

## LINK Consultation Response

Review of the Effectiveness of Environmental Governance  
October 2023



### **Review of the Effectiveness of Environmental Governance Consultation Response October 2023**

#### **Introduction to Scottish Environment LINK**

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Its member bodies represent a wide community of environmental interest, sharing the common goal of contributing to a more sustainable society. LINK provides a forum for these organisations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for the environment. Acting at local, national and international levels, LINK aims to ensure that the environmental community participates in the development of policy and legislation affecting Scotland.

LINK works mainly through groups of members working together on topics of mutual interest, exploring the issues and developing advocacy to promote sustainable development, respecting environmental limits. This consultation response was written by LINK's Governance Group.

#### **Response**

##### **Overview of Environmental Governance**

#### **1. Do you have any general comments on the scope of the review and the Scottish Government approach?**

Scottish Environment LINK's Governance Group is disappointed that the review took a narrow approach to the consideration of environmental governance. We consider this a missed opportunity to examine the governance gaps post-Brexit in the context of a governance landscape that was insufficient even while the UK was a member of the EU. The report asserts Scottish Government positions but fails to include substantive discussion of how Ministers arrived at these positions or what evidence base was drawn upon. We hope that this consultation process will allow for these positions to be considered in greater detail.

The consultation itself defines environmental governance as "a term that can be interpreted broadly to include consideration of the administrative, regulatory and judicial structures that contribute to protection of the environment and promotion of sustainable development. In this wider sense, environmental governance includes the design of arrangements for communities and individuals to participate in decision making, and to make representations and seek routes to redress." It then, however, proceeds not to comprehensively review or analyse many of the administrative, regulatory and judicial structures that exist, or examine how these might be improved - and it fails entirely to



assess whether any of the environmental challenges we face as a result of the climate and nature emergencies might be better addressed by reforms to these structures.

Rather than adopting a wide ranging approach (as might be expected from the definition used), the review adopts an unnecessarily narrow approach of reviewing only governance matters affected by Brexit (and then only those aspects that were partially addressed by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021). As a result, the review is of limited value and the Scottish Government should consider if and how to undertake a fuller review - and to consider proposals for wider governance reforms.

Finally, we note that in commenting on the amendment that became section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, [the then Cabinet Secretary said](#) "it is important to ensure that stakeholders and communities are given sufficient opportunity to participate in the consultation exercise, and for proposals and recommendations to be made that are both meaningful and evidence based". In LINK's view, the narrowness of the approach taken and the lack of evidence and analysis presented in the consultation paper (albeit this was slightly rectified by the publication of a supplementary briefing) mean that this process has been limited in the participation of stakeholders - and, partly as a result, has not been meaningful or evidence-based.

## **2. Do you have any further comments on wider issues of environmental governance?**

Yes, as discussed above, we consider there is a good case for a proper review of environmental governance. This has been the case since the publication, in 2012, of LINK's discussion paper, [Governance Matters](#). In the context of Brexit, the Scottish Government commissioned [a report on environmental governance](#) from its Roundtable on Environment and Climate Change. Whilst some key actions were taken by government through the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, in particular the creation of Environmental Standards Scotland - which Scottish Environment LINK strongly supported - a number of other recommendations from the report remain outstanding.

Annex 3 of the Roundtable's report set out nine areas of environmental governance that would be affected by the UK's withdrawal from the EU. These were:

- Monitoring, measuring and reporting: Reporting environmental data (State of the Environment)
- Monitoring, measuring and reporting: Reporting on the implementation of environmental law (Is the law in place and working?)
- Scrutinising of reports, preparation of independent assessments and reports, examining environmental compliance and progress.
- Initiation of investigations, cross cutting studies and reports.
- Mechanisms for individuals or organisations to make complaints regarding the application of (non-criminal) environmental law.
- Formal and informal mechanisms to seek solutions to concerns about the implementation of environmental law, through interaction with Government.
- Powers to refer a public body to a court for alleged failure to implement environmental law in order to seek a remedy.



- Powers to order interim measures to prevent irreversible damage before judgement is handed down.
- Powers to require the Government to take such action as is necessary to bring it into compliance and to impose sanctions if action is not taken (including fines).

Some, but not all, of the 'gaps' created by Brexit were addressed by the provisions of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. Any review of environmental governance, post-Brexit, should - at least - have adopted this approach to assess what 'gaps' remain and what might be done to address them. Rather the report presented by the Scottish Government focuses only on the operation, to date, of ESS. The Scottish Government should, therefore, establish a process to enable a systematic and comprehensive review of the impacts of Brexit on environmental governance and how any remaining 'gaps' might be filled. This consultation does not deliver such a review (as, surely, was the intention of section 41).

