Governance in Scotland on the UK's withdrawal from the EU – Assessment and options for consideration: a report by the Roundtable on Environment and Climate Change, Scottish Government May 2018

into what also emerge as principles – introduced in footnote 1 – or tests in terms of the merits of independence, expertise, capacity, resources, powers, accessibility to the citizen and accountability in its various forms. They also build upon the fundamental notions of the functional separation of executive administration, the powers of the legislature and the overseeing and adjudicating capability of the judiciary. In turn these components allow framing and empowerment, initial delivery, first tier scrutiny, independent oversight and independent adjudication, determination and disposal. The lines between may be blurred at times but these pillars of our environmental governance require careful consideration and a running assessment is made of the value of these components and the attributes they possess before reaching the conclusions summarised above and set out below.

Conclusions

2.1.3 In addition to the main specific conclusion that there is **a clear need for a dedicated environment commission and a dedicated environment court** to replace what is liable to be lost, there is, standing further back, a fundamental conclusion from the research that what we stand to lose is serious and must be addressed and that serious reform of our governance arrangements is necessary with or without the UK's EU withdrawal and its consequences for Scotland. *It is also worth observing, albeit that this research has been focussed on governance per se, that there is clear potential benefit in having independent oversight mechanisms to inform and enable better policy and strategy making processes and thereby in turn the potential to deliver better environmental outcomes.*

2.1.4 **For the functions being lost to Scotland by the UK's withdrawal from the EU and the resultant gaps in oversight, application of powers of the Commission and the CJEU and expert knowledge exchange dimensions of the EU institutions and fellow member states, it is clear and ought to be publicly stated and agreed that existing arrangements at the Scottish and UK level are inadequate, as concluded by the Round Table**. This in a practical and philosophical sense is a first recommendation.

2.2 Specific Recommendations

i. An independent dedicated parliamentary commission role for the environment[2] – and potentially considering related human rights issues in parallel - appears essential. It would have the powers and resources to perform independent assessments, checks and investigations[3], sitting outside the government of the day and its agencies and this should report to parliament. A Parliamentary Commissioner for the Environment (PCE) should be appointed, accountable, assessed, resourced and empowered to act in such a way as to command trust, credibility and authority, to provide a freely accessible complaints mechanism for the public and to deliver robust oversight of environmental performance by all public bodies. It should also be considered that such a role potentially be even more widely drawn to consider those acting generally in the Scottish environment. The PCE should also be given the powers to refer a matter to a court.

[2] This could be, in practice not unlike the OEP - if, but only if, the recommendations of the EAC on independence are accepted when the final OEP proposals are published.
[3] To be clear, this ought to include scrutiny of existing law and policy, investigating individual cases and pursuing enforcement actions and remedies, directly or by referral to the court.

ii. There appears to be significant merit in consideration of the establishment of a dedicated superior court. This would be an independent, tenured, specialist, adequately resourced, skilled and supported court body, with broad power of discretion on process, including being Aarhus-compliant, to provide the ultimate checks and balances to the environmental governance system.

iii. There remains a need to undertake a feasibility study or options appraisal, progressing beyond the 2016 Environmental Justice Consultation to recommend specific proposals to be implemented as a coherent package. This could be treated as an ECCLR Inquiry, or 'outsourced' by Government or Parliament to a Task Force of experts[4]. This need not impede the early establishment of the PCE, including interim court referral arrangements.

iv. While a PCE and an Environment Court could be created separately and co-exist simply through mutual recognition in the public realm, properly connected in a robust governance system, the PCE would logically have powers to refer matters of policy and specific cases to a court and indeed, once established, to the (new Environment) Court. Equally, in its preliminary consideration and triage, the identified court or new dedicated Court could refer matters better suited to the Commissioner's remit. The initial routing of cases would depend upon public policy communications and identified persons, routes, bodies of standing, etc., with appropriate support arrangements, to shape demand and to be refined over time.

v. Subject to the powers established for the court by remit, expertise etc., the appropriate fit with government arrangements, oversight audit and scrutiny powers elsewhere and the delegated administration elements of the system would also be advisable.

2.3 General Recommendations

2.3.1 General recommendations arising from the Review:

i. Explicit acknowledgement and description of the system of environmental governance applying in Scotland would be helpful to wider society.

a. What good governance constitutes should be a visible concept, stating clearly that how we are governed and how this affects how society operates is not a highfalutin, theoretical, abstract matter but an important 'protection' in itself, both for the environment and for citizens' rights.

b. It would be helpful to the public to understand the comparative position of the system of governance at the point of exit from the EU versus the position

[4] A revived Environment Round Table could be considered or a similar mechanism with appropriate technical and resource support and lifetime to enable full consideration and properly to inform a subsequent decision. This could also operate in a similar manner to Prof. Alan Miller's Human Rights process.

post exit and for there to be an open communication around what the losses mean and how they can and will be addressed.

ii. A strong, and strengthened, environmental governance system would help to deliver commendable stated ambitions to tackle the crises faced. Governance that ensures government – central and local - and its agents are held to account is not a threat but a strength; a fundamental democratic safeguard.

iii. The existing elements of environmental governance in Scotland merit careful consideration and no little appreciation. Scotland possesses significant elements of a good system and has a largely good environment by global comparison at present. This should not be underestimated, nor indeed put at risk. Positive ambitions have been expressed by the government. With good data, visible to all and a clear governance framework and effective protective actions proportionate to the recently declared climate and nature emergencies, we could be more confident that we remain on the right track. Scope clearly exists to develop the system and environmental condition further in ways that would improve the former's effectiveness and efficiency and the latter's state and these also merit careful consideration.

iv. The positives of the existing position in Scotland should also not be over-stated or lead to complacency or inaction. Much of the merit in the current status, arguably, emanates from the EU membership and our approach historically to engagement and compliance. There are too, clear weaknesses: too slow compliance with major directives impacting for example on air quality, waste management etc. and therefore on our environment, economy and society; and, for example Aarhus compliance, where other states do better.

v. Any consideration of specific interventions to the current system, should be required to consider the fit with and impact upon the other elements of the system. A strategic, structural, regional or thematic plan or the classification of land use or water bodies or emissions standards etc. may well have an impact on the remit and scope or powers of a regulator, auditor, a parliamentary commissioner or the courts. Establishing a commissioner may well affect the governance arrangements and reporting of an agency board or the call-in process operated by central government to consider a planning appeal. A contested issue at Court may lead to a resolution and remedy affecting national policy or cases, licences, conditions etc. elsewhere. The system therefore needs to be seen as a functioning whole.

2.4 Acknowledgements and Author's Foreword

Many thanks go to the LINK Steering Group, those interviewed and those who have provided various inputs by email and telephone. Special thanks to my former colleague Paul Metcalf in New Zealand for helping me identify and contact some key contributors there.

This review has taken a range of views from people involved in environmental governance, in theory and practice, from a very useful workshop with interested parties on 6 September, and from service providers and users in differing jurisdictions. I have also looked into some academic and grey sources as well as

public reports of official bodies. Together this has provided a rich basis for consideration. I should also say that some large books have been written on aspects of this subject generally and component and related aspects have been written about at length. The scope even of "watchdog substitutes for the European Commission and Court of Justice of the EU" could be a work of experts and years. This is not that. I have tried to be focussed, even in the face of fascinating subjects, individuals, learning and ideas and huge and live uncertainties. Interviewees and correspondents have been generous with their time and given access to a range of materials and insights. This has allowed me to build on the work of the Round Table on Environment and Climate Change Sub-group on Environmental Governance in 2018 in a very dynamic area where ideas and proposals are still evolving rapidly but with a sense that we are still in the same zone of issues addressed in the original report. No one has rejected aspects under consideration as wrong or out of bounds nor have they had "pat" solutions that would "fix" the issue in hand. Some contributors were circumspect about speaking on the record so as not to compromise or reach beyond their defined roles or as proposals remain "live" and not yet settled or agreed in the political context. Authoritative commentary has come from those practising in relevant areas and this has been very useful. It has also highlighted that considerably more work may be advisable and necessary before progressing to implement a new system in a post-Brexit Scotland, both in any case and especially if based on a hybrid of models garnered from elsewhere. Given the timescales involved it is also clear that there may be a balance to be struck between urgency and maturity, with interim measures and a staged plan necessary to address the biggest risks. I hope nonetheless that this report proves helpful in focussing in further on the components of an effective environmental governance system for the future.

List of Abbreviations

ADR	Alternative Dispute Resolution
APEEL	Australian Panel of Experts on Environmental Law
CEU	Commission of the European Union
COPFS	Crown Office and Procurator Fiscal Service
CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
DPEA	Planning and Environmental Appeals Division of the Scottish Government
ECCLR	Environment, Climate Change and Land Reform – the portfolio of Cabinet Secretary Roseanna Cunningham and the title and scope of the Scottish Parliamentary Committee
EEA	European Environment Agency (also European Economic Area)
EP	European Parliament
IUCN	International Union for the Conservation of Nature
JR	Judicial Review
MS	Member State of the European Union
OEP	(Proposed UK) Office of Environmental Protection
OSPAR	Oslo and Paris Convention and Commission established in 1992 for Marine Conservation and Protection primarily related to the North East North Atlantic
PAD	Planning and Architecture Division of Scottish Government
PCE	Parliamentary Commissioner for the Environment
SIC	Scottish Information Commissioner
SPSO	Scottish Public Sector Ombudsman

3. Introduction

3.1 Mission, Scope and Background

3.1.1 LINK commissioned this work in July 2019 to seek an overview of potential models for environmental governance post-Brexit. LINK indicated in its brief for this work that "LINK members have been actively engaged in identifying risks of EU exit for the environment, in particular with respect to critically important functions performed by EU bodies and agencies that would be lost. This would create a gap in the way that environmental laws are monitored, scrutinised and implemented – this is now a commonly acknowledged issue and referred to as the 'environmental governance gap'.

3.1.2 "The Scottish Government launched a consultation on environmental principles and governance in Scotland in February 2019 which sought views on the risks a potential EU exit creates for the environment. In this consultation, which closed on 11 May, the Government sought views on the environmental governance gap, its nature and potential solutions. The Government has not yet outlined its preferred policy approach but it is expected to do so on the basis of the consultation results."

3.1.3 This report is intended to assess and build upon available research insights and help to describe models and approaches that may offer ways of addressing the gaps described and provide proposals for effective future environmental governance in Scotland.

3.1.4 Reference to UK-wide aspects of environmental governance and their longer-term impact and possible interim measures follows but (a), these are still "in play" and far from clear and (b), the report focuses on solutions for Scotland at the Scotland level to support Scottish Government in determining its preferred policy approach for addressing the environmental governance gap.

3.1.5 With respect to assessing what is liable to be lost through leaving the EU, this is addressed in Section 4. An assessment was made of what was potentially going to be lost and set out in a report of the work undertaken under the banner of the First Minister's Standing Council on Europe's Round Table on Environment and Climate Change. This was submitted in March 2018 and refined in April/May 2018. The Round Table was invited by the Cabinet Secretary for ECCLR to consider potential areas at risk and both governance approaches and options to manage these. The report of that work[5] allows a summary setting out the context and level of existing knowledge and consensus on these issues to be given. The report also highlighted the attributes of successful oversight, or the desirable characteristics of any new governance body[6], as follows.

3.1.6 The critical issues to be addressed in a new or revised system are: -

- Independence;
- Expertise/capacity;
- Resources;
- Powers;
- Citizens' entry point; and
- Accountability.

[5]Roundtable report on environmental governance in Scotland: https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/

[6] Body or bodies in this space with "watchdog"-type functions in lay terms.

3.1.7 These will be considered again in the light of the evidence gathered in respect of possible mechanisms to address post-Brexit gaps in Section 7.

Mission – some further context

3.1.8 The client for this work made it clear that the purpose of this work is not to design the ideal environmental governance system in Scotland, which would be a much larger piece of work and given the current circumstances and time constraints it is important to focus on key areas of risk. The report's primary purpose is therefore to address the issue of any governance gaps arising from an EU exit. That being said the research has thrown up many interesting considerations about what good environmental governance looks like (e.g. that it is a system), and some of these findings are included in the report as they remain relevant to the discussion about future environmental governance in Scotland how the effectiveness of any new arrangements created post-Brexit could be established, improving and strengthening the governance system.

3.1.9 There are therefore wholly relevant but somewhat competing pressures in this work. The first is the clear and urgent need to address the imminent losses and the gaps they create – the removal of EU Commission engagement, scrutiny and oversight, and the powers of consideration, pursuit, direction and remedy of the Court of Justice of the EU. Secondly, there is the arguable need, and certainly the clear opportunity presented, to address the whole system of environmental governance in Scotland and put in place something better suited to Scotland's contemporary and likely future needs. The former is the specific given mission for this report and yet the second is an inevitable area of consideration when the question is asked, "what does Scotland need?"

3.1.10 The report seeks to tackle both to some extent, with consideration of the latter, ideally not distracting too much from the former. Indeed even in terms of addressing the gaps identified, time is extremely short and it might well be advised that we not only ought not to have started from here but we ought to have started sooner. As the end of August approaches, the end of October is very close.

3.1.11 It is also worth observing that, like the author, several of those interviewed have spent a working lifetime, commonly 30-40 years considering and active in aspects of environmental governance and their reflections and insights hold considerable value. None thought "their system" perfect and time was spent comparing models. There has been broad agreement that strong emphasis should be placed on solutions that will fit the particular cultural and political circumstances in Scotland, recognising that fitness for purpose is vital and that 'click and drag' solutions from other jurisdictions may not be the best approach.

Specifically,…

3.1.12 The brief for this project sets out that relevant useful international examples should be considered and EU equivalent mechanisms and resourcing questions should all be explored and these will be considered in turn as information available allows. The work of the Round Table – and the consultation[7] resulting from this -

[7] https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/pages/1/

and the Client Earth Report[8], "A new nature and environment commission" are taken as given starting points.

3.2 Refining the Scope

3.2.1 This report looks at the EU institutional arrangements, Commissioners of Environment and related bodies internationally, environment and related Courts and other potential institutional models. It is assumed that all existing bodies in Scotland will remain in place for the foreseeable future in terms of agencies and oversight bodies as well as COPFS and Courts but it seems prudent also to consider where these could be supplemented or otherwise altered, as this could occur in the period after October 31 2019 in any case. Given the place of information, compliance oversight, access to justice and formal legal pursuit of those responsible and accountable for environment performance failures as well as the mechanisms of redress, COPFS, Ministers and indeed Parliament as well as their agents and Ombudsmen and Auditors remain absolutely key parts of the existing system.

3.2.2 As an observation, it is clearly for government to consider, in the light of UK and Scottish developments as well as the arrangements finally lit upon for actual exit, what actions on environmental governance should be taken and when. Some actions relating to existing bodies could be taken in relatively short order through directions and revised policy stances but those actions requiring statutory instruments and especially primary legislation would inevitably occur in the longer-term. It seems fair to assume that very few measures will be in place before Oct 31st and so the desirable interventions and arrangements should ideally be timetabled so as to allow consideration of short term measures and interim measures to address key gaps, alterations to existing bodies in the medium and longer terms and the establishment and/or transfer of powers to new bodies in the longer term to improve environmental governance more generally in Scotland once any more immediate post-Brexit gaps have been filled. As yet this has not been a very visible discussion and the response of the Scottish Government to the Governance and Principles consultation is a central plank of this. Mapping out the impact and change requirements for existing bodies would be a priority as would the configuration of the proposed new entities.

3.2.3 In relation to COPFS etc., there would be little change needed as most of their role and expertise relates to wildlife crime, environment protection issues handled by the PF service and criminal prosecution generally. In terms of the Court-based aspects of governance, as opposed to administrative decisions and operations etc., LINK's concerns are related largely to the civil law[9]. For instance, in all the environmental courts submissions, LINK has argued that it would be a civil court, replacing JR, various court/tribunal/reporter appeals, etc. that would be required; and that all the current criminal matters would remain with COPFS and Sheriff/High Courts.

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[8] https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/

[9] That said, LINK and its members and indeed some regulators ad many commentators are clearly not of the view that the criminal system could not be greatly further improved. It is not, however, that the structure or system primarily need changed, it appears more a case of the need for more resources, more severe sentences, more targeted improvement effort and demonstrable improvement of outcomes.

4. Establishing what we are losing as a result of EU exit

4.1 The Roundtable Report considered the important areas of likely loss. In addition to the general areas of knowledge exchange and peer body networking and access and wide-scale policy shaping, the specific areas of concern were:

- Monitoring, Measuring and Reporting;
- Scrutiny and Investigation;
- Considering Complaints;
- Seeking Solutions;
- Powers to refer a public body to a Court;
- Powers to order interim measures;
- Powers to require Ministers or a public body to comply and to impose sanctions.

4.2 In the conclusions of the report, at 7.1, these areas were summarised and it went on,

> "These are important for good governance in terms of transparency and accountability and for the proper functioning of Scottish authorities in fulfilling their environmental responsibilities. In deciding how, if at all, these should be replaced, some design issues arise. These do not require the same solution in every case and interim measures may be appropriate whilst more enduring arrangements are put in place:
>
> - the functions could be conferred on a ministerial advisory body, on a parliamentary body, or on existing bodies given expanded remits, or on a new body;
> - to be effective and achieve public confidence, any such body must have independence from government and the regulatory bodies, must have the expertise and capacity to do its work, must have a guarantee of the resources necessary for its role and must have the powers required to fulfil its tasks;
> - there must be effective ways for citizens (or national/local associations of citizens) to hold the government and other authorities to account for failing to meet their commitments and obligations, but these can focus on public reporting, parliamentary accountability or reference to the courts (which in turn raises the questions of at whose instigation, to which court(s) and leading to what remedies)."