Similarly, while environmental governance was undoubtedly affected greatly by Brexit, there were (and remain) issues that need to be addressed that do not arise from, or are related to, Brexit; this is illustrated by LINK's 2012 paper - as well as, for instances such as non-compliance with the Aarhus Convention. There is, therefore, a strong case for a systematic and comprehensive review of environmental governance in general - perhaps, using a similar methodology to that adopted by the Roundtable's report.

## **Environmental Governance Post-Brexit**

### **1. Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?**

As described above, this chapter is focused primarily on the establishment of Environmental Standards Scotland (ESS). There is, as set out above, a clear case for a more comprehensive review. However, in relation to ESS, LINK recognises it has an important role in environmental governance and was very supportive of its establishment.

It is however indisputable that the legislative limits on ESS powers has left Scotland with weaker environmental governance arrangements than we enjoyed while part of the EU. The review does acknowledge the exclusion of individual cases from ESS's remit and that some stakeholders remain concerned over this. The review also acknowledges that this could create friction in the system, but offers no solutions other than "good communication between ESS and regulators".

There are three broad points that should be considered:

1. The ability to raise complaints over individual cases has been an important part of developing EU environmental policy, and therefore the exclusion of a similar process under post-Brexit arrangements represents both an in principle and material downgrade in the rights of the Scottish public.
2. The Office of Environmental Protection (OEP) does not face similar legal constraints, meaning that, rather than being an inevitable consequence of Brexit, this situation is a result of



Scottish Government policy and is therefore deserving of scrutiny. Moreover, this means that environmental governance in England, Northern Ireland (and for reserved matters) is stronger than for devolved matters in Scotland - this is not a situation with which the Scottish Government should be comfortable.

3. If it is Scottish Government policy that ESS is an inappropriate body to hold these powers, it follows that it would be appropriate in a review of governance arrangements to consider whether alternative equivalent arrangements could be developed. Unfortunately the review fails to consider these points.

## **2. Do you have any further comments on the existing environmental governance arrangements?**

Yes - addressed above in our response to overview questions.

## **3. Do you have any further information or evidence on the issues presented in chapter three?**

### **Access to Justice on Environmental Matters**

#### **1. Do you have any comments on the content of chapter four and the Scottish Government position on this subject?**

LINK welcomes the acceptance that Scotland is in breach of the access to justice requirements of the Aarhus Convention in relation to costs.

Paragraph 4.2 then sets out the Scottish Government proposals to address this “in order to ensure Scotland's compliance with the requirements of the Aarhus Convention”. Five processes are referenced - however, while any or all may address (or contribute to addressing) the challenge, none will do so. Thus, we do not consider the work identified to remedy this is sufficient.

First, the suggestion that the forthcoming Human Rights Bill will contribute to achieving compliance is not supported by the consultation on that Bill. We welcome the commitment to legislate for a human right to a healthy environment; however, in order for this to be meaningful it requires that citizens are in practice able to enforce this legal right. While the consultation refers to procedural rights, no details are provided as to how these will be enacted or enforced.

Secondly, the consultation refers to “the review of the Protective Expenses Order (PEO) regime currently being undertaken by the Scottish Civil Justice Council”. Again, this may prove successful but it is far from certain. The SCJC has previously reviewed PEOs and few, if any, improvements materialised.

Thirdly, the consultation paper notes the new exemption from court fees for Aarhus cases in the Court of Session. This is welcome and has been introduced - but the paper fails to note that (a) the exemption relates to only a small part of the otherwise highly expensive process of seeking justice at the Court of Session and (b) by limiting the exemption to Court of Session, this excludes cases dealt with in Sheriff Courts or the Land Court. This is therefore a small but welcome step which does not address the wider issue.



Fourthly, the consultation paper refers to “legal aid reform, which will consider extending legal aid availability”. This will be a welcome process - however, ‘consideration’ does not mean action. To be meaningful, the Scottish Government must both extend eligibility and ensure adequate funding - at present, there is no commitment or proposal to do either.

Lastly, the consultation paper indicates that the Scottish Government will “continue to explore means to provide further expert support to prosecutors and the judiciary on environmental matters, such as through further training opportunities”. This is welcome; it could and should be done without this consultation. While a positive proposal, it also does not address the issue of costs (except insofar as better trained participants may result in shorter or more definitive court processes).

Thus, in relation to the issue of ensuring that access to justice in environmental matters is “not prohibitively expensive”, LINK welcomes the Scottish Government’s acknowledgement that it is not in compliance with the Aarhus Convention. We further welcome the tentative steps proposed to address this issue. However, to ensure compliance, the Scottish Government should take more definitive action to fully implement the Aarhus Convention Compliance Committee’s recommendations of Decision VII/8s before the deadline of 1 October 2024. A clear timetable must be introduced to enact necessary reforms, including amending Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, overhauling the Protective Expenses Orders (PEO) regime and replacing the ‘loser pays’ rule with ‘qualified one-way costs shifting’ (QOCS), reviewing retrospective planning permission, reviewing time limits for Aarhus cases, reforming procedures in Sheriff Courts relating to litter, and establishing a dedicated environmental court or tribunal with comprehensive jurisdiction.

## **2. Do you have any further comments on existing access to justice on environmental matters?**

Whilst this section of the consultation paper discusses non-compliance with the Aarhus Convention in relation to costs, it does not mention (or address) the issue of merits. Article 9.2 of the Convention requires that states should provide that its citizens (and NGOs) “have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission” (emphasis added).

This matter is subject to an ongoing [representation](#) to the Aarhus Convention Compliance Committee; [the Committee](#) has “on a preliminary basis determined it to be admissible”.

The failure of this review and consultation to even acknowledge this as an issue (albeit that the ACCC has yet to reach a final conclusion) illustrates its narrow scope - and failure to address issues that were raised by stakeholders. A fuller review of access to justice on environmental matters would consider this issue in addition to that of costs and, subject to the analysis, provide possible solutions.

In passing (and in advance of matters addressed by the subsequent part of this consultation), it should be noted that one very obvious means to provide for ‘substantive review’ would be the establishment of an environmental court or tribunal.

## **3. Do you have any further information or evidence on the issues presented in chapter four?**



## **Governance Arrangements and Environmental Court**

### **1. Do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?**

We are concerned that the review does not give sufficient consideration to the potential of an environmental court, nor explain the evidence base behind the Scottish Government's assertion that there is no strong argument for its establishment. The requirement of the Act was to consider whether an environmental court "could enhance the governance arrangements introduced by the Continuity Act"; the published report does not meaningfully do so. While we recognise that the supplementary briefing paper has provided some more argument on this issue, even taken together, the consultation and the briefing paper provides very little analysis and fails to refute the arguments in favour of an environmental court made by stakeholder.

This purported assessment of the potential of an environmental court or tribunal follows a similar consultation held in 2016-17 based on a paper called "Developments in Environmental Justice in Scotland". The [analysis of consultation responses](#), published in 2017, noted that: "A substantial majority of the respondents favoured the introduction of an environmental court or tribunal. The majority envisaged a specialised court or tribunal as a means to reducing costs and improving access to justice in civil environmental matters."

Notwithstanding that strength of expert opinion, the Scottish Government determined that no further action should be taken. It said "the variety of views on what sort of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape caused by Brexit lead Ministers to the view that it is not appropriate to set up a specialised environmental court or tribunal at present" (emphasis added).

The issue of a "variety of views" seems to relate to the conclusion that "there was no clear consensus on whether such a court or tribunal should deal with criminal or civil cases, whether it should be a specialised sheriff court, a specialist tribunal, or a specialised court within the Court of Session, and within each of those jurisdictions, what types of "environmental" cases should be considered". Thus, there was only a limited 'variety' of views on the principle of an environmental court (the clear majority were in favour) - the real 'variety' related to the exact nature of such a court. In such a situation, the logical next step would be to agree with the principle and undertake a more in depth analysis of the options available and seek to find a consensus. This was not done in 2017 - or, indeed, in any depth, in the current review.

Of course, the "uncertainties of Brexit" (see above) may have been, in 2017, a reasonable reason to delay any such in depth analysis. However, the current review, required as it is by the 2021 Act, takes place when the consequences of Brexit are now clearer (and partially mitigated), and the opportunity exists to revisit a decision that was "not appropriate in 2017" - but may be now.



For the reasons set out above, LINK considers that the conclusions of the 2016-17 consultation are either overlooked or somewhat misrepresented by the current consultation. For instance, the majority response in favour of an environmental court is not mentioned - nor that the “uncertainties of Brexit” were cited as the main reason not to proceed further. Rather, it is implied (see page 8 of briefing paper) that the number of cases and the Law Society’s view were/are significant arguments against proceeding. The Law Society is quoted as saying “they did not believe that an environmental court would either be effective or provide value for money, given the relatively small number of cases which end up being pursued”. However, that is a selective quotation as immediately following that statement [the Society continue](#):

“However, we do believe that there are current opportunities for specialisation, particularly the existing powers in terms of Section 41 of the Court Reform (Scotland) Act 2014 referred to above where the expertise of a specialist sheriff could be enhanced in dealing with environmental matters. As referred to above, we also believe that some consideration should be given to extending the jurisdiction of the Land Court.