4.3 The points made above still apply. As a result, this report will not detail these issues further except where relevant to the specifics of a relevant model or process that could be appropriate for deployment in Scotland.

4.4 It is also important to observe that there is a general expectation, and this is now most evident in preparation for EU accession or associated states in trade or other agreements, that there exist the basics of good public administration. This relates to government structure, local government, dedicated public administration bodies for statistics, trade, regulation etc.

4.5 In relation to compliance and sanction issues arising, the proposals by DEFRA in the draft Environment Bill are especially relevant as they are the most explicit proposals to alter and supplement existing governance structures at the UK level and they may have significant implications for Scotland. This will be discussed further in Sections 5 and 7.

4.6 In the context of this work, the essence of what is of interest as being lost through Brexit is the powers of the EU Commission and Courts[10]. The Commission has the power to query Member State (MS) performance, to ask for national legal, policy and implementation clarification, to investigate concerns and complaints revealed by citizen complaints, Parliamentary petitions, data reports, local cases, apparent Directive failures, member government decisions not to implement EU law, or licence performance "events" etc., or state, region or authority decisions that call compliance with EU law into question. These are issues where the first line of potential escalation of concern originates with the Commission.

4.7 It is important to note that the Commission often becomes aware due to the critical citizen's right to submit complaints[11]. This is a key feature of the EU framework that will be lost. The current complaints system is fairly clear, well-flagged, segmented into specific handling components and open, and simply facilitates the citizen raising issues. Petitions and European Parliamentary questions options add to this element of accountability and scrutiny.

4.8 The Commission may also respond, as may the Court to concerns raised against the state by another MS. Usually the complaint originates with the Commission. Matters of financial performance and probity and related non-financial performance in an EU legal or policy area may fall under the consideration of the Court of Auditors. Ultimately concerns by either over whether or not a Member State has fulfilled its obligations under EU law may lead to the CJEU. There a series of infringement procedural steps, and in close concert with the Commission's preparatory work, starting with reasoned opinions on a case, it may progress via a letter of formal notice and escalate on to Court process where a preliminary ruling by the General Court may be reached. This may be appealed but if upheld the toolkit of sanctions may then be deployed, upon the Commission's request. Action by the member state at almost any stage may result in the infringement being paused or terminated if the breach itself is terminated.

4.9 In addition, in January 2018, the Commission of the EU set up a group of experts on environmental compliance and governance[12]. This forum, drawing on expertise from EU environment agencies and networks of judges, police, prosecutors and auditors, was charged with considering:

(i) compliance promotion, monitoring and enforcement (compliance assurance);
(ii) access to justice on environmental matters;
(iii) access to environmental information;
(iv) public participation;
(v) any other governance issue.

4.10 Progress to date, following the establishment of this group and the work undertaken by IMPEL and others in support of this, as well as the Action Plan launched also in January 2018, has focused largely on industry and agency compliance support. The main working document[13] produced so far suggests the focus of effort should also be on improved member state State of the Environment

[10] Particularly in relation to infringement of EU Law. https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en
[11] https://ec.europa.eu/environment/legal/law/complaints.htm
[12] Commission Decision of 18.1.18 C(2018) 10 final, setting up a group of experts on environmental compliance and governance
[13] https://ec.europa.eu/environment/legal/pdf/SWD_2018_10_F1_OTHER_STAFF_WORKING_PAPER_EN_V5_P1_959220.pdf

Reporting (SoER), effective peer expert networking and international/transfrontier policing around waste and wildlife issues. Annex 4 of the document also highlights the use of court models at the national and EU level to drive critical improvements where failures have not been addressed. In-state governance is not visibly addressed.

4.11 It is important to recall that the EU environment acquis and environmental laws and policy provisions in general are often considered only under the environment components of the EU Treaties, whereas significant provisions originate and are governed under the Single (or Internal) Market. Where the former establish standards that act as a base level upon which members states can choose to improve but with which they must comply, under the Single Market arrangements, active derogations have to be sought for any deviation and therefore if a standard or condition is not met, as might be specified in product standards and trade deals, these issues of compliance may be additionally burdensome and challenging. Careful consideration of all current and future environmental standards and where they fit in European Law is strongly recommended.

4.12 Having revisited the losses, it is important too to acknowledge and consider strengths remaining as well as possible solutions and positive developments in the short and longer term scenarios. This will be done in Section 6.

5. Implications of UK Withdrawal on future EU relationships

5.1 The implications of UK withdrawal from the EU, the UK withdrawal agreement and the arrangements for future EU/UK relations are largely still unclear as of July/August 2019 and can be taken as both in flux and likely to be systemic and significant. It is likely that the UK Withdrawal legislation and the Scottish consequentials will require urgent development in October/November and these may well have particular significance for the scope of this work.

5.2 As a general observation and discussing these issues with informed EU commentators and European officials off the record it is clear that prior and continuing investment in EU relationships has been and remains important. Scotland's standing remains positive and its culture of engagement and broad acceptance of the acquis and areas of best practice is noted. Unlike the UK, Scotland's affinity and alignment with smaller progressive countries within the EU, might also be seen as presenting simpler benefits and shared learning opportunities. Given staff turnover in the EU institutions and in key roles in Scotland, however, and the potential for memories to fade and relationships to weaken over time, future relationships depend on many variables. Assuming that the UK does leave on October 31st, were Scotland, or indeed the UK, to seek to rejoin the EU at some future time, the length of the gap as well as the tonality of the exit and the return would likely be highly significant as of course would be the interim environmental performance.

5.3 Whether or not there is a single UK or a federated environment watchdog[14] or oversight body for the "four nations" is just one part of this. The status of the Scottish Parliament and the devolved powers for the environment of Scottish Ministers and agencies and Parliament are currently a legal given but may change. How data are gathered, kept and reported on, how compliance is demonstrated and how contested cases are handled by existing bodies may be taken as a given too but may also be subject to change. The current powers of environmental regulators and information providers etc. would similarly be a given part of the institutional framework, but may be subject to change.

5.4 If we accept the status quo ante as a starting point, what we stand to lose is multi-faceted and was set out and assessed in the Round table Report and revisited earlier. These range from access to professional networks and collaborations to personnel exchanges to access to common information process and exchanges such as the EEA environment data sources, and on to the areas of policy development, implementation and reporting of the Commission and its agencies through to the powers of compliance assessment and reporting, investigation, challenge and ultimately to the powers of investigation, audit and prosecution etc. of the CJEU and ECA.

[14] The UK's proposals for an Office of Environmental Protection (OEP) and other components of the UK Environment Bill are being developed further at the time of writing of this report and some elements are becoming more visible. The nature of the proposed OEP watchdog as a supra-national body, in Scottish terms, is unclear and so there may be component, connected or other arrangements at the Scottish level. Current knowledge suggests the plan is for the OEP to have oversight of English/reserved matters (and NI, subject to developments there). There is debate about the definition and extent of 'reserved matters' and even about "environment". There may also be some form of 'duty to co-operate' with equivalent bodies in the Devolved Administrations (DAs) in relation to 'transboundary matters' (meaning across an actual border – e.g. Solway/Tweed River Basin for catchment management planning, and/or a jurisdictional, devolved/reserved boundary). The nature of that co-operation will, most likely, be devolved to the bodies to define – but it will mean the OEP will have to work out who/what its "equivalent bodies" are. Prior dialogue and relationships between the environment agencies are generally strong and well developed.

5.5 If an OEP has a relevant role in Scotland, it is possible that it could seek to maintain relationships with the EU institutions to ensure connectivity and awareness of policies and practices at the EU level. If it is internally UK focussed, or dominated by or exclusively dedicated to England, and possibly Northern Ireland, issues, it will be unlikely to help Scottish-EU relationships.

5.6 Whilst to go beyond this point, or even this far, takes us into the realms of pure speculation, it is perhaps simply worth observing that given the Scottish Government's environmental and constitutional ambitions, in the context of devolved administration or independence in future, the maintenance of EU relationships, as indicated in 5.2, and demonstrable commitment to environmental best practice, is likely to be a continuing priority and as such active institutional and expertise-based relationship management to retain access to networks and close awareness of best practice and policy developments would be important.

6. Overview of domestic governance mechanisms that remain and what gaps ensue

6.1 At this point, Scottish Government has not reported on the results of the Governance and Environmental Principles Consultation[15] and has not yet set out a response or progressed an explicit environment vision and strategy for post-Brexit Scotland. As a result it is difficult to know whether the questions raised and conclusions reached in the prior work have been acknowledged and accepted or rejected and in any case if their consideration will lead on to particular consequences in vision, strategic, organisational or process terms.

6.2 Given the stance adopted by the current Scottish Government and the stated intent of the Cabinet Secretary ECCLR in terms of maintaining environmental standards and keeping pace[16] with or shadowing evolving, existing and new EU Directives and policy for the environment, it is assumed that reporting requirements contained in these will continue to be met. The Roundtable also made this assumption and highlighted that the reporting potentially becomes "ownerless". Reporting could be consolidated in an existing entity[17] – ideally not distributed among or retained in the originating bodies where its coherence would be lost and access made more complex, exacerbating existing risks and weaknesses - or become a part of a Parliamentary Commissioner role, for example.

6.3 Accepting the suggested system view of environmental governance proposed in this report, and the four pillars of: administration, primary oversight, independent expert scrutiny and dedicated court, it is worth a simple health check on the elements to assess Scotland's governance baseline. This is subjective of course but is a serious professional view and is a necessary filter on an assessment of "gaps".

6.4 The existing state of general administration in Scotland, whilst undoubtedly capable of further improvement, is by global standards actually good.

(i) First, there is a strong body of law set out in a number of Acts, decisions and policies, much of which has been framed by the EU environmental acquis and successfully translated into Scots Law. Scotland has tended to take a leadership view on much environmental legislation.

(ii) Secondly, there are institutions and agencies of varying but definite degrees of democratic accountability cascading from the devolved elected and administered Scottish Parliament and the elected government which has acknowledged and implemented the law and resourced and empowered the agencies, with boards etc., involved in protecting the environment and enabling use and appreciation of the environment.

(iii) There is a dedicated senior cabinet minister, and an administrative department as well as political advisers in the subject area. The government has wide powers and resources to delegate to and direct agencies to implement and give effect to the law and political or administrative decisions and there are functional units to call in, assess

[15] https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/ ; open between February and May 2019

[16] As per Continuity Bill language

[17] Environmental data and reports have been managed in differing ways over time, sometime by SEPA for example, drawing in other relevant expert providers, currently in a centralised government manner. There has been debate worldwide about best practice in terms of thematic reports, overview reports, 5 yearly "big volume" State of the Environment Reports or rolling collection and presentation of web-based reporting. The availability, accessibility, independence and use of the data and reports is perhaps the most important set of points and how best to achieve these objectives.

and determine decisions taken elsewhere in the system and basic internal government assessment of the decisions, actions and behaviours of delegated bodies.

(iv) There is a set of administrative arrangements to devolve relevant powers to local government and delegated agencies, including independent regulators. There is significant spatial planning and policy making, much policy implementation and arrangements around public engagement, access etc. cascaded to the local level and elements of local democratic accountability for framing and implementing decisions about the environment below state level. Investment support for environmental interventions also exists below state level.

(v) There is also a vibrant NGO community involved in engagement, scrutiny, criticism and campaigning on environmental and community concerns with significant profile and membership connectedness to provide links between environmental issues, community concern and the structures of the state.

(vi) There is a culture and history of seeing the environment as an asset in Scotland, with a perception of high quality held widely and seen as a marketing advantage for tourism and trade and an underpinning of our iconic industries and products from water itself to whisky, salmon, barley, oats, beef and lamb etc. There is also at least some informed free media interest in these issues and whilst not necessarily a public policy priority, like health or education, there is widely possible public discussion and appreciation of the environment and its importance.

(vii) There is a principle, enshrined in law and customary in practice of establishing and using scientific assessment and data to form policy, condition reporting and licensing etc., and also a body of data and good general independent environmental data gathering, monitoring, analysis and reporting which allows sound decision making and public awareness, environmental planning and interventions, licensing, land use planning assessments etc.

(viii) Finally there is an economic model where the business community actively participates in lobbying and delivery, with trade body structures and representatives engaging with regulators, communities and government allowing at least some degree of reality check as well as development activity capable of managing environmental resources

6.5 Additionally in terms of pillar two there is primary oversight via the Scottish Parliamentary structure and a dedicated thematic committee (the ECCLR Committee) and there is an independent audit body, Audit Scotland, dealing with financial and performance audit issues and reporting to Parliament to assess public body performance.

6.6 The UK Parliament's Environment, Food and Rural Affairs Committee and the Environmental Audit Committee also play a potentially valuable role in aspects of legislative, policy and implementation scrutiny of relevance. They provide a direct point of comparison between the English and Scottish empirical situations, allow policy and implementation comparison and provide information and analysis on UK/MS areas. UK Frameworks issues and consideration of implementation around transboundary air quality, cross border river basin issues, trans-frontier shipment of wastes, radioactive wastes, and some MS issues around nature directives could prove important, including during any transition period. Subject again to any parliamentary or constitutional reforms or legislative and policy scope changes, they would continue to offer degrees of scrutiny and oversight.

6.7 Whilst in the EU, clearly pillars 3 and 4 have strong powers to deliver. But currently the pillar 2 bodies and arrangements allow a significant degree of scrutiny and visible, public reporting and there exist independent courts from the Sheriff Court upwards to the High Court and Court of Session – and indeed the UK Supreme Court - which either do or may engage actively in addressing environmental justice and specific issues of the creation and implementation of environmental law. There is also the Scottish Land Court[18], albeit that it has limited scope of relevance to the broader environmental governance agenda of this report. Independent investigation empowered at a senior level does not exist but journalism, academic research and the powers of regulatory bodies do enable differing degrees of investigation of environmental performance.

6.8 Often we focus on the powers of Commission and the CJEU to investigate, opine and adjudicate on the law in the context of MS failure. The UK and indeed Scottish Courts have the ability to ask the Court for a "preliminary ruling". They – the UK Supreme Court and, where there has been no right to appeal granted, lower courts also have the power and currently the duty to refer matters of EU Law to the CJEU for determination[19]. Since 2003[20], the Commission opened over 750 cases against the UK, with 668 of these being resolved by the UK before court proceedings were initiated. The largest single category of cases was the environment. Failure fully to implement the Urban Waste Water Treatment Directive remains the single area where failure persisted and for the UK, and for many other states, this has been the most expensive area in which to achieve compliance. But CJEU cases have progressed after the Commission has issued reasoned opinions in relatively few environment areas, with only 33 rulings last year for all members, with the environment 9th on the list of case types. The UK was not a major case-owner. But over the last 15 years reasoned opinions have been developed and issued for waste, air quality and bathing water issues as well as in relation to combustion plants. At least three of these areas related also to Scotland.

6.9 In terms of keeping pace with the EU, mirroring standards and shadowing developments, it is interesting to note the developing shape of the Eighth Environmental Action Plan in the new Commission and the approach taken by Ursula von der Leyen, the incoming Commission President, in her Political Guidelines and Speeches – with a prominent focus on a "European green deal", new "2030 biodiversity strategy", "circular economy" and "climate neutrality" action as well as a "zero pollution" ambition. These, as well as financing, scrutiny, cohesion and other economic, social and human rights ambitions could set ambitions for Scotland too. Stating the somewhat obvious, over time, as the EU progresses under such a new Commission approach, the gaps that currently exist and open up at 1 November, would likely widen further without intervention.

6.10 In terms of critique of Scotland's current position, the issues that could be raised, whilst not necessarily the subject of this report, do help qualify the strengths identified earlier, point to vulnerabilities and help identify areas where resilience or effect require enhancement. These would range from levels of resource, pace of process, transparency in the system, degree and stability of independence, the

[18] http://www.scottish-land-court.org.uk The Land Court – and indeed the separate but related Lands Tribunal - is of limited scope and established largely to address and resolve agricultural and crofting disputes and commonly landlord/tenant contractual or tenural arrangements but does not have broad land, land use and management scope or powers, although some environmental management issues have been added to its remit: see e.g. Nature Conservation (Scotland) Act 2004, ss.18, 34 & 40.

[19] https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf ; https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf

[20] as 16 first ref.

representation, skills, resources and oversight and robustness of councils and agency boards, accessibility for the public as well as costs of access to justice, specificity to Scotland of aspects of the legal framework and the law itself, quality of data, dynamics between community, owners and polluters and developers, land and resource ownership structures, for example, and so on. Critically too, however good the system may be, it is a widely held view that it is not wholly succeeding. Nature is still in decline[21] and some serious pollution is continuing seemingly unchecked. It is important therefore to set an assessment of the system per se with its impact. At this point, the laudable rhetoric of government aspiration is not always and systemically translated into decisive and effective action. Nonetheless, this author does not consider any of these issues fatally to undermine the current model's utility in the Scottish context, certainly as a basis for measured consideration of necessary next steps.

6.11 Therefore it is fair to conclude as stated at the outset, that there is a sufficiently strong starting point from which to consider the significance of losses to Scotland and the needs to be identified, addressed and reinforced for the future on exit from the EU. Whether, without or even with, augmentation, including simply to address the gaps created by Brexit and the loss of the CJEU and Commission, the status quo is effective and robust enough to tackle the climate, nature and pollution pressures we face, is highly debatable. The risks of missing biodiversity, pollution and other environmental targets suggests the challenge is significant and taking a rounded view, the existing governance system has some effective elements but is inadequate and with the imminent losses, seriously inadequate.

6.12 Assessing what is actually needed and when, remains challenging. This depends upon the final scope, powers and impact of the UK Environment Bill as enacted and any changes to existing law and policy resulting. Also, given that the current EU acquis is already very substantially translated into Scots Law, there is, if the Scottish Government seeks, and is able, to continue current devolved arrangements, a strong foundation of environmental law in Scotland. The acquis is a robust starting point, albeit reform and consolidation into a more strategic Scottish package would be desirable[22] and the declared emergencies will require further legislation to be tackled effectively, hence Scottish Environment LINK's current public campaign calling for a new Scottish Environment Act.

6.13 There is however a need for change in environmental practice, irrespective of EU exit. The need for better delivery in several areas suggests, especially on exit, that governance changes are necessary. Renewed and coherent summary ambition and vision, need to connect with structured strategic direction, plans and programmes as well as principles and structures to convert aspiration into delivery, much as the Environment Strategy in discussion and "Part 3" of LINK's proposed Scottish Environment Bill would seek to do. Current, reformed and new bodies would then require to be charged with responding to this revised framework. It is readily apparent that there is no simple tinkering option here. The status quo or minor adjustments and efforts cannot address in any real sense the scale and nature of the losses, howsoever rarely they might currently or in future actually be needed.

6.14 If information flows, access to international networks, for example the EEA, were to be continued in some form, medium term data, knowledge exchange and

[21] Alongside state and condition indicators, Scotland appears to be on track to meet only 7 of its 20 international biodiversity targets at 2020.

[22] Much as Sweden did 20 years ago in its Environmental Code.
http://www.swedishepa.se/Guidance/Laws-and-regulations/The-Swedish-Environmental-Code/

peer review activity could continue even if it gradually weakened through constrained or terminated budgets, programmes or relationships.

6.15 However, access to enforcement mechanisms for soft issues such as information will likely be reduced and focus solely on the Information Commissioner and duty and information holders in Scotland as well as possibly the Public Services Ombudsman.

6.16 “Harder” issues of scrutiny, investigation and oversight consideration leading to enforcement actions would be much more challenging and the impact of the incipient losses whereby independent structures and processes sit above the internal mechanisms of Scotland become critical. This, quite simply, is because, if failures of implementation or enforcement are identified, once direct routes of requesting information and action have been exhausted with an agency, land or industrial activity owner or operator and remedial action is not taken or the issue is not acknowledged, the process of pursuing the case has very limited further options. If the delegated body will not act, the complainant can pursue the upward curve leading to MSPs, Ministers and Parliament as well as Parliamentary officers and then ceases unless existing Scottish court and ultimately UK Supreme Court options are pursued. Depending upon whether the matter is pursued as a criminal or civil or administrative one, it is likely that costs as well as time will be significant and if a Minister, for example, supports the agency or is themselves the “owner of the transgression”, accountability and oversight would, without the EU institutions, potentially cease with the matter being closed by the government or raised in Parliament and stopping there unless reference back to the SPSO, for example, or legal proceedings were to be undertaken.

6.17 The role of the Commission in “watchdog mode” over recent decades is of huge importance albeit, to many, especially those not involved in policy making or policy implementation and certainly to the public at large, often and largely invisible. This alone highlights aspects involved in the risks flowing from losing the Commission’s oversight tools.

6.18 In the Round Table Report in 4.4 the Commission’s important role in pursuing complaints is described, and in 4.5.1, the report considered approaches taken to seek solutions to problems identified by citizens or internally by the Commission’s staff, often in the context of specific data issues highlighted by national or EEA reporting as well as via complaints. In 4.5.2, the report goes on, before referring to the role of the CJEU itself, to the crucial informal role of the commission historically in engaging directly with the member state and its agencies to discuss what it considers to be a valid complaint or emergent compliance failure and seek resolution. This latter category, sometimes characterised as “the call from Brussels”, has often been highly effective in focussing minds around the issue at hand and the identification and implementation of appropriate solutions. This avoidance of failure is a classic version of “controlling harms” and intervening before the point of crystallisation of the harm into a crisis and fixing, or mitigating the risk as advocated by Malcolm Sparrow[23].

6.19 Finally, whilst the issue of Single Market versus “pure” Environment treaty provisions was raised above, one further area which is still somewhat unclear in terms of domestic arrangements and potential gaps, is the future handling and

[23] The Character of Harms, 2008 and The Regulatory Craft, 2000 by Professor Malcolm Sparrow of Harvard’s Kennedy School of Government are bibles in this domain.

impact of international treaty arrangements[24]. For, once EU oversight is removed, and subject to whether trade arrangements quickly and directly impact the position, which is likely, or aspects of European Economic Area arrangements are put in place, for example, at some point it is possible that the focus for oversight might shift. Some common frameworks and some international treaties have inspection regimes and indeed dispute resolution and settlement mechanisms that have largely been overprinted or rendered much less significant by the EU obligations and compliance arrangements. It seems possible, if not likely, that provisions of the UN Framework Convention on Climate Change, Basel Convention on Hazardous Wastes Movement, IUCN arrangements, OSPAR, UN Convention on the Law of the Sea, and many others could be more relevant and impactful in future without the structures and, to a degree, protections provided by the EU. This may have been carefully considered already but that is not clear.

6.20 To be clear, this review has shown that the existing governance structures are inadequate and will require reform and supplementing post-Brexit. This is not a matter for minor tinkering but for intelligent, integrative, systemic change to ensure that oversight is clear, simple, independent, robust, credible and effective. This is true not only of itself but also because there is a need to be seen to be taking the current and future rights of the citizen seriously: rights to information, to justice, to a clean environment, as consumers and to protection from harms, not least to the environment and to health.

[24] A useful initial overview prepared by the NIA in 2016 highlights the UKFCO's summary of 14000 treaties to which the UK was then signatory and sets out some key categories, treaty bodies and scopes. http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/executive_office/6216.pdf

7. Lessons we can learn from other countries and jurisdictions

7.1 The Brexit context is unique, not only in terms of the nature and impact of a first member state leaving the EU but in terms of the position of Scotland as a pro-European, environmentally rich nation with a history of effective networking on environment issues. In the Round Table report at 6.3, the sub-group indicated that it had already become clear that there were several jurisdictions and entities of interest, with New Zealand and Wales as well as Canada being considered potentially instructive. Case Study examples from which lessons might be drawn have therefore been considered from Australia, Canada, New Zealand, Sweden and Wales among others.

7.2 An initial caveat may be prudent: all experience and potential lessons need to be seen within the environmental, historical, political and cultural context of origin. Scotland's unique starting point here comes as a result not just of the UK's EU membership but through the complex layers and developments of the post-war planning, environmental and devolution arrangements and relates to Scotland's land ownership and land use history, its spatial context as a country on the north west edge of the European continental mass, strongly influenced by the north-east Atlantic and North Sea marine environment setting, and the economic, social and environmental activities and interventions establishing the realities and culture of Scotland over decades and more. Comparators may have significantly different contextual dimensions.

7.3 The Scottish Government and civil society at large has looked particularly to Nordic as well as both other anglophone countries and EU members for examples of best practice. This has seen strong parallels, and sought alignments with, smaller, outward-looking environmentally-rich, often Scandinavian nations in seeking closer comparable learning models. There is a prevailing sense that Nordic countries or other countries that have similar history, geography or size to Scotland will be most instructive. However a further caution is important, the Scandinavian homologues are all either EU members or closely associated through EEA arrangements. They also possess cultural dimensions that may weaken any sense of a "click and drag" solution.

7.4 This research project has therefore sought some models of environmental regulators and watchdogs in other countries and jurisdictions near and far that have similarities with Scotland including some other models of existing international bodies based on independent commissioners but also the linked systems as well as models that are different from a commissioner-led one.

7.5 It would be possible to consider lessons to be learned on a country by country, jurisdictional basis or conversely on a topic by topic basis looking at aspects of environmental governance by turns. Both would be valid and instructive.

7.6 As raised earlier, in the Round Table Report, attributes which might be considered tests of the merits of a component of a system to address the gaps left by EU exit would include: -

- Powers;
- Independence;
- Resources;
- Expertise/capacity;
- Citizens' entry point; and
- Accountability.

7.7 In reviewing the international experience under consideration, these may help assess the viability or preference in selecting a fit model.

7.8 In any case it seems appropriate then to start an assessment of useful models with existing neighbours, and then continue with an assessment of Australasian and other cases, where potentially valuable evidence is visible.

7.9 **UK**

7.9.1 The England/UK position is still dynamic in the Brexit context. It is clear however given the historical position and connected approaches to policy-making and implementation that England faces, as does Wales, and to a perhaps lesser or at least differing degree, Northern Ireland, similar challenges to Scotland in terms of how to maintain and demonstrate the maintenance of environmental standards in line with previous law and commitments. It is clearly relevant in that the administrations and their agencies have often worked together to shape and implement the law, have a connected history from the 1990 and 1995 Acts onward in shaping major powers and organisations

7.9.2 There is also now the more recent DEFRA Environment Strategy and Michael Gove's 2017/18 Bill proposals, including for oversight at a UK level[25]. Although information commissioners and substantial primary environmental powers are devolved, process elements may be considered by UK Parliamentary Committees such as the Environment (EFRAC) and Environmental Audit Committee (EAC) and the Scottish Affairs Committee and ultimate appeals and contest in some cases go to the UK Supreme Court and through Member State mechanisms to the EU institutions. UK/England proposals may well develop the current UK-led or federated (four nation) regulatory oversight proposals for an OEP[26] further and these would be significant to the scope of this study. The extent in particular that the environmental law and policy corpus under consideration relates to Scotland at all will be critical in determining whether the OEP has particular relevance to Scotland. It is possible that only directly cross-border issues and any reserved matters such as some offshore marine environment will merit attention.

7.9.3 It is clear that the current Secretary of State, through her speech in recent weeks, is maintaining an ambitious agenda for the UK's Bill. Ms Villiers stated, "Our Environment Bill will be ground-breaking and the new watch-dog it will create will have the powers and independence it needs to hold this and future Governments to account so that standards are upheld, laws are respected and commitments are met." We have yet to see what precisely this will mean[27].

[25] UK may mean UK or more likely England and reserved matters.

[26] OEP proposals as part of the DEFRA "flagship Bill" announcement Dec 2018. "A world-leading, green governance body will be established – the Office for Environmental Protection (OEP) – to uphold environmental legislation. The OEP will be an independent, statutory environmental body that will hold government and public bodies to account on environmental standards, including taking legal action to enforce the implementation of environmental law where necessary, once we leave the EU, replacing the current oversight of the European Commission." There are currently no specific proposals for a federated solution on the table and both the Scottish and Welsh governments have been clear that the ability to develop a joint governance model rests entirely on improving the intergovernmental working mechanisms across the UK nations.

[27] Indeed, the view of the environmental NGOs at UK and Scotland level and the observations by Law Society and academic legal commentators, also supported by the EFRA and Environmental Audit committees in Westminster, is that the NDPB model in the draft bill does not deliver "independence" not do the approaches being taken to scope, recruitment and MO.

7.9.4 Other than the OEP itself, at this point there is no particular area in which specific learning of value is emerging. Earlier work by Professor Richard Macrory[28], has extensively consider aspects of UK/English environmental legal developments in the EU and domestic content and he has influenced the journey towards dedicated environmental tribunals and courts as well as civil and administrative law alongside the criminal and effective sanctioning regimes. He has also written and spoken eloquently of the merits as well as scope for reform in the roles and actions of both the EU Commission and the CJEU.

Lessons

7.9.5 The OEP *may* deliver relevant areas of scrutiny and oversight capability. But these would be subject to crucial definitional clarity on "environment", "devolved", common frameworks and transboundary, marine territorial and other jurisdictional issues. Issues of independence, resourcing and accountability as well as actual relationships with citizens in Scotland are not yet wholly clear and would also need to fit with Scottish governance needs and standards. Some aspects like citizen access appear positive, thus far.

7.9.6 Wales and Northern Ireland (NI) are interesting case studies too. A devolved environment agency in the former case has a policy framework different from the rest of the UK under devolved parliamentary oversight whereas in the latter case a devolved agency is operating under civil service oversight whilst power-sharing via the NI Assembly is suspended. Direct-rule options may be relevant in coming months.

Wales

7.9.7 In the Welsh case, devolution of a wide range of environmental law and powers and the creation of Natural Resources Wales (NRW) under the Welsh Government brought a wide range of environmental policy and organisational elements together. The result is a Welsh policy context somewhat different from the rest of the UK, with NRW forging new arrangements and connections and undoing some of the elements of the previous organisational cultures and breaking ties with some former approaches, such as from the Environment Agency on pollution control, and allowed a more integrated approach to be taken. Above and across this revised landscape was also placed The Well-being of Future Generations (Wales) Act 2015[29] (WFG Act) and the Future Generations Commissioner for Wales[30] (FGCW) whose role is to act as a guardian for the interests of future generations in Wales, and to support the public bodies listed in the Act to work towards achieving the well-being goals.

7.9.8 The role of the FGCW is widely drawn and, in recent time, the work programme has focused on 9 or so areas, including decarbonisation, environmental permitting and priority policy implementation areas including housing, planning and transport. Staffing and programme information as of the last report[31] highlight a staff of 21 (core staff) and 12 secondees, staff costs of £1m and expenditure of £1.41m. The focus on environmental permitting looked at specific cases, evidently raised with

[28] Regulation, Enforcement and Governance in Environmental Law, 2014
[29] https://gov.wales/well-being-future-generations-wales-act-2015-guidance
[30] https://futuregenerations.wales/about-us/future-generations-commissioner/
[31] https://futuregenerations.wales/wp-content/uploads/2018/11/FG-AR-18-Financial-Statements.pdf ; https://futuregenerations.wales/work/

the Commissioner and this resulted in recommendations that Welsh Government and NRW undertake further work.

7.9.9 Interestingly the FGCW states, "The Commissioner's role as set out in the Act does not include a case-work function to intervene in specific cases, however, we have pledged to listen to concerns the public raise and to monitor these to detect any wider systemic issues." [32] As a result it is clear that assessments and observations are made and communicated. In some areas, FGCW will work in collaboration with government and agencies to develop better guidelines for agencies and service users. In other areas, reviews are proposed and in still others training programmes have been proposed and observed/co-developed by the Commissioner's staff. Government has appeared to respond positively to these. It is also apparent that in some cases, for example the proposed M4 extension, the Commissioner has been prepared to be robust and challenging. Sophie Howe, since she took up the role in early 2016 has, with her team, demonstrated wide interests in stretching and holding public bodies to account and challenging them to meet the letter and spirit of her founding Act and is still exploring her scope and whether and how far to progress with certain work, knowing there may well be significant governmental and public body discussion and push-back but clearly seeking to use the Commissioner's office to influence for the better.

7.9.10 The FGCW website also highlights the quasi-audit function played, at least in respect of including and assessing the compliance of a range of public bodies with the requirements of the WFG Act. Extensive assessment, reporting and engagement with most Welsh local authorities is also apparent. It is not completely clear what the precise current fit is between FGCW and the Welsh Audit Office[33] (WAO), or how this may evolve. The WAO has also looked at the initial performance of the Commissioner, providing a positive overview and highlighting the importance of public bodies in Wales responding boldly to the Act and using the Commissioner to help with that process.

7.9.11 It would be instructive to examine this model in greater detail[34]. This is first, both given its real and potential fit with intergenerational, human rights and sustainability policy issues; secondly due to the potential significance of the partly audit and performance advisory roles played; and, thirdly, as, given its scope, it will likely be informative to see how it adapts and develops over time, not least in the context of Brexit and/or other constitutional developments, including the UK/England OEP. It is also worth noting that Wales, perhaps uniquely, undertook a Health Impact Assessment of Brexit[35] and this was considered by the FGCW.

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[32] https://futuregenerations.wales/work/environmental-permitting/

[33] The WAO has an MoU with the Commissioner. The WAO produced a Brexit report in February this year and Brexit also features as an area of consideration in the 2019/20 work programme.

[34] I was unable to secure an interview during this study.

[35] HIA Links:

https://whiasu.publichealthnetwork.cymru/files/1815/4806/3883/The_Public_Health_Implications_of_Brexit_in_Wales_-_A_Health_Impact_Assessment_Approach._Executive_Summary..pdf and https://www.bmj.com/content/366/bmj.l5300/rapid-responses . A number of recommendations were made based on assessments of risks and observations on necessary precautionary actions and mitigations that could be undertaken in relation to medical supplies, health infrastructure and community readiness, for example, as well as risk identification around mental and physical health.

Lessons

7.9.12 The FGCW is not an environmental governance mechanism in law or in practice. It is not and cannot be seen as designed to address post-Brexit environmental governance gaps. Oversight of sustainability and intergenerational equity and related policies shows some of the potential for connected policy areas to be scrutinised across public authorities but environment in pollution and nature terms is not the priority. Nonetheless in its general scope and its practical operational work, it has shown itself to have the style and ambition and to an extent the resources to embrace relevant issues of reporting, assessment and scrutiny that demonstrate something of the independence and approach that would enable a parliamentary commission for the environment to be effective. The Commissioner is appointed by Ministers, albeit confirmable by the Assembly, and as such falls somewhat short of the independence criteria ideally sought. The powers available exclude referral to the courts or fining powers etc. The Commission appears to be relatively accessible and well-aligned to the citizen generally although constrained. Finally, the locus in terms of human rights appears instructive.