“Such proposals should be considered, though, in the context of a wider review of how environmental cases - administrative, civil and criminal - are dealt with, both those that currently reach the courts and those which do not, either because they are handled by other procedures (e.g. appeal to Ministers) or because they never reach the stage of formal proceedings (whether through lack of expertise, resources or priority). Looking at only the cases that currently come to court is taking too narrow a view of what is necessary to deliver environmental justice”.

Notwithstanding the issue of number of cases (a number that is undoubtedly suppressed by access to justice issues and the ‘prohibitive expense’ of undertaking legal proceedings in the courts), this longer quote from the Law Society clearly supports greater in depth analysis and the possibility of some form of environmental court or tribunal - albeit developed by the evolution of existing structures. As acknowledged in the Government’s briefing paper (pages 3-4), [the Law Society has also said](#), in their response to the consultation on the future of the Land Court and the Lands Tribunal, that “in light of existing jurisdiction in these matters, there may be scope for the remit of an amalgamated body to be widened to deal with other environmental matters, such as littering and matters arising under the Environmental Protection Act 1990.”

In addition to the non-recognition or misrepresentation of the 2016-17 consultation, LINK also considers that the lack of evidence in the consultation paper (and skewed presentation of evidence in the briefing paper), does not justify the Scottish Government’s conclusion that “does not see any strong argument for the creation of a specialist court”. Indeed, [chapter 5 of the consultation paper](#), entitled “Whether and, if so, how the establishment of an environmental court could enhance the governance arrangements introduced by the Continuity Act?” is, in fact, only five paragraphs long and the word ‘court’ appears only once (when repeating the above conclusion from chapter 2). That conclusion in [chapter 2](#) is made in paragraph 2.5, headed ‘concluding comments’ summarising the “wider context of environmental governance across our governmental and legal systems” described in the chapter, but offering no analysis that might lead to such a conclusion.





Any analysis is to be found in the briefing paper, published subsequently. This additional information is welcome - however, as indicated above, it is, in places misleading. It also does not fully describe the potential benefits of an environmental court - yet expands on the disbenefits or arguments against at length (including, as described above, by the use of selective quotes). As an example of the briefing paper's skewed analysis, we note that, in its annex, it reports nine "ways in which [stakeholders] consider that the establishment of an environmental court could enhance governance arrangements". These seem to be unreflected (or, at least, unweighted) in the paper's main text and conclusion. By contrast, the annex only reports two potential "disadvantages to establishment of an environmental court for governance arrangements" reported by stakeholders (both of which are minor and/or refutable).

Once again, therefore, the annex to the briefing paper appears to show clear support by stakeholders for the establishment of an environmental court (by some means, including the evolution of existing institutions). Yet, this support and the evidence provided is not reflected in the briefing paper - and certainly overlooked by the conclusion in the consultation paper.

It is LINK's view that the establishment of a specialist environmental court would significantly enhance governance arrangements. An environmental court could lower the barriers to accessing justice and would therefore be one way to ensure Aarhus compliance. More importantly, with environmental decision-making likely to be subject to scrutiny and challenge, it will improve the likelihood of good and robust decisions and, thus, improve governments' ability to meet the challenges of the climate and nature emergencies.

This position is outlined in greater detail by the ERCS report [The clear and urgent case for a Scottish Environment Court](#) (referred to in the supplementary briefing but with little or no evidence provided to refute the benefits described by ERCS).

## **2. Do you have further comments on whether an environmental court can enhance governance arrangements?**

No - full argument provided in answer to question 1.

## **3. Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?**

No - our reports and analysis were provided (as described above) via the stakeholder evidence sessions. However, as asserted above, we consider that the evidence provided has not been refuted and the Scottish Government's conclusion is not supported by the evidence it purports to provide.





**This response is supported by:**

Badenoch and Strathspey Conservation Group  
Butterfly Conservation Trust  
Scottish Wildlife Trust  
Environmental Rights Centre Scotland  
Froglife Scotland  
Planning Democracy  
Marine Conservation Society  
John Muir Trust  
Keep Scotland Beautiful  
RSPB Scotland  
Soil Association Scotland

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