International Bodies and Case Studies

7.10 Australia

Context/Overview

7.10.1 Before progressing to details of specific jurisdictions and bodies, some overview comments may prove useful. One of the interviewees, Prof. Rob Fowler, an environmental lawyer and public defender with over 40 years experience observed that we should "take a step back for a moment and examine carefully the overall goals involved. It is understandable that the focus is on how to fill the significant institutional gaps left by Brexit, such as the European Commission and the Court of Justice…but I would suggest this situation presents a unique opportunity to take a more visionary approach that would deliver new and better institutional arrangements than those that are being replaced." Rather than reopen earlier questions about the scope of this report, this contribution helps to show where Australia stands, through some expert eyes at least, and where some of its environmental legal community would wish to go from here. His comments were supported by a number of other interviewees and commentators and presage some insights from New Zealand (NZ).

7.10.2 Prof Fowler elaborated that the APEEL project[36], in collaboration with Australia's ENGO's, was to design the next generation of environmental laws for Australia, given the widely held perception that their current legal and governance arrangements have largely failed to arrest the most serious forms of environmental deterioration (climate change, biodiversity loss, water shortages, marine pollution etc.). He sees the possibility that Scotland might also "envision similarly innovative measures in place of those from the EU that will have to be replaced".

7.10.3 On the institutional front, whilst APEEL recommended that the Federal government should fill a long-standing gap by finally establishing a federal EPA[37],

[36] APEEL, the Australian Panel of Experts on Environmental Law, http://apeel.org.au . The group has produced a Blueprint for the next generation of environmental law.

[37] Australia has federal, aka Commonwealth laws and a federal Ministry and Departments but also largely devolved and constitutionally primary state and territorial laws and institutions, including

their other, more visionary proposal was to establish a National Sustainability Commission with similar status and independence to the Australian Reserve Bank to promulgate national strategies that would be implemented by both the Federal and state governments. Substantial attention is devoted in their environmental governance paper to the mechanisms by which this could be made to work in a federal constitutional system (basically grants and pre-emption) that may not be relevant in the Scottish context, but the core idea was to vest the responsibility for strategic direction in the hands of an independent, visionary body. This, of course, seriously challenges conventional norms concerning ministerial responsibility (and power), which is why the Australian Labor Party (ALP), had it been elected, was only willing to take forward a federal EPA proposal and not also the Sustainability Commission. The ALP having been defeated and the current Liberal/National Coalition government's focus remaining on a resource-based, high carbon economic model, these proposals seem unlikely to progress federally for some time.

7.10.4 These observations however serve as a provider of context, potentially for global politico-economic and environmental attitudes and pressures, but highlight more specifically in the Australian context both that there is an informed drive and a will to progress with governance reform and also that there is potential in some states and territories to take aspects of a more progressive approach forward.

7.10.5 Resource-dominated states such as Queensland and Western Australia have largely taken different paths but most other states have from time to time at least looked at enhancing environmental governance in terms that would be relevant to the scope of this study. Approaches in Victoria, New South Wales (NSW), ACT (the Australian Capital Territory centred upon Canberra) and Tasmania have more frequently sought to remedy developing concerns about environmental damage and poorer access to justice and politicised governance aspects but these are often challenged or undone by the next swing from left to right between the two major party groupings.

7.10.6 Victoria with its longest standing EPA[38] and an environment department and administration that also led into sustainability issues earlier than most in Australia has been progressive over much of the last nearly half century, although has constrained and limited some aspects of justice as well as sometimes giving resources companies and polluters more manoeuvring room than good governance might suggest. The Commissioner for Environmental Sustainability, established in 2003 has several powers and responsibilities of interest[39].

7.10.7 Victoria and South Australia in addition to their modestly sized EPAs also have courts with environmental remits, but both are smaller and more technically and resource industry focussed than automatically of relevance to this current study. In both cases, they fall short on matters of ststus in terms of a superior court role, with clear record and jurisprudence. The focus is often on planning and consent processes, frequently involving resource companies and the state. New South Wales on the other hand has probably the most established, probably the largest and certainly one of the most widely respected environmental courts in the world and lessons are also to be learned there.

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environment departments and agencies, including EPAs, with varying powers and resources. There is however no federal EPA, for example.

[38] Victoria's is the third oldest/longest operational EPA in the world after Sweden and the USA, established in 1970. It also has a quite wide-range of policy implementation responsibilities and powers.

[39] https://www.ces.vic.gov.au/sites/default/files/publication-documents/CES%20Annual%20Report_Final%2010Dec20182018.pdf

7.10.8 Whilst taking a broad, summary view of expertise in Australia, it is also worth noting the work of the Wakefield Futures Group[40], which is more focussed on a longer and more radical future view, based on a philosophy that,

> "if we are to avoid what is increasingly looking like an imminent global collapse that could radically affect human civilisation, we cannot afford to look at the challenges in effecting a transition to sustainability simply through the environmental/ecological lens. We need to distinguish the various symptoms of collapse (climate change and biodiversity being just two) from the underlying causes, in particular consumption (which reflects the results of the excessive extraction of natural resources, both renewable and non-renewable) and population growth, and the underlying paradigm of economic growth[41]."

7.11 **Specific Australian Learning**

7.11.1 Victoria's Commissioner for Environmental Sustainability, CES, introduced above was established in 2003. Dr Gillian Sparkes is the current post-holder and she was appointed in 2014 and has recently been re-appointed for second 5 year term. She has a staff of 8 and declared costs of A$1.4m. (1.2 previous year; 0.99m 2013, 1.88m 2012. Interestingly, the Commissioner's office is funded largely by State Landfill Levy.

> "The reforms I have been leading for the past five years have largely been about building trust and public value in the role and Office of the Commissioner for Environmental Sustainability in Victoria and our science reporting programme.
>
> An important part of our role is ensuring Victoria has independent baseline science reports – and therefore an independent voice on the environment. Since we have refocused on the intent of the CES Act 2003 being fundamentally about the notion of "data democracy" and worked hard to get baseline science reports adopted and used – the Victorian Government has tasked the Commissioner with 7 new science reporting functions since 2015. That's the first time the Commissioner has been tasked with new functions since the role was established in 2003. This highlights our value in providing a positive component of environmental governance in the state."

7.11.2 The Commissioner also highlighted that "(h)aving the role isn't enough, the role must be focused and well defined to maintain impact and when it is the role can have a big impact at the governance level". She has sought a "Ministerial Statement of Expectations" to clarify her role at the beginning of the new term of appointment "to improve and maintain good governance and focus as we build and contribute to the independent evidence base that informs government decision/policy making etc and brings confidence to the community as a trusted source of science. In that way the Commissioner provides an informed, independent voice for the environment – independent science is a foundation on which to build environmental justice."

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[40] http://wakefieldgroup.org/ ; Among other proposals, the group promoted establishing an alternative set of performance measures known as the Genuine Progress Index alongside the usual GDP approach.

[41] The First Minister's recent TED talk (30 July) seems to acknowledge a similar and crucial concern, https://firstminister.gov.scot/fm-delivers-ted-talk/ . Wellbeing is not the same as or always well-served by growth alone.

7.11.3 The Commissioner also sought independent assessment recently of the founding Act and the Victorian Public Service Commission confirmed no changes were necessary but noted her own request for clear framing in a mission description in her new term.

7.11.4 The CSE in Victoria has also provided advice to other jurisdictions in Australia and discussed the need for a related role at a Federal level in Australia.

Lessons

7.11.5 Overall, while the State of Environment role clearly dominates a part of the cycle of work and challenges the resources available, there is a strong view that there is high utility, despite the relative lack of powers to challenge and hold to account, in the Commissioner's function and her style of operating it. There is clear access to expertise and good collaboration across government departments and general transparency and access for the citizen but the scope and powers as well as the resources and Ministerial appointment and reporting line could be viewed as falling some way short of the ideal.

7.11.6 NSW LEC [42](Land and Environment Court of New South Wales)

7.11.6.1 The Land and Environment Court of New South Wales was the first superior environment court in the world. It is still the only superior environment court in Australia. It is a specialist court, established under the 1979 statute, which deals with cases relating to development, the environment, Aboriginal peoples' land and water rights, and local government. It is a senior part of the NSW court system, and has equal standing with the Supreme Court of NSW.

7.11.6.2 The operation and procedures of the Land and Environment Court are governed by the Land and Environment Court Act 1979 (NSW), the Land and Environment Court Rules 2007 (NSW), and a range of practice notes and directions issued by the Chief Judge. The Court hears merit appeals and has well defined and widely visible case materials and judgements.

7.11.6.3 There are five judges and Chief Judge, Brian Preston, sitting in the NSW LEC, with the Chief Judge sitting since 2005. Justice Preston has spoken worldwide on the court and it is one of the most fully recorded in the academic literature not least given its long operational record and the substantial body of jurisprudence created. It has also been involved in some of the most controversial environment cases in Australia and given its standing its rulings have been widely cited elsewhere in Australia. Tonally significantly, Justice Preston has also stated, "(t)he Court has an overriding duty to ensure the just, quick and cheap resolution of the real issues in all civil proceedings in the Court."

7.11.6.4 The Court operates under 8 classes and these allow the speciation of its work into clearly defined areas from tree disputes to mining issues to aboriginal and land rights issues to environment protection licensing and planning law issues. Its scope is perhaps the most interesting from a Scottish perspective and it has a long and well-documented history of handling environmental cases from the simple to the massively complex and from the most detailed up to the highest and most sensitive

[42] http://www.lec.justice.nsw.gov.au

challenges with the government of the day. As it is so well documented, including in the overview volume by Rock and Kitty Pring[43], I won't attempt to detail or summarise this further here.

Lessons

7.11.6.5 Key learning appears to relate to the robust structure, skills and processes in and around the court, its record of independence and holding to account, the seemingly effective triage and first instance resolutions as well as the high quality, by international peer assessment, of its jurisprudence. Weaknesses appear to relate to the nature of the law itself, the industry of legal players and entities, time and cost issues and both the lengths to which ministers may go to avoid proper scrutiny and the decline in environmental quality as a background pressure irrespective of the impact of the court. It is also clear that ADR is favoured as is simple assessment by commissioners, supporting the judges, of the merits of cases. Preparatory and often informal hearings as well as direction hearings are common and these appear to enable early resolution in many cases. The work of the State's independent Planning Tribunal also complements and influences part of the value of the Court and the whole NSW system.

7.11.7 Other Australian examples

Both South Australia (SA) and ACT have courts of interest. In SA, the Environment, Resources and Development – ERD - Court) and the Environment Court of the Australian Capital Territory have relevant powers and scope and, like the Tribunals models in Victoria they provide some insights to court business dominated by the developer and resource industry as well as expert and disputed planning cases. Generally, I have taken the view that these are less instructive than the NSW example, for reasons of likely assessment of standing, low public access, process dominance over merits, lack of Supreme status, weaker and less visible jurisprudence and low transferability to the Scottish context.

7.12 Canada

Context/Overview

7.12.1 The contexts in Canada and indeed in Ontario are instructive albeit different from Scotland in several ways. The Canadian Commissioner for Environment and Sustainability (CCES)[44] has evolved from a dedicated sustainability and environmental oversight role in 1996 into a more audit based approach over its lifetime and there is some evidence of industrial as well as governmental stresses on the commission to the lay observer. The key areas of responsibility and activity relate to performance audit, handling "petitions" (complaints from citizens principally) and sustainable development strategy reviews (consideration of the discharging of SD duties by provincial administrations primarily). Recent arguments in terms of costs, coherence, transparency and efficiency have been applied in the federal as well as the Ontario State case. These arguments have been disputed by environmental NGOs and community groups. Ms Gelfand also observed that there

[43] Environmental Courts and Tribunals, A Guide for Policy Makers, (2016) UNEP, by George and Catherine Pring http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y

[44] http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html

was much to be gained by looking at the activities and developments led by the Welsh (FGCW) and New Zealand (PCE) Commissioners and noted that her remit was somewhat constrained by retrospective audit approaches as opposed to taking a more progressive and future-oriented perspective.

Canadian Commissioner for Environment and Sustainability

7.12.2 Whilst somewhat sensitive it is clear that the role has been a challenging one at times and operated more robustly by some post-holders with varying levels of support from state and federal governments. Julie Gelfand was the most recent, seventh and some have observed, last, Commissioner and was appointed in March 2014 and retires in September this year. An interim Commissioner has been appointed, the current Deputy Auditor General, and the position is under review but likely to be incorporated into "normal" audit functions of the Auditor General. The changes to the CCES over 20 years covered in the media and through updates shared across environment agencies and networks such as INECE highlight too the comments of the outgoing commissioner.

Ontario's Commissioner of Environment

7.12.3 Similarly interesting and potentially relevant to "test" issues of independence and capacity as well as powers as well as citizen's point of entry is the fact that the Canadian and Ontario positions have revealed significant contest between governments, oil and gas and mineral developers as well as first nation and other community interests and the Commissioners. The Ontario situation[45], as of Aril this year, following a major reform in the 2018 "Restoring Trust, Transparency and Accountability Act", resulted in the abolition of the Ontario Commissioner and the remit being incorporated into the Office of the State Auditor General. The widely held view is that the Commissioner fell foul of powerful interests including the incoming Premier. Within its new location, last month a new Commissioner has now been appointed[46].

Lessons

7.12.4 The main observations to be made in both cases would centre upon the variable level of independence and arguably therefore impact over time, resulting in loss of locus altogether at certain points through political pressures; issues of budget restraint and loss affecting independence and operational capability; limited public access, partly based on costs and severely limited powers beyond the ability to perform audit and deliver quantitative and performance audit recommendations. At best the capability of both entities has been positive and prominent as an advocate of change and performance improvement but given the constraints and seeming political interference evident, the weaknesses are significant and render these bodies as models more akin to rather weaker versions of Audit Scotland and not the PCE equivalents ideally sought.

7.13 **Sweden**

7.13.1 Sweden as an EU member with strong institutional structures of its own also has recourse to the CJEU and is subject like all other member states to the

[45] https://eco.auditor.on.ca
[46] https://www.nationalobserver.com/2019/07/09/news/jerry-demarco-named-ontarios-new-commissioner-environment

Commission and Court. It does however also show the additional role of its own, regional environment court model.

7.13.2 Key learning from Judge Bengtsson is presented in a useful overview paper[47]. The Court model in Sweden, already embedded in the structures and processes of the EU as well as building upon the EU environmental acquis, has a positive history of determining environmental matters and engages openly in educational, mediation, adjudication and disposal judgement modes. That it operates at effectively no cost to applicants is a particularly noteworthy point.

7.13.3 In addition to specific process observations, the Judge makes interesting comment that,

> "How to deal with environmental cases in court is mainly a political issue that has been answered in different ways around the world, based upon respective national legal culture and traditions. The Swedish way, allocating environmental cases to specialised courts, has some great advantages regarding efficiency and the development of routines and competences. The solution is obviously very citizen friendly, with its cost-free process in most cases and burden on the courts to examine the cases ex-officio with the aim of reaching a substantively correct result. On the other hand it is not without its challenges."

Lessons

7.13.4 The Court system in Sweden appears to be a valuable part of the state system of governance. It is also evident that it fits into an EU context as well as a cultural context different from that faced by Scotland. Both the local government, community engagement and land ownership and management models in Sweden vary hugely from contemporary Scotland. Peer knowledge exchange appears potentially valuable in future but lessons in the current context appear limited.

7.14 New Zealand

Overview

7.14.1 In his paper[48] based on his opening address to the specialist symposium on comparative environmental adjudication in April 2017, Judge Stephen Kós, President of the Court of Appeal of New Zealand, observed that New Zealand's "environmental legislation – some twenty years old now – was cutting edge in its heyday"….but that its "underpinning philosophy is more obscure now as competing administrations have remodelled it." He went on to use some interesting metaphors to describe how an initially ground breaking systemic approach to resource management, sustainability and the citizen, set out in the Resource Management Act (RMA) 1991[49], has been added to, complicated and rendered unwieldy over time. In its practical administration, the government and the courts have struggled to use it to

[47] Specialised Courts for environmental matters: the Swedish Solution Anders Bengtsson. Environmental Law and Management Journal, (2017) v29 ELM 15-24
[48] Public participation in environmental adjudication: some further reflections (2017) Jl of Environmental Law and Management ELM 29, p60-63
[49] https://www.mfe.govt.nz/rma ; http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM237737.html

deliver positive environmental outcomes never mind environmental justice. A major review of the RMA has been initiated[50] in the last two months and this may prove very significant, for the framing environmental legislation and for the bodies administering it as well as the wider community and environment itself.

7.14.2 In New Zealand, the RMA is fundamental to the governance model and there is a cascade of powers and policies and plans from the NZ government, through the Ministry of Environment and two tiers of local government and agencies including the EPA to practical delivery on the ground. Beyond the executive branch and elected councils there is the Parliamentary Commissioner[51] and the Environment Court[52].

EPA, National and Local Government

7.14.3 This review is not primarily intended or resourced to describe the details of environmental governance elsewhere and focuses on key components of value for the mission here of identifying good practice liable to be instructive in shaping how Scotland can address the incipient gaps caused by UK EU withdrawal. It is clear by simple comparative consideration that the strategies and spans of operation and powers established for environment agencies in Scotland and the strategic and policy frameworks in place in Scotland as well as significant aspects of local government here limit the likely learning in these areas. Local government is not working very well to deliver policy intent or robust planning frameworks in NZ and the EPA has very limited powers and responsibilities and instructive value by comparison with related Scottish bodies other perhaps than in relation to alien species control which is an especially acute NZ issue. Additionally national government, until the recent months of the latest administration, has largely failed to provide the critical national policy statements proposed under the RMA that set key parameters and specific rubric both for local government policies and plans and for the determinations and adjudications of the courts. There has been a flurry of new policy statements in the last few months. In the absence of these hitherto, larger regional councils have produced their own rather diverse and less robust versions of frameworks which have led to litigation and challenges and smaller and local councils have often improvised with lesser resources and greater pressures, often yielding to poor environmental practices and more powerful players in the system. Again, whilst we might see echoes of some weaknesses here, these aspects only serve to tell us what should be avoided rather than emulated.

Parliamentary Commissioner for the Environment (PCE)

7.14.4 The Parliamentary Commissioner for the Environment (PCE) in New Zealand, currently the Rt.Hon. Simon Upton took up the office in October 2017[53]. The PCE role was created under Section 16 of the Environment Act in 1986 and the Commissioner has a five year term and may be renewed for a second term. The previous three Commissioners have served double terms. The Commissioner has a staff of 20 people (18FTE) and the office is a multi-disciplinary team with skills and qualifications in chemistry, geography, physics, biology, forestry, economics, politics, geology, law, planning, history, marine science, soil science, and coastal management. Staff provide administrative, research, technical, and general support for the Commissioner's investigations. The PCE does not report on the state of the

[50] https://www.mfe.govt.nz/rma/improving-our-resource-management-system
[51] https://www.pce.parliament.nz/about-us/the-commissioner
[52] https://www.environmentcourt.govt.nz
[53] https://www.pce.parliament.nz/about-us/the-commissioner

environment but may investigate thematic issues including river water quality, invasive species, coastal management issues and so on.

7.14.5 The Commissioner operates independently. His programme of work is not agreed with parliament nor discussed with government. He has functions and powers[54] to review, investigate and report on matters concerning agencies and systems relating to the environment and the management of the country's resources, including the effectiveness of environmental planning and management by public authorities, and he may inquire about and encourage preventive and remedial action be taken. The Commissioner may investigate any matter where the environment may be or has been adversely affected. He has the power to require data but without time limit and so, often, persistence, patience and threat of embarrassment may have to be deployed. He reports to the House of Representatives, requiring their direction to undertake a dedicated inquiry and may examine under oath. But he stresses the diplomatic and persuasive attributes of his toolkit and style, indicating that he does not have teeth as such but "my predecessors have erected an important tradition of the office making itself heard."

7.14.6 He observed that much of the work he undertakes is stimulated by public complaint or request. Local government failures and developer pressures do also dominate the agenda. He also observed the weaknesses of the once pace-setting RMA legislative framework. Much of his effort goes in to assessing the issues raised and then engaging with the local authorities and other parties to seek resolutions. [55]

Lessons

7.14.7 There is widespread support for the PCE and acknowledgement of the value of both the quiet behind the scenes efforts to fix problems, respond to complaints and direct them to appropriate authorities and clarify the nature of disputes and problems as well as the more conventional scientific and technical reports produced on specific issues of concern. Recent reports on climate change issues, one incorporating a review of a proposed zero carbon bill, made suggestions for improvements and offered criticism of potential weaknesses to be addressed, including the need for statutory rather than advisory/discretionary targets. Others based on forestry issues and dairy and beef livestock issues took a forward policy critique approach. Still others related to management proposals for managing invasive and predatory species. At the highest level there has also been visible work on landscape system management and regulatory oversight needs which appear to offer a more robust assessment of governance system needs. From the interviews conducted, it is clear that some important case and policy work is less visible.

7.14.8 The PCE is wholly independent and has significant manoeuvring room, especially given its diplomatic and experienced leadership. It has significant expertise and this is plain to see. The resources are modest but effective and the same could be said of powers, while only having a recommendatory function. The double term of the commissioner and the longer term funding settlement clearly allow a longer view to be taken and add to the substantial measure of independence available. It is clear that the powers could be used still more robustly but there is a practical and political accommodation involved here. There is no formal power of referral although clearly the community of interest is small and routing of issues to

[54] https://www.pce.parliament.nz/about-us/functions-powers - set out in Sect 16 of the 1986 Environment Act.

[55] This may again speak to the hidden value of some critical intervention efforts; actually avoiding cases progressing to court or crisis if they can be addressed at an earlier point. Not all issues however can be solved in this way.

the ministry, parliament and court is evidently possible if not explicit. Citizens have access and given the range of public interest entities in New Zealand this works passably well. The PCE is accountable and has profile and heft that allows a real degree of accountability to be achieved from and of others. It could, and, in the sense of an even vaguely EU-equivalent commission, would have to have more for a Scottish solution.

Environment Court

7.14.9 The history and jurisdiction of the Environment Court of New Zealand is set out on the Court's website[56], highlighting its evolution in 1996 from earlier fora and tribunals and court appeals mechanisms and it is essentially connected to the Resource Management Act. The Principal Environment Judge of the Court is Judge Laurie Newhook and he and Judges Kirkpatrick and Hassan have written, with their colleagues, a number of general and specific papers and book chapters on the Court and its cases. An introductory summary as part of a dedicated symposium in 2017, recorded in Environmental Law and Management Journal, following an earlier event in 2016 in Oslo where judges from around the world had gathered for a first major knowledge exchange event, also sets some useful context[57]. Newhook et al, stated that New Zealand ha(d) until recent times been widely regarded as a world leader in terms of access to environmental justice. That reputation, however, has come under pressure. Talking with Judge Newhook, he cited the growth and flux in the RMA and hinted at matters more to do with national and local government and their approaches to environmental governance over the decades as well as local environmental pressures as weakening factors in New Zealand's leadership of such matters. Access to justice issues and the efficiency and internal reform of the court are particular focus areas and the analytical and reflective work undertaken by the Judge and his colleagues both in the New Zealand courts and in his global network merits careful consideration, beyond the immediate scope of this research.

7.14.10 The NZ Environment Court is framed such that it is the creature of the founding and RMA acts and has broad powers of discretion. The conditions for judges are set in conjunction with Cabinet, with five year terms and compulsory retirement at age 70. It is an independent tenured body with dedicated specialists, clear training and development plans, effectively CPD seminars etc. for judges and judges are supported by robust case management processes. Practice notes and records are published. Resources are evidently substantial albeit rather opaque.

7.14.11 Judge Newhook and the various other system parties and commentators interviewed consider that the NZ Environment Court is invaluable, now faster and has built up considerable valuable policy and jurisprudence insight, although some still consider it an expensive system, a matter hard to assess given the opacity of cost detail. Given the current scope of the RMA and the review of environmental legislation generally and the RMA specifically there is a great deal to consider here that relates to the effectiveness and efficiency of the Court. Also in reviewers' sights are the powers of the EPA, use of national policy statements emanating from the NZ Government, and performance of local government given its central practical role as local planner and regulator of local development. These all affect each other and in turn therefore the Court. It seems likely that each component of the system as well as specifically the legal framework and the workings of the Court may be likely to be refined and extended and enhanced further. But it is clear that the Court plays an central part in the current system and this is likely to continue.

[56] https://www.environmentcourt.govt.nz/about/
[57] As 48.

Costs

7.14.12 The Environmental Legal Assistance Fund plays a significant role in supporting cases coming forward. Although there is a modest overall budget of NZD 600,000 and the maximum amount per group per application for any one case, this does evidently support a significant number of applicants. The significant and strong role of the Environmental Defence Society (EDS)[58] and a set of environmental NGOs with the Royal Forest and Bird Protections Society[59] of NZ prominent among these means that the level of support in place for complaint handling and routing, as well as the bringing of cases to the PCE and the Court is far greater than might initially appear. These organisations have a large amount of experience of the issues and almost always appear to work very successfully together with the PCE and Court staff, structures and processes.

Lessons

7.14.13 The Judge offered strong and clear views of what good looked like in the case of an environment court based on his substantial experience. Such a court should be independent, with tenured expert judges, robustly supported and adequately resourced, with broad powers of pursuit and discretion and must be able to require interim and declaratory final measures reaching from first instance and early triage and resolution of simple cases up to determining the most complex and weighty matters including those where local government and central government agencies and ministries, ministers included, had to be held to account for process and outcome failures, subject to the framing of the law to be adjudicated.

7.14.14 It appears that several of our key criteria are currently met or capable of being met. The Court is as independent as any encountered albeit constrained to a degree by the RMA and the legal framing around a clearly deteriorating environment. It would work better with better, contemporary law and clearer national policy and national and regional plans and policies to assess. The level and quality of resource appears relatively satisfactory and whilst variable, given the changing pricing of access, citizen entry to the system is supported and relatively easy. It could be easier and cheaper but there is active support to access the court as well as in environmental bodies. The upper reaches of accountability do not appear to have been as effective, perhaps again given the weaknesses of the Act. Nonetheless, the court is helping to deal with the vagaries, inconsistencies and transgressions of authorities and developers where adequate plans and policies exist to guide judgements. A stronger feedback loop to a stronger PCE and/or the machinery of the executive would add further value.

Overall significance

7.14.15 I would stress again that a lot of detail lies behind the observations from New Zealand and that perspectives and my overview were triangulated through the comments of the PCE, Judge Newhook, the EDOs, and other NGOs and advisors, including off the record commentators. Several felt that New Zealand faced very serious environmental problems and most had strong views about how to address

[58] http://www.eds.org.nz
[59] Commonly “Forest and Bird”, https://www.forestandbird.org.nz

them. None could imagine the system working or progress being made without the PCE and the Court.

7.15 Other relevant examples?

Hungary

7.15.1 Hungary's Parliamentary Commissioner for Future Generations[60], established in 2008, included significant powers to consider environmental complaints and take cases and reports to parliament. Environment issues were in scope from the outset. The Commissioner's powers were reviewed in 2011 as part of a wide Constitutional Review and the recommendations resulted in the winding up of the Commission and its theoretical incorporation into the scope, responsibilities and powers of the new Commissioner for Fundamental Rights. A quick review of the cases and reports emanating from this office suggests that the environment is no longer a focus of particular interest or priority.

7.15.2 Specific issues of courts will be covered further in Section 8 but it is worth mentioning here that **Ireland and England** have also been considering the best model for environmental justice for some time. In Ireland, Áine Ryall[61] presented an overview of the potential framework for an Irish Environmental Court in 2015, including an assessment of the merits, challenges and dimensions of a potential court, and this work has continued to evolve. In England there have been many attempts to advance the notion of a dedicated court, with varying degrees of success and aspects of thought and implementation, including papers and consultations from Jeremy Rowan Robertson's 1993 paper and Richard Macrory's considerations in his paper of 2003 looking at an environmental tribunal model and his article and subsequent book chapter on "The long and winding road – towards an environmental court in England and Wales" in 2013.

[60] https://www.futurepolicy.org/guardians/hungarian-parliamentary-commissioner/ ; http://jno.hu/en/?menu=home ; http://www.ajbh.hu/en/web/ajbh-en/

[61] Environmental Courts, Enforcement, Judicial Review and Appeals: Exploring the Options for Ireland held at the School of Law, University College Cork on 19 June 2015.

8. What domestic mechanisms are needed to achieve equivalence?

8.1 The different types of power and remit identified will inevitably require different solutions as this review has not identified any model which combines all suitable powers. It is useful to remember that current arrangements are based on the two or three devolved tiers of authority and then the separate supra-Member State dimensions of the EU Commission and the CJEU for the main power elements. The European Parliament's powers may also be under revision in the next few years with the political and administrative changes of the new Commission and Parliament as well as key changes in the Council.

8.2 Achieving equivalence of the European Commission requires an understanding of the workings of the model not just its legal powers. The workings of the model are both formal and informal in nature and also fundamentally supranational. Whilst state and local politics will always impact on organisations making and implementing policy, pressures commonly are to flex the law rather than adhere to it in the interests of the environment. Pressures increasingly appear to be development and economically focussed.

8.3 The impact of the "call from Brussels" as mentioned earlier and indicated in the Round Table report, the use of infringement letters and notification of CJEU stages, focussed on applying the law in the interests of the environment, all bring a force and focus that has no real international equivalent as Richard Macrory points out.[62] A Parliamentary Commissioner or an independent Parliamentary non-financial Auditor may be constructed to have similar force but would require not only powers and demonstrable independence from political intervention but time to develop a reputation and a case history to secure a meaningful impact. They would also have to stand firm for the environment and the applicable law as a cultural contextual matter. Pursuit of cases of failure and identification of responsibility and subsequent formal holding to account requires clear empowerment, Parliamentary sanctions and/or access to redress in the Courts. Again, these can be formulated and would build significance over time. Powers, mechanisms and bodies are required to discharge the will to have such arrangements.

8.4 A key disadvantage of the EU oversight mechanisms is their lack of proximity either in space or time. EU processes, not least given the staged approach to intervention around failure, are not fast. They may take months to years to have impact at their most serious. Whilst the scale of fines and the potential embarrassment and other impacts of failure are not to be understated, they take time to bite. And the distance from Scotland, via the UK MS to the institutions of Brussels, Luxembourg and Strasbourg may at times not only delay but weaken the signal of the message. Proximity of oversight might therefore be a principle of effective or good environmental governance. Systems working within Scotland, home-grown and part of our operating environment are less easy to ignore or seek to avoid or delay.

8.5 A Scottish system by its nature, on the other hand, is an internal one and the risks of political and government interference in perception or reality are plainly apparent.

[62] Richard Macrory 2014 "The system of supranational enforcement within the European Union remains unique amongst contemporary systems of governance, …the environment does not respect national boundaries…and we should be looking for ways of developing and strengthening rather than weakening the current system." Regulation, enforcement and governance, p521.

8.6 So, what mechanisms?

8.6.1 Individuals and bodies, including committees and commissioners, accountable directly to Parliament are, suitably constructed, appointed, empowered and operated, a significant viable solution to the non-Court elements of access to information, initial access to justice and initial reporting, referral, scrutiny and accountability.

8.6.2 The existing appointed Parliamentary Officers are identified below. It is now and would be in future for proposers and then Parliament itself to determine the actual powers and mode of operation, resources etc., but it is worth stating that the various officers have differing powers. It seems that the Information Commissioner (SIC) may be the only one with powers of sanction and an ability to seek redress. The SIC model might be the best to emulate in the context of this report. The SIC, the Public Services Ombudsman (SPSO) and Audit Scotland clearly have significant roles already in the environmental governance space and the relative merits and impact of their roles would justify further consideration, although the former is located rather specifically around customer and public complaints.

Appointment of parliamentary officeholders

8.6.3 There are two processes for the appointment of parliamentary officeholders. Under the first process, the Scottish Parliament makes nominations to the Queen based on a recruitment process chaired by the Presiding Officer with remaining panel members representing the political balance of the Parliament.

8.6.4 The Scottish Parliament makes nominations to the Queen for the following positions:

Post	Current post holder	Legislation	Maximum term	Process for removal from office
Auditor General for Scotland	Caroline Gardner	Public Finance and Accountability (Scotland) Act 2000	Eight years	Two-thirds parliamentary majority
Scottish Public Services Ombudsman	Rosemary Agnew	Scottish Public Services Ombudsman Act 2002	Eight years	Two-thirds parliamentary majority
Scottish Information Commissioner	Daren Fitzhenry	Freedom of Information (Scotland) Act 2002	Five years	Two-thirds parliamentary majority
Commissioner for Children and Young People	Bruce Adamson	Commissioner for Children and Young People (Scotland) Act 2003	Eight years	Two-thirds parliamentary majority
Chair, Scottish Human Rights Commission	Judith Robertson	Scottish Commission for Human Rights Act 2006	Eight years	Two-thirds parliamentary majority

8.6.5 Under the second process, the Scottish Parliamentary Corporate Body appoints, subject to an approval by motion of the Parliament:

Post	Current postholder(s)	Legislation	Maximum term	Process for removal from office
Commissioner for Ethical Standards in Public Life in Scotland	Bill Thomson	Public Services Reform (Scotland) Act 2010 *	Eight years	Two-thirds parliamentary majority
Standards Commission for Scotland	Kevin Dunion (Convener), Lindsey Gallanders, Michael McCormick, Tricia Stewart and Paul Walker	Ethical Standards in Public Life etc. (Scotland) Act 2000 **	Eight years	Two-thirds parliamentary majority
Members, Scottish Human Rights Commission	Susan Kemp, Jane-Claire Judson and Alan Mitchell	Scottish Commission for Human Rights Act 2006	Eight years	Two-thirds parliamentary majority

8.7 An enhanced audit body reporting directly to Parliament.

8.7.1 Audit Scotland is the obvious foundational candidate upon which to build and is already well placed and established. In discussion, it is clear that Audit Scotland considers that whilst it is perfectly appropriate and readily able to be continued, and routine periodic and focussed financial and performance audits of environmental issues and policy implementation are well within scope, a permanent oversight role, however, enhanced to provide a dedicated scrutiny, investigation and accountability role, potentially including scrutiny of ministers etc., would be beyond its scope.

8.7.2 Such an additional role seems likely to need, and be seen as requiring, not only greater expert, support and financial resources but an extension of powers and remit that would distort the balanced and rounded effective generalist role of the auditor at present. The current arrangements also allow public policy implementation and performance issues to be assessed against similar entities and issues and these to be evaluated and compared in similar terms. A change of role, extending it into one specific area might well also lead to further requests to extend its attention into other detailed technical areas of public policy and performance, thereby undermining and distorting its mission and distracting its focus.

8.7.3 Whilst there is general confidence in the competence, professionalism and effectiveness of the body and thus most of the tests suggested for a body

contributing to improved environmental governance would be met, this does not seem like an appropriate or welcome solution.

8.7.4 Audit Scotland seems well-suited to continue to serve the periodic deeper dive into relevant issues and provide additional assurance or separate occasional attention to problem issues but is not best suited to the rolling task at hand. Also, were there to be an Independent Parliamentary Commissioner for the Environment, these two commissions seem to be likely to be able to agree a different professional and complementary accommodation of roles to maximise public value and impact.

A Parliamentary Commissioner for the Environment ?

8.7.5 The examples of commissioners in New Zealand, Canada, Ontario, Wales and Victoria in Australia considered in this research, indicate that a scrutiny body reporting to Parliament in similar manner to the parliamentary officers identified above can play an invaluable role in enhancing environmental governance and indeed environmental performance. These examples have had a variety of roles and tasks designed into their remits and work programmes. These have included: general audits and targeted policy area, planning and practice specifics, audit functions, roles in assessing and providing overview reports on government, agency and local government performance in various areas; the production of state of environment reports; investigations following complaints or government identified failures and elements of powers of court or inquiry referral. There is little consistency either between the bodies or in the same body over time. Demonstration of utility to each and successive administrations is clearly critical.

8.7.6 Whilst in most cases, even where the staff is small, they are expert-based and targeted in their approach, they vary in the scope and depth of work undertaken and some have focussed more on the positive, marketing angle of promoting good news stories and urging improvements, others have at time been more robust and critical and this has in some cases proved damaging to their empowerment and even survival. The relevant governments find the core audit functions useful and in several cases have pursued the value of a complaints body as well as an overall state of environment data collator and reporter. Higher order scrutiny is present in most but used sparingly. Independence is therefore not guaranteed and the other “tests” identified are up to the gift of the parliament and the tolerance of the administration. Expertise and resource makes them more subjectively effective and certainly allows more, wider and deeper work to be undertaken and it might be suggested, better.

8.7.7 All of these bodies have reputations based on perceived governmental, parliamentary, lobbyist and general public value and these elements are not always “in synch”. If renewal of commissioner and expansion of staff or budgets are measures of success, Wales, NZ and Victoria have been successful over time, albeit Victoria has been volatile until the last few years. Canadian federal and state politics have proved very challenging for the commissioners there. Cross party support for a commission and strong legal bases as well as effective public engagement are clearly vital.

8.7.8 **A Scottish PCE**

A PCE in the Scottish context would allow a dedicated expert focus on specific policy and performance audit, complaints, environmental condition and higher scrutiny and

accountability issues in relatively short order and would be based on the best of experience elsewhere.

8.7.9 The scope and powers for a Scottish PCE would require to be determined. State of the Environment Reporting (SoER) is a central plank of the scientific underpinning of policy making and implementation, public information and engagement, and regulation and needs to be authoritatively delivered. It does seem that provided state of the environment reporting is science-driven, strategic, independent and of appropriate relevance (scope, scale, frequency and granularity) it is both of fundamental value and its actual location is unimportant. It is however a major potential distortion of the work of a PCE and would be best done independently elsewhere, unless determined as a key function.

8.7.10 What does appear to be centrally important to an effective PCE is that it is independent, reports to Parliament not the government, is adequately resourced and empowered, technically competent and suitably authoritative. Resourcing however large or small appears most effective if it is independently allocated and set for the longer term, connected to a measure of secure leadership and independent programming in terms of activities undertaken. It appears highly desirable too that it is recruited and reviewed independently of government, reports at least annually, has the power to require information and attendance at hearings within agreed timetables and other appropriate parameters, acts as locus for relevant complaints and questions, may direct to other parties to respond to such complaints within agreed parameters and may investigate and scrutinise freely and with meaningful coercive powers to be used if necessary. It is fundamentally important too that the PCE may refer matters under investigation and the subject of reports to Parliamentary Committees, to other Parliamentary Officers, Auditors and Ombudsmen and ultimately refer directly to the Courts as necessary, without the agreement of the government of the day.

8.8 Courts

8.8.1 The judiciary is usually seen as the most likely component of a national administrative system to be independent of the quotidian and political interference and to able to demonstrate this through a “without fear or favour” approach to upholding the body of law of a state and expanding and clarifying the body of jurisprudence. For independence, expertise, powers and accessibility – in our checklist of desirable attributes of a “watchdog” introduced in Section 3, the courts would sit at the top of a governance system in most expert opinion. All of those elements mentioned are somewhat variable however and depend on the operating environment, budgets allocated, expertise available, etc.. Accountability is even more a matter for reflection. The court will likely provide accountability for others. For itself, the court and its member judges will have been appointed by agents of the Crown, influenced by the government of the day, after selection, promotion and deployment by processes that too may be influenced and the court’s standing and decisions may have to consider, reflect or resist the public will of the time, for example. Again, nothing is absolute. Nonetheless, the court would be expected to play a very high order role in delivering ultimate oversight.

8.8.2 The existence of an environment court would provide the potential for such authoritative and independent oversight of the law to be delivered.

8.8.3 The notion of a dedicated environment court is neither a new nor a particularly radical or challenging idea, although it is sometimes evidently seen as such.

8.8.4 As Don Smith in the Journal of Energy and Natural Resources Law in 2018 observed,

> **"**four decades ago, only a few ECTs existed, but by 2016 more than 1,200 (not including ones at local or municipal level) were dispersed over 44 countries. As of 1 March 2018, nearly 1,500 ECTs exist. As the Prings state[63], '[t]hese new specialized adjudication bodies are rapidly changing not only traditional judicial and administrative structures, but the very manner in which environmental disputes are resolved'. In this regard, Judge Preston[64] has noted, '[i]ncreasingly, it is being recognized that a court with special expertise in environmental matters is best placed to "interpret, explain, and enforce environmental laws" and regulations in the achievement of ecologically sustainable development'.

History, Supply, Need and Demand

8.8.5 Most systems reach a point of dynamic equilibrium where depending on one's standpoint they are either mature and work adequately well or they are proven to be inadequate and failing. In any case, we tend to become used to the system we have and only a crisis or a critical mass or a rare real review opportunity result in significant change. Leaving the EU might just be (is?!) such a shock to the system and the losses are plain to see. Responses are less clear, especially when there is still so much fog before our view. Nonetheless scrutiny and oversight are about to be dramatically reduced.

8.8.6 The nature of the consequent need and demand has taken some time to emerge, and indeed the quantum of issues and cases liable to require handling by a commission or a court substitute is far from clear. Also, the opportunity is still just coming into focus for the expert and non-expert community alike. Where a senior court jurisdiction is being removed, replacement is a fairly logical response. Nonetheless a supra-national replacement appears impossible. Therefore an internal one is the logical next step response.

8.8.7 The unique constitutions of Australia, the US, Canada and other nations have led to or been shaped by their histories and some of their own institutions and led too to state and federal courts and the vertical structures we also have in Scotland, the UK and indeed the EU. The locus of the CJEU is unique but the role too of various environment courts is also unique in that they are widely established to look on a dedicated basis an environment matters, not amongst a mixed diet of other types of case. Also, an appropriate court, as policy and legal specialists have observed, is positioned so as to look not (only) at the administrative and procedural correctness of the handling of an issue but actually to look at the substance and merit. Additionally, specialist courts focus on technical areas with expert inputs and overseen by expert judges. Whilst procedural correctness is undoubtedly important, whether at initial hearing or at appeal stages, the ability of such courts to provide expert merit based consideration makes them uniquely valuable.

[63] Pring, G and Pring, C (2016) Environmental Courts and Tribunals: a guide for policy makers, UNEP.
[64] Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Envtl L Rev 396, 398

8.8.8 There is a case for a dedicated court but for the case to be compelling, it seems there is a real need to be able to answer the question that repeatedly is raised by legal experts and some politicians and commentators, "to do what?"[65] The role the Environment Court plays, its span from small planning details and disputes to state compliance with state or international law and the writ of ministers, its scope, its scale, the number, qualifications, training and skills of judges, the support arrangements, how and how often it sits, how it uses experts, and ultimate costs are all serious matters to consider.

8.8.9 Much it seems depends on the actual case load and the nature of these cases. Is the court primarily to resolve planning issues and replace "call-in" stages, adjudications and final determinations? Would a court focussing on lower tier tribunal matters also be fit to handle major licensing failures, non-compliance with major components of the law or wilful failure to deliver a legally underpinned piece of national policy? Is the putative court to provide ADR: mediations between disputing parties. Including where the minister of the day might be a party? Is it to provide the Judicial Review function? Or act where the Session or High Court have acted historically? Appealing in a court of record contested or poor decisions made by a sheriff allegedly thirled to a local farmer, landowner or fishing community? Or is it simply to replace in supreme terms the role of the CJEU, sitting as ultimate authority, handling just a few cases per year, if that, and determining governmental and ministerial errors and failures in upholding the highest order of elements of environmental law? Or is it to span all of these with the diverse skills and experience and technical input requirements resulting? In respect of earlier suggested tests re independence,

8.8.10 In March to June 2016 Scottish Government undertook a consultation on "Developments on Environmental Justice in Scotland"[66]. The Scottish Government's September 2017 Report highlighted the perspectives of many and observed in summary that "(a) substantial majority of the respondents favoured the introduction of an environmental court or tribunal". The Government took the decision, citing uncertainties around the scope or type of court as well as Brexit, that then was not the time[67].

8.8.11 Unfortunately the consultation paper whilst purporting to fulfil the 2011 government manifesto commitment to consider an environment court, did not undertake an analysis of the options that could have been progressed and their various merits. Respondents criticised this lack and it appears that a structured and detailed analysis is still required. The Law Society of Scotland and UKELA as well as SE LINK, RSPB and FoE among others criticised the consultation's limited scope and method. Whilst some commented that the current number of cases coming forward and progressing to court consideration was small, thereby failing to justify a dedicated court, some also suggesting extending the Land Court's scope but others maintained the strong view that a dedicated court was essential. SE LINK observed, also noting that DPEA and the determination of planning cases was ruled out, "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

[65] I am not providing direct quotes and references here but discussions with the Law Society of Scotland, UKELA and Prof. Colin Reid among others have shaped the comments made.
[66] https://consult.gov.scot/courts-judicial-appointments-policy-unit/environmental-justice/ ; https://consult.gov.scot/courts-judicial-appointments-policy-unit/environmental-justice/consultation/view_respondent?uuId=57831104
[67] A consultation on improving environmental justice was undertaken in 2006 and the author of this report was actively involved in that process. An environment court has been in discussion, including with the Lord Advocate, since at least 2005 and this process evidently continues.

framework." This view has not changed. Nor it seems, in the absence of a wider and more detailed consideration of the issues and potential purview of an Environment Court, have the views of others in the legal profession, that there is doubt as to need and function but that there is a case to be made and considered that has not yet been adequately set out. In any case, a full feasibility study therefore still appears necessary.

8.8.12 In 6.7 where the Scottish Land Court was introduced, it was observed that it had limited relevance to the mission of addressing a post-Brexit gap given its current parameters. There are arguments for and against starting a new court model to fulfil post-Brexit requirements starting from here.

8.8.13 Some might argue that a new court may be good for lawyers, but less so for its users. That is certainly a risk. A tribunal, as opposed to a new independent court would also have an obvious appeal route to the (pre-existing) Upper Tribunal for Scotland[68], with no need for additional appeal infrastructure. But is this sufficient? Adapting existing entities would likely have several advantages over an independent court, not least having lower start-up costs given the existing infrastructure – and would circumvent the low caseload argument, as it already has a caseload. Also, in addressing why a court rather than tribunal, while some (most?) courts tend towards more legal formality/complex processes and higher costs for users, tribunals are usually more accessible and informal: better therefore for the litigant, especially the common citizen.

8.8.14 However, this review has found courts, for example in New Zealand and NSW, readily capable of less formality and with degrees of supported approach for potential litigants. Whilst costs – of running the court and for the litigant - undoubtedly are a critical part in designing a high-functioning model and this must be a key factor, in this author's view, arguments for a new entity that are most compelling of all are that the radical approach seems the better opportunity to set matters more plainly right from the outset, deliberately independent of the status quo. Incrementalism and modifying aspects of the existing structures has appeal, given seemingly reduced costs etc., and the (supposed) virtue of not constituting a major change. I have found however that confronting resistance to change in the status quo, in institutions, the vested interests and their leaders and supporters, is critical. I am also persuaded by the better aspects of the NSW and NZ courts and the value of their officers and commissioners in taking early and effective action short of full blown court proceedings to ease and speed achieving justice and resolution.

8.8.12 The Law Society of Scotland, in its May 2019 response to the Scottish Government's Environmental Principles and Governance Consultation, revisited some of its concerns and cited case-load data which remain of significance.[69]

[68] The UT generally follows the same rules on expenses as the relevant first-tier tribunal. The alternative would be appeals to the Court of Session, the costs of which would be prohibitive for most litigants.

[69] https://www.lawscot.org.uk/media/362627/19-05-11-env-consultation-sg-environmental-principles-and-governance.pdf ; also Footnote 10 in LSS response, Barry J. Rodger, 'The application of EU law by the Scottish courts: an analysis of case law trends over 40 years' (2017) 2 Jur Rev 59 which highlights that between 1973 and 2015, there were 534 judgements in cases before Scottish courts (including the House of Lords/Supreme Court sitting in Scottish cases) which referred to EU law. Of these judgements, 40 of these (7.5% of the total) related to environmental law matters. 111 cases (20.8% of the total) were judicial review proceedings. During the course of the research, 12 CJEU rulings in Scottish preliminary references were located over the period, none of which concern environmental law matters. No updated data were available when requested.

Judicial Reviews made up 20% of senior cases and 7% or so of cases were environmental[70]. No cases of an environmental nature resulted in a CJEU ruling during the period of 42 years under consideration. This is important but has the confounding property of raising the issue of absence of evidence versus evidence of absence. The successful application of EU Commission and Member State and agency engagement may well have prevented serious issues reaching the court and preliminary engagement around the court could have resulted in appropriate resolutions before a point of riling. Nonetheless there is value in a more detailed examination of cases taken at various levels *and* such consideration as might be given, were for example cases to be possible at lower or no costs or with the support of appropriate bodies, to potential cases that have not been possible to pursue and the caseload that might result.

8.8.13 To emphasise some of the points being made here, the Law Society stated in responding to the consultation question (7) on concerns over losses from EU oversight,

> "We consider that there will be missing environmental governance mechanisms as a result of leaving the EU, including the loss of governance functions of the European Commission (EC), the Court of Justice of the European Union (CJEU) and the European Environment Agency (EEA). The CJEU has the power to make sure that Governments meet their legal commitments. While it can sometimes be challenging to galvanise action by the European bodies, the supranational oversight will be lost. We recognise that at the end of 2018, there were 16 environmental infringements cases being considered by the CJEU in respect of the United Kingdom and four Article 260 (previously 228) Cases. While these may be considered to be fairly limited in number, the supranational oversight of the European bodies is likely to cause some loss." [see footnote 48, above]

8.8.14 This research has highlighted that courts are not only essential parts of the governance toolkit but emerge from and influence their unique local cultural and operational environments. There is no one model nor a perfect example that leaps out as automatically a template for Scotland to adopt and replicate, although the New South Wales and New Zealand Courts offer very valuable insights.

8.8.15 Jurisdictions with environmental courts appear to vary significantly in type and scale but all appear to have created demand, often for the developer community and those with deeper pockets; have stimulated growth in the scale of the legal community, do not always deliver swift outcomes and may become focussed on the transactional detail of planning cases and not the law itself or compliance by senior parties with it.

8.8.16 They do however, subject to how they are configured, also create a body of case law and decisions and that jurisprudence can make for much more robust environmental law and policy over time, especially if a reformist and "learning" approach is taken by the legislative, executive and judicial branches in response to the experience of the court. They provide a focus for skills and policy development and for visible, structured procedural handling of environmental issues, and they can provide resolution of disputes, assessment of performance and ultimately both

[70] There have been 0-2 environmental JRs each year of the last decade - https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/pages/6/#Table_24 . –so environmental JRs are few in number, but it is likely this relates at least in part to their being unaffordable.

accountability of delivery bodies and governments and their ministers and agencies as well as administering justice and providing redress for the citizen. They can represent both the minutiae of environmental governance and its grander peaks in a civilised society, especially one that cares about its environment and its citizen's rights. It remains to be decided what we wish to have in Scotland and how best to achieve that.

8.9 Costs, Benefits, Value and Savings

8.9.1 Justice systems it seems are justifiably notorious in their lack of transparency on costs. It has proved very difficult to obtain actual costs of running or even accessing the systems under consideration. Even senior judges have a rather sketchy picture of these details. The elements are important and would be necessary to analyse and understand in order to make informed recommendations and decisions about the way ahead. The costs of beginning a system from scratch versus amending an existing body are relevant but again not necessarily compelling if they don't serve the mission. In any case the costs of running a suitable court model need to be determined.

8.9.2 Additionally, the issues of case processing, the costs of access and pursuing a case for the applicant or complainant, the availability of legal aid and other dimensions of support affect cost and benefit. The actual time taken, the nature of admissible evidence and the style of engagement also matter. Likewise, the pace and scheduling of preparation, delivery, appeal. All are relevant elements to work out. Beyond the costs of running the court on a daily basis and support arrangements' costs are the training and CPD of judges and court data, reporting, and the nature of records. The costs associated with representation and case-handling also relate to expert input. Over time there would be benefit in a review of the balance of cases entering the system, handling timetable and cost versus the nature of the result, including drop out rate, successful closed and prosecuted cases and appeals and the costs associated with success or failure there. The CJEU produces elements of these data and there would be scope to analyse this for comparative value. Subject to the powers given the courts effectiveness in remedy, in qualitative terms as well as applying fines and costs and the relevant recovery model for court and party costs etc. would also be very useful information.

8.9.3 On the other side of considerations would be the environmental, societal and economic savings (even where netted out against costs of mainstream triage, trial and ADR etc.) of having a successful court model in place. This could be the savings from the replaced assessment, call-in or other appeal bodies, for example, whether in Government, the Reporters Unit and planning functions (DPEA/PAD functions) or other courts, as well as the savings from having better[71] decisions at first instance, which are thus not challenged, due to the 'threat' of court oversight. The value to the citizenry of being able to seek, especially if at low or no costs, adjudication, response and justice as perceived in tackling problems and failures etc. is very hard to quantify but liable to go well beyond mere morale. There might well also be the value of avoiding the frustrations and upset of issues and cases not pursued or considered and thus not resolved and the system impacts of unhappy,

[71]SE LINK view as expressed by Lloyd Austin, pers.comm., ' "better" doesn't always mean "more like what the NGOs want", as some might suspect – it's not a 'green plot'. "Better" actually means clear, more robust, more consistent, and clearly in line with the law.' Vermont's Supreme Court's Environment Division has shown examples of relevant best practice. https://www.vermontjudiciary.org/environmental)

disgruntled or disruptive parties thereafter. The dimensions of costs saved in the round would also merit significant additional work. In the human rights context these could be amongst the most compelling reasons for some determinative model whether largely at the lower tribunal type level or ranging up to a higher court.

8.9.4 Some have argued, Ben Christman[72] for example, that there is significant merit too in,

> "the intangible values of promoting the rule of law and enhancing democracy. These are not well-suited to a cost-benefit analysis. What is the point in passing an environmental law if the government or private actors can neglect it when it is convenient, without fear of enforcement? Similarly, why give citizens rights if they can be trampled over and cannot be vindicated? Accessible courts help give citizens confidence in the democratic process and the legal system."

These seem very valid points.

8.10 Comparisons

8.10.1 The role of supported preparation and presentation of cases, expert advice available to the public and potential complainants/litigants seems especially important, learning from the Australian and New Zealand insights obtained. Like the best of Citizen's Advice experience, the Environmental Defenders Offices and the EDS in New Zealand today as well too as the services performed by many environmental NGOs, these may wholly or partly resolve issues, clarify the real issue or "target" body or better route the complainant to the appropriate process. This also relates to the live discussion in Scotland about an Environmental Rights Centre or service. But appropriate bodies of skill and legal standing, well networked with the governance system can play an immensely important and positive role in preparing and routing cases for consideration and resolution.

8.10.2 In the NZ and NSW courts, the role of initial commissioners, the technical specialists supporting the judges in triage, re-routing if necessary and case preparation and assessment appears fundamentally important.

8.10.3 Fit with existing Scottish bodies is also a relevant issue for consideration in terms of the adoption of other models or appropriate comparative analysis. Our agencies are largely considerable more structured, more widely empowered and more effective historically than say their equivalents in New Zealand. Some administrative weaknesses in the latter context have been addressed by significant expansion and engagement from the NGOs there. This may well relate to the environmental rights body issue above to support applicants/complainants. But issues are largely shared even if there are variations of degree of scale, effectiveness, costs etc..

8.10.4 Whist as indicated previously Scottish case experience suggests small numbers of senior cases, this is not compelling, given the barriers to entry at this point and the lack of a suitably dedicated mechanism in place. It is also clear that the failures of the system for example in the New Zealand case may be attributed to a range of factors: land use pressures and poor performance of the (well-connected) agriculture sector, water companies and local fisheries bodies; the lack of coherence in the legislative framework, given the modifications and complications wrought on the Resource Management Act there; and the impact of poor local authority

[72] Ben Christman, pers.comm.

governance and the weakness (or absence in some cases) of national policy statements and more local plans make the judicial processes harder and less impactful. In the NSW case (with some echoes in NZ) the court has been expanded significantly over time and has a great deal of business connected to the contest of plans and licences by major industrial, housing and consulting bodies with a broader development based agenda and this, thus far, would be only partly relevant to the Scottish context. Sweden's situation is plainly culturally very different and the nature of land and asset ownership as well as Sweden's continuing presence in the EU all render differences of core conditions very important and thus comparative learning less applicable

8.11 Vulnerabilities

8.11.1 A number of risks has emerged to effective implementation of a high functioning environmental governance system.

8.11.2 The highest order appears the issue of overall empowerment and management within the state. This embraces the founding legislation, its amendment over time, the general and periodic political approach and ultimately the potential for acute interference. Political issues may play a significant role: ministerial or governmental interference, even in an otherwise nominally independent body, through influencing recruitment, engagement terms, remit, scope, cases prioritised, costs of taking cases the handling or outcomes of cases, judgements made, licences or permits or planning decisions reached and granted or report findings published and appeals and public positioning of, or commentary on, the performance and outcomes of the system, individuals or cases. This interference can evidently take many forms from the overt to the subtle.

8.11.3 But as Hungary at national level, and Canada federally and in the case of Ontario at state level demonstrate, ultimately where a body may be seen by the government of the day as having grown too powerful or having caused irritation to key stakeholders or governments themselves, they can be wound up completely or absorbed into less irksome or less powerful entities, such as state audit bodies. The focus, profile, case-law, and experience and skills of staff and leaders may then be partly or wholly lost or undermined. Informally there appears to have been significant pressure applied to other such bodies over time, often congruent with the swings of the party political pendulum.

8.11.4 Interference with independence can apply to agencies, committees, commissioners and courts but is certainly more likely to occur and to be less outwardly visible if it is routine and operates within the administrative or executive branch of the governance system. Undoubtedly application of influence is part of normal government and politics but egregious interference in decision making seems generally to be less likely in a transparently open decision making model and where higher order determination bodies are more genuinely independent and sitting within the legislature or more so the judicial domains. Those bodies in the executive branch, under political oversight and control are generally less likely to be trusted and to be wholly objective, especially if evidence of interference and yielding to it has been perceived or identified.

8.11.5 The nature of interference also needs to be carefully considered as it may be internal to process and often less visible as well as external in terms of societal framing, media discussion etc. From "setting up to fail" actions such as withholding funds, limiting access, increasing justice system fees, failures to provide policy or

focussing on stopping/blocking decisions or inquiries etc., interventions and positioning can all be part of undermining independence, good governance and ultimately the rights of citizens and the state of the environment. In other cases the interference can be more specific, occasional or case based, caused by less systemic, often local, personal, party or financial pressures.

8.11.6 Legal case support is a central issue in relation to citizen entry and access to justice. The costs and potential barriers include the range of fees involved to bring cases, i.e. entry as well as participation fees. There are potentially significant costs of representation, engaging counsel etc., as well as possible costs once an outcome is determined. These can all serve to discourage the citizen from bringing cases forward, even before we consider the social and psychological components, including the sense of being "up against the system".

8.11.7 Especially in times of austerity but in good public service generally, there is little point investing in the time and financial resources to create a set of structures or an individual body that fails to deliver the intended policy effect or is excessively expensive or slow to deliver etc. There is also, however, clear merit in public administration terms in using commission and court processes to seek resolutions and constitute as well as advocate preventative spend to avoid outcomes and processes entailing even greater expenditure. But there are clearly other challenges in terms of a range of factors, including adding bureaucracy and managing the risks of political exposure.

8.11.8 A supranational solution to the need for an independent commission entity appears unlikely given the absence of any likely substitute and the constitutional and sovereignty issues implied. One possible solution lies in the scoping of the proposed Office for Environmental Protection in the UK Bill. The scope of the entity is still under discussion[73] and therefore the detailed arrangements remain unclear. It has the potential to act as overseer of regulators at the Scottish level but it is not clear which areas of the environment would be in scope, as environmental policy has been significantly devolved to Scottish Ministers, nor is there a clearly proposed federal structure, which would allow consideration of Scottish governance and performance issues. Subject to the content actually under consideration, specific knowledge might well also be required. Ultimately too, this may only be possible if the OEP is made, for those Scottish matters, accountable to the Scottish Parliament, which in turn would require careful co-design, Legislative Consent Motion and potentially other legal and practical considerations.

So, the Scottish "Watchdog"

8.12 Overall, the issues and assessments made above on commissioners and courts etc. to replace the two pillars of external scrutiny and independent court, and discussion of scope and powers, all highlight that it ought to be a two headed beast. The research indeed also argues strongly the need for a thorough analysis, as was initially suggested by government, and an appropriate consideration of the necessary functions and the appropriate forms of solution for these needs in order to get to the best solution for Scotland. There appear to be some voices, including within government, that see no great urgency in seeking methods to address imminent gaps nor any need for major change and would prefer to adopt a "wait and see" posture. This research process has highlighted that that may be seriously unwise. This is partly because Scotland derives significant, albeit often and largely

[73] The jurisdiction of the putative OEP and the distinction between reserved and devolved powers in the draft bill are contested by both the Scottish and Welsh governments.

unseen, benefit from the system now. That is going to change on exit. It is also because the pressures and risks increase from the point at which access to peers, Commission and Court ceases. And it is a matter of serious and urgent concern because of the weaknesses of the current mechanisms. We do not have adequate access to justice, sufficient independence of scrutiny, objectively assessed high performance or adequate accountability for successes and failures.

8.13 The actual Scottish solution achieved ought therefore to consider the PCE and Environment Court together as a coherent package[74]. Without a dedicated court it is not clear that we would have the teeth, the coverage or the impact necessary, subject to the model of commission established, certainly given the powers and capabilities of what is being lost. As Tom West highlighted,

> "Civil society should be able to make complaints to the PCE ***and*** be able to take complaints directly to the court. This should be a coherent system, which may take a little delicate design, but is clearly possible."

8.14 In recent weeks, in the highest courts in Scotland, England and the UK, the very issues of scrutiny, accountability, authority and justiciability have been aired in constitutional and more operational contexts of government oversight and parliamentary democracy. Lord Carloway, The Lord President on September 11 2019 in the Court of Session observed[75], that it was essential that there be "parliamentary scrutiny of the executive, which was a central pillar of the good governance principle enshrined in the constitution; this followed from the principles of democracy and the rule of law." Whilst perhaps somewhat less weighty, the arguments for environmental oversight mechanisms have run for some time and they are in sharper focus now than ever. Technical experts in a dedicated entity, independent of government with the power and capability to review and adjudicate on facts, substance and merit would mark a huge step forward.

8.15 Additional Observations

The role of Human Rights developments.

8.15.1 Whilst some aspects of rights and human rights as well as generational rights were mentioned in the context of the Welsh Future Generations Commissioner, there are also relevant aspects of progress in Scotland. Of particular relevance is the work of the Scottish Human Rights Commission[76] and the First Minister's Advisory Group on Human Rights Leadership[77] reported under its chair, Prof. Alan Miller and also established a reference group on Human Rights and the Environment. This group explored the fit between these policy and governance domains and considered amongst other issues the work of the UN Human Rights Commission and the UNHCR's Special Rapporteur[78]. During his initial tenure as special rapporteur, in 2018 John Knox reported to the council and published an

[74] Some of these summary points and recommendations reflect discussions and suggestions from the SE LINK workshop on Environmental Governance in Edinburgh on September 6 2019 and inputs from Tom West, Client Earth.
[75] http://www.scotland-judiciary.org.uk/9/2261/Joanna-Cherry-QC-MP-and-others-for-Judicial-Review
[76] http://www.scottishhumanrights.com
[77] https://humanrightsleadership.scot/ ; Report and recommendations https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf
[78] https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx

assessment of the issues and a set of 16 principles[79] relating to human rights and the environment that remains relevant and instructive in this context. Such principles and rights would significantly advance environmental governance in Scotland, if adopted by Scottish Government.

8.15.2 More recently, in Scotland, the establishment of a Human Rights Task Force to take forward the Leadership Group's recommendations was announced[80]. The scope, membership and terms of reference for this task force are expected in or around the Programme for Government announcement on September 5. It appears likely that this could relate to and support aspects of environmental governance.

8.15.3 Together these developments highlight that there is a rich and live dialogue in this space and significant potential for human and environmental rights, whilst at their cores somewhat different, to offer mutual benefit in securing rights, structures and processes as well as enshrining values that are likely to be beneficial to the delivery of improved environmental governance. These steps in turn, in the long term, strengthen the relationships between the environment, citizens and justice.

8.15.4 Whilst the environmental governance process and the timing of Brexit may mean that human rights and environment issues are on different paths and travelling at different speeds, they may contribute jointly to an enhanced situation.

Final thought…

8.16 Connecting back to Prof Rob Fowler's observations in Section 7, it might be worth looking to different models elsewhere and even previous models here in Scotland to help to take "the long view". In terms of potential solutions to filling the gaps of governance in terms of categories 2 or 3 (initial oversight and independent scrutiny), there may be merit, both despite and because of the UK and Scotland's experience in this area, in taking a different approach and looking to a longer time horizon by envisaging something like a Sustainability Commission with policy and strategy development and intervention powers. Such a body was deployed in the UK and gained some very positive assessments in its earlier years and a Sustainable Development Group existed in Scotland in the 1990s, acting as a reference group for the Environment Department of the Scottish Office at the time. The Commissioner in Victoria throughout its life as well as the Commissioner in Canada at some points over the last twenty years has had a more expansive sustainability remit. Given Wales' Future generations Commissioner, with a wider scope still, there would appear to be some merit in a reflection on the value and achievements of these entities in order that mistakes and successes are learned from and the gaps for which filling solutions are sought are well understood, agreed and effectively and efficiently addressed in the right way with the right tools.

79 https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx

80 https://www.gov.scot/news/new-national-taskforce-to-lead-on-human-rights-in-scotland/

9. Resourcing aspects

9.1 Costs of watchdog bodies are, where they are government agencies, NDPBs or similar, are publicly visible and range from tens to hundreds of millions at the front line level subject to powers and scope etc., down to commissioners with a handful of staff at a few millions at maximum. Costs of courts are generally[81] a very different matter and are almost wholly opaque, are not particularly easy to identify and assess as a result and appear significant, likely in the high single digits to tens of millions. Such entities also over time and subject to demands and governmental culture and favour grow if not managed, and even if well managed as they establish and grow demand by their existence and success. Where out of favour, commissions may be axed or severely trimmed. Courts tend to wield more heft and retain significant resilience and resource over the long term. Costs it is clearly argued are set against clear and important benefits. And who argues with a judge so minded.

9.2 A dedicated assessment of the costs and benefits is recommended not only for any new proposal but for the template body being considered as a model example, whether a wholly new entity or an augmenting of an existing body, such as some have suggest for example in the case of the Scottish Land Court. Reservations in relation to the latter possibility are clear and have been made in terms of scale, scope, skills and powers required and the benefits of a fully dedicated expert supreme court and international practice and experience suggests that modifying another limited court is not the way to go.

9.3 In terms of the potential benefits, evident in aspects of practice identified elsewhere, there appear to be two types of benefits: (1) that related to process (clarity, transparency, citizens' rights, pace of process and resolution, etc.) but also (2) monetary savings to both the public purse and business/NGOs as described earlier.

9.4 In terms of either courts or commissions, much depends on scope, powers, case load, general justice cost structures and place of legal aid or similar mechanisms, the presence and effectiveness of bodies of standing and their role in process and bearing of costs of raising issues, representation and administrative and court process, etc.

9.5 To take the detail a little further, in terms of Parliamentary Commissioners – NZ and Welsh examples are in the 20-30 FTE category but Victoria is c 8 and scope and load are handled accordingly. Again, therefore, much would depend upon whether the body would be required to deliver a marketing or proselytising role, to deliver annual investigations and reports and/or a three or five-yearly magnum opus overview of the state of the whole environment or a government's whole programme and its impact. Scale and form should clearly follow the agreed functions.

9.6 In relation to potentially more focussed audit functions or the investigatory roles of some tribunals or lower officers of a court undertaking triage and assessment investigations prior to cases going before the court, a small(er) additional resource to deepen effort or increase frequency of audits or increase case numbers or add extra

[81] Despite criticism on a number of fronts, including over its costs, the CJEU is one of the most transparent in terms of budget and other information. For its 28 (Court of Justice) + 48 (General Court) Judges, 11 Advocates General, judges, 2217 staff and proceedings and support costs it has a 2019 budget of 429.5 million €. Each court handled over 800 cases last year and data are accessible on cases opened, closed, pending and appealed.
https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf

technical expertise etc., but this is second tier checking and policy implementation or effectiveness emphasis largely. This might well be hundreds of thousands of pounds to several millions.

9.7 As indicated, for Courts – it is almost impossible to get an external handle on costs. Effective courts need one chief judge and 1-10 additional judges and c 5-20 support staff for likely parallel loads. Subject to locus, emphases on final determination versus early adjudication or ADR, property support costs etc., a £1-5m bracket would not seem unlikely. And in the case of a Court of the scale of New South Wales' LEC, it will likely be an order of magnitude greater at least. And it may still not readily have in scope the roles one might wish to recreate to reproduce the powers of the CJEU.

9.8 In terms of sources of funding to resource commissions in particular, or less likely, courts, the use of primary parliamentary financial votes in some jurisdictions is one approach. The use of landfill tax/levy funds and proceeds of crime options are also relevant. And an approach based on the hypothecation of proceeds of crime funds may also be possible.

10. Preliminary conclusions and recommendations

The Governance System

10.1 The effectiveness and indeed the independence of an environmental governance system is to an extent in the eye of the beholder. What has become clear in this short review is that it is a system; there are several versions in existence from which it is possible to learn and draw; and the system appears to work best when there is a good span of well interconnected elements that are well adjusted to the environment and the cultural context of the jurisdiction. Any system or element may be abused or mis-used but generally there is an essential value in separating the executive, legislative and judicial elements. Clear separation of powers and appropriate tailoring of components to establish and maintain high functioning within and across them allows them not only to work, but also to be seen clearly in their respective place and role and for confusion and abuses to be minimised.

10.2 There are several potentially valuable elements of a high functioning system: a policy as well as an institutional framework, a strategic vision for the system and for the environment; a democratically representative and empowered parliament, dedicated thematic and functional parliamentary committees and officers, government ministries, departments, agencies, stakeholder engagement models, independent experts, independent audit mechanisms and bodies; dedicated courts, low costs of access to justice; periodic system reviews and potentially more. Such systems are populated by real people and operate within real world politics, spending real resources and these factors as well as cultural and institutional issues will impact on the effectiveness and "feel" of the system over time.

10.3 Comparator systems even where superficially appealing, are often quite opaque, especially in terms of costs and effectiveness and may polarise interested parties based on their values, objectives, experience and outcomes. Successful complainants and those pursuing better compliance and enforcement may have particular agendas in speaking out or not doing so. Victors and losers also may or may not wish the position to be known. Reputation can be triangulated with reference to regulators, general public, environmental lobby bodies and elected representatives and jurists. The media may also be influential in shaping opinion and the public view of the effectiveness and merits of the system.

10.4 This review has taken a range of views from service providers and users in differing jurisdictions and this has provided a rich basis for consideration. Whilst several of those interviewed for this study have been extremely experienced and well-regarded, and a range of lessons has been extracted from them and from independent research, it appears likely that no one version of the narrative is likely to be wholly authoritative and adequately roundly informed to make a definitive judgement of what works best or would work in the situation in which Scotland finds itself. This short study has also highlighted that considerably more work could be done and may be advisable before progressing to implement a new system, even if initial and scoping steps could be taken relatively quickly.

10.5 What is needed and likely to be best for Scotland may be the Aristotelian "from each in moderation" and one's view of that need may well be affected by how satisfied one is with the current system. Losing the CJEU and Commission is one major issue but the pace and effectiveness of these supranational "ultimate weapons" in achieving environmental justice or good environmental governance sits alongside the quality of the environment, the effectiveness of environmental licensing and compliance checking, Ministerial commitments in practice, the ambition

and reality of policy implementation, public engagement and ease of achieving justice etc..

10.6 A system such as applies currently in Scotland has developed particularly over the last 20-40 years, strongly influenced by the EU acquis, the EU policy agenda and the suite of directives, regulations and programmes emanating from and "policed" by the institutions. Some of these have not been particularly well-suited to Scottish circumstances; some have. There is therefore scope for improvements and better fit between some aspects of the governance system and Scottish public and environmental needs. But the removal of the key components of the system – the Commission, CJEU and ECA as well as the loss of peer policy making and KE, results in massive gaps in Scotland's Governance system. To achieve the stated objective of at least maintaining existing environmental standards and shadowing delivery of future policies and objectives, significant replacement effort will be required and potentially quickly.

10.7 Some clear options, previously flagged, appear urgently needed and examples of good if not best practice have been identified. Urgency relates not just to the proximity of exit but the time taken to produce, agree and implement proposals and then stabilise well-designed and high functioning entities across the necessary spectrum of Information, Advice, Scrutiny and Enforcement.

Good governance

10.8 The elements of a good environmental governance system have become clearer during this research and interview work. The construction has four main pillars – good public administration, first tier scrutiny and oversight, independent parliamentary commissioner, dedicated superior environment court - within which there is a suite or framework of infrastructure elements required:

- Appropriate well-designed policies and delivery bodies[82]
- Environmental information sufficient to support the system
- Effective regulators
- Effective auditors
- Dedicated courts[83]
- Parliamentary oversight and accountability, both first tier member committee and second tier independent commissioner[84]
- Ministerial accountability mechanisms
- Appropriate checks and balances in the system[85]

[82] including delegated structures of national and local government to make and cascade plans and delivery to the practical, local level

[83] with appropriate powers, resources, support and expertise; also supported access to justice mechanisms and appropriate appeal systems.

[84] informed by international bench-marking and KE and also adequately resourced and supported.

[85] including systemic and periodic independent assessments and reviews, including use of independent expertise and assessment of Effectiveness and Efficiency. Conditions for, and measurement and reporting of, as well as delivery of efficiency and cost-effectiveness can and should be applied to all elements of the system. This should be assessed at regular intervals to ensure the components are collectively optimised and that each component is working, in terms of the outcomes and performance

10.9 Particular note is suggested to be taken of the experience in New Zealand. The caution overall must be that even with the key elements, of effective components – public administration, independent performance audit, parliamentary commissioner and dedicated court, the environment and key indicators of its health, may deteriorate. Indeed in the NZ case, deterioration is significant and serious. Good governance structures alone are clearly not enough. National leadership, good and effective strategies and delivery also matter as do an understanding, deeply rooted in science and data, of the state of, and drivers of, change in the environment. There must also be minimal opportunity to influence or ignore, and systemic intolerance of failure to respond to, the signals of deterioration or system stress. The fit too between components of system and practice identified appears as important as some of the elements themselves.

10.10 Fundamentally, if we wish to prevent or minimise harm to the environment and to the public and also to hold those responsible for environmental damage and failures to account, appropriate systemic approaches, structures, bodies and processes are required. They must be suitably framed and constructed, resourced and empowered and allowed to work and be seen to be working.

measures established, as well as it reasonably can. However the focus here is on the system components needed and also on their effectiveness.

11. Conclusions and next steps

11.1 An independent Parliamentary Commissioner for the Environment, a dedicated Environment Court and a stronger, more pacy, engaged and transparent as well as better aligned set of administrative arrangements, including audit and parliamentary accountability appear now to be highly credible, precedented and potentially necessary elements of a future high-functioning environmental governance system for Scotland. Necessary but not perhaps sufficient components of such an environmental governance system. Alone, even in combination within a system, they are not sufficient to ensure environmental quality is retained and improved, as New Zealand demonstrates. Without them and certainly without the ultimate powers of the EU institutions and the deep knowledge systems around these, or some equivalents, there is little hope in future of doing so, given the climate crisis and the depredations on ecological and resource systems, and less chance of knowing this delivery of high environmental standards and quality has been achieved.

11.2 The laudable and desirable commitments of the Scottish Government to maintaining the European environmental standards and policies of the last quarter century in particular appear to be very hard to deliver and provide assurance upon without the additional and complementary elements of good governance described above.

11.3 The suite of components is needed to serve as a renewed foundation and shape and give coherence and impact to a more explicit vision; a clear framework and mechanisms to focus government departments and agencies on their respective roles in cohesive delivery of environment policy in the full knowledge of the drivers, expectations and failure consequences of the system.

11.4 Therefore, it may be that in considering the best model for the future, there needs to be careful attention given to the urgent need to fill gaps at October 31st and thereafter combined with consideration of what is actually wanted for the longer term future and how soon the elements of the system need to be changed and in place. Much might depend on Scotland's constitutional position, the reality of any putative federal oversight model for the OEP for example and the likelihood of an independent Scotland in due course seeking readmission to the EU from a position of continued equivalence and high compliance with the EU environmental acquis.

11.5 Continued shadowing of EU developments as well as commitment to and visible reporting of actual high degrees of compliance would enable this. In addition, supplementary post-EU arrangements such as a dedicated independent commissioner and court structures would demonstrate serious commitment to the highest possible governance standards as well as the ultimate protections for the environment and for citizens.

11.6 A great deal will depend on the outcome of the still live process between the UK Government and the EU negotiators and institutions and the agreement reached or not. Legal and constitutional arrangements are clearly being considered now and Withdrawal-related and Continuity-related bills at the UK and Scotland level will be important as will the specifics of the Scottish Government response to the Governance and Principles consultation and then how these – and any relevant UK environment arrangements - may be incorporated in the bill(s). The consequences of either "deal" path being taken will then set us on a new trajectory in Scotland and in any event the terms for new governance needs and opportunities will begin to clarify further. Early planning and timetabling of the consequences and the

arrangements needed will then begin to be both real and possible, with the UK arrangements and their impact on Scotland as suggested becoming crystallised.

11.7 Subject to Scottish Government's decisions and ambitions, and the position of the Scottish Parliament, plans could begin not only to firm up the governance system needs but would allow specific actions to start. These could include immediate, interim and foundational longer-term considerations: on establishing a Parliamentary Commissioner to handle high level performance complaints, to gather performance information, and to prepare appropriate institutional arrangements for the full-blown commission; refinement, if and as considered necessary, of Audit Scotland's and other Parliamentary Officers' remits in relation to the environment, including the SPSO and SIC; clarification and refinement of COPFS and regulatory and policy implementation bodies' roles to deal with proceedings, data dead-ends and referral arrangements, including concerning a PCE; and potentially the deeper examination, options appraisal and consultation necessary in relation to a dedicated Court. Underpinning many elements might also be a deeper consideration of the current administrative set-up and an assessment of its fitness for purpose in the new constitutional and operating environment, including in relation to the adequacy and independence of environmental data and reporting.

11.8 For the Scottish Government, in deciding on the model to follow, the examples shown by arrangements in New South Wales and New Zealand for example might be accepted, as recommended, as the best available – outside the EU - from which to learn and alongside the best facets of existing governance in Scotland, perhaps tightened to ensure greater independence and transparency in and of themselves, could in combination, achieve the best form of independence, powers, etc.. It might also be instructive to reflect on the system needs that might be considered were Scotland to be an EU member and be more directly engaged in using and being subject to the Commission and Court systems and what then might be needed within.

11.9 There is also a great deal of learning that could be taken from the Welsh situation and the FGCW model. Despite a rather different brief, the Commissioner's MO and targeted approach as much as her remit are potentially informative. Human rights and environment together could offer serious future-facing scope for engagement and delivery, suitably constructed and empowered. These aspects, to work best, may take time to be designed and implemented, requiring careful constitutional and legal framing as well as the second order effort to fit them with existing bodies. They might also fit or be fitted well to a dedicated court model in due course.

11.10 In the shorter term, a commissioner solely for the environment seems an essential first step in addressing the gaps about to open up and ensuring early action is taken to deliver continuity of oversight, policy delivery scrutiny and access to justice, based at least on complaints handling, for the longer term, starting now. It would also signal "acting now as we mean to go on".

11.11 Thus, while it may be an Aristotelian approach of "from each in moderation" to start with, the final result would ideally be one "greater than the sum of its parts", best suited to the current and intended and planned future state of the Scottish environment and therefore "world-leading": an aspiration to be upheld and delivered, fit for the qualities of the environment we seek to nurture, repair, protect and enjoy.

Annex I

Brief

(extract)

SCOPE OF RESEARCH:

Some of these issues have been explored by other groups (charities, academics, thinks tanks, government commissioned expert groups). However, the aim of this research is to assess specific options available and provide recommendations on the most effective way to address a post-EU governance gap Scotland. This will draw on international best practice, identify the functions that could be performed by existing bodies and identify the remaining gaps and mechanisms for addressing those gaps.

As such, areas of research will include:

1. International models

It would be useful to explore in more detail some models of environmental regulators/watchdogs in other countries. Some examples that have been raised previously include the Welsh Commissioner for Future Generations and the New Zealand Environment Commissioners. Whilst it has generally been agreed that these commissioners don't have the necessary legal 'teeth' to enforce decisions in the same way that EU institutions do today, it would be helpful to set out on paper their advantages and disadvantages.

It would also be helpful to have some other models of existing international bodies that are different to a commissioner model. For all international examples it would be useful to explore how these bodies interact with other environmental agencies and regulators in that country.

The starting point for this part of the research can be Client Earth's report on 'A new nature and environment commission':
https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/

It would be good to explore models in the Nordic countries or other countries that have similar history, geography or size to Scotland.

2. Achieving equivalence with the EU

The Scottish Continuity Bill required the Scottish Government to propose environmental governance arrangements which would reach equivalence with the current governance standards provided by the European Commission and the Court of Justice of the EU.

An analysis is needed to determine:

a) how far existing bodies can take us to achieving equivalence

b) examine what additional powers and functions could be given to existing bodies (for example expanding the powers of Audit Scotland)

c) whatgovernancegapwouldstillremainevenafterexpandingexistingpublicbodies

d) what model would be most efficient at filling the remaining governance gap

It would be important for this piece of work to also draw on the conclusions of the Roundtable report on environmental governance in Scotland:

https://www.gov.scot/publications/consultation-environmental-principles-governance- scotland-4/pages/1/

3. Resourcing

Given that cost is being given as a reason against establishing any new bodies in Scotland, it is important to try and assess the funding needs in several areas, in particular:

- Upfront capital and ongoing costs of setting up a new and dedicated Environment Watchdog versus the model based on existing bodies taking on new functions
- Upfront capital and ongoing costs of an Environmental Court
- Potential cost saving of having a UK-wide umbrella watchdog (additional to and sitting above DEFRA's proposed Office for Environmental Protection)
- Determine whether public bodies are adequately resourced to carry out existing functions and what additional resource would be needed to carry out additional functions

Annex 2

Review/Report Process/Method

Inputs

A 1 Interviews and Sources:

1	**Bridget Campbell, Katriona Carmichael, Kate Thomson-McDermott, Scottish Government**	**160819**
2	**Ruth Chambers, Greener UK**	**010819**
3	**Kevin Hague, Chief Executive, Royal Forest and Birds Protection Society of New Zealand**	**050819**
4	**Dr Aileen McLeod MEP, member of EP Environment Committee**	**080819**
5	**Alison McNab, Policy Executive, Law Society of Scotland**	**140819**
6	**Judge Professor Simon Molesworth AO QC, Barrister, Former Tribunal Member of State Planning Tribunal in Victoria and Land and Environment Court of New South Wales, Australia**	**080819**
7	**Judge Professor Laurence Newhook, Chief Justice of the Environment Court of New Zealand**	**150819**
8	**Alastair Patrick, AP Beacon Consulting, New Zealand**	**120819**
9	**Professor Colin Reid, Professor of Environmental Law, University of Dundee**	**120819**
10	**Dr Mark Roberts, Senior Manager, Audit Scotland**	**290719**
11	**Gary Taylor, Chairman and Exec Director of Environmental Defence Society (EDS), New Zealand**	**250719**
12	**Rt.Hon. Simon Upton, Parliamentary Commissioner for the Environment (PCE), New Zealand**	**120819**

A 2 Correspondence:

13	**Judge Anders Bengtsson, Senior Judge of the Land and Environment Court, Växjö, Sweden**
14	**Janice Crerar, Chief Executive's Office, Scottish Parliament**
15	**Prof. Rob Fowler, Law School, UniSA, Adelaide, South Australia**
16	**Dr Paul McAleavey, Deputy Director and Executive Director of the European Environment Agency, Copenhagen**
17	**Mark Parnell, MLC, Parliament of South Australia and admitted Barrister of the Supreme Courts of South Australia and Victoria**
18	**Dr Gill Sparkes, Commissioner for Environmental Sustainability, Victoria, Australia**

A 3 Further Research:

19	**Sustainability and Environment Commissioner Canada**
20	**Anne Johnstone, Former Chair of UKELA**
21	**Paul Metcalf, previously Auckland Regional Council and Ministry for Environment, New Zealand**

B References and Weblinks [See also footnotes]

Environmental governance in Scotland after Brexit: report
https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/

Scottish Parliament evidence on the 'Environmental governance in Scotland after Brexit' report: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11580&i=104971

Scottish Government consultation on environmental principles and governance in Scotland:
https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/

Welsh Government consultation on environmental principles and governance in Wales post-EU exit: https://gov.wales/environmental-principles-and-governance-wales-post-european-union-exit

DEFRA draft (Principle and Governance) Bill:
https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018

House of Commons pre-legislative inquiry on the DEFRA draft Bill:
https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/inquiries/parliament-2017/copy-this-page-inquiry-name-17-191/

Brexit and the Environment:
https://ukandeu.ac.uk/brexitresearch/divergence-dismantling-and-contestation-brexit-and-the-repoliticisation-of-uk-environmental-governance/

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https://www.rse.org.uk/wp-content/uploads/2018/11/Brexit-Environment-Paper.pdf

Greener UK documents:

- *The funding of the Office of Environmental Protection:* https://greeneruk.org/sites/default/files/download/2019-03/OEP_funding_note.pdf
- *The Governance gap: how Brexit could weaken environmental protections:* https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf

Client Earth report on a New Nature and Environment Commission:
https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/

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https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/policybriefs/SCELG_Publication_-_SULNE_EnvtlProcRights_EMrev_(2).pdf

https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/events/2018festivalofglobalenvironmentallawandgovernance/brexitworkshop/

University of Strathclyde event: Brexit, the Environment and Human Rights: Turning Risks into Opportunities?
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New South Wales
http://www.lec.justice.nsw.gov.au