



Law Society  
of Scotland

# Consultation response

Environmental Standards Scotland - draft strategic  
plan

August 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law Sub-committee welcomes the opportunity to respond to Environmental Standards Scotland's consultation on its *draft Strategic Plan*<sup>1</sup>. We have the following comments to put forward for consideration.

## Consultation questions

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### Our Strategic Plan Our Approach

#### **Do you have any comments on our Vision and Mission Statement, set out in chapter 3?**

We note that the Vision refers to "the consistent application of effective environmental laws". We suggest that this might best refer to consistent strong application of the law rather than potentially consistent but weak application.

#### **Do you have any comments on our Strategic Outcomes, set out in chapter 3?**

In relation to the outcome of "Monitoring and evaluating environmental performance and change in Scotland", we note that in the context of references elsewhere within the Strategic Plan (for example, paragraph 9.10 and Annex B) to assessing progress on the Scottish Government's Environment Strategy indicators, this may raise questions about how far ESS plans to perform a general role in assessing the state of treatment of the environment rather than looking only at matters of compliance with and implementation of the law. While there is an inevitable overlap with the statutory function of considering the effectiveness of environmental law

<sup>1</sup> <https://consult.gov.scot/environmental-standards-scotland/draft-strategic-plan/>

(section 20 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021), there is some difference.

We recognise that “prioritisation and investigation of the most important matters of concern” will be crucial to the success of ESS. However, we anticipate that prioritisation may be a challenging exercise, particularly as there is a potential for significant numbers of representations to be received, likely with varying strengths of evidence base. Access to relevant data and scientific information will be key to this process in order to make data-driven decisions and we consider that it is important that ESS prioritise well to be able to make best use of its limited resources. In addition, a key part of this process will be clear communications and engagement – being clear about what ESS is and what the organisation can and cannot do will be crucial to managing expectations of stakeholders and the public up-front. There is a risk that ESS may be thought of being ‘toothless’ if issues that are being raised are perceived as not receiving attention.

### **Do you have any comments on our Values and Principles, set out in chapter 3?**

We have no particular comments to make although are supportive of the suggested values and principles. The emphasis on targeting efforts and resources where ESS can add most value is appropriate given its limited resources.

### **Our Proposed Approach to Delivering Our Strategic Objectives**

#### **Do you have any comments on our proposed approach to resolving matters informally with public authorities, set out in chapter 4?**

We are supportive of informal resolution where this is possible. We suggest that there be a clear commitment to publicise what ESS has looked at and the informal resolution that has been agreed so that the public is aware of the issues that are being dealt with and can therefore help to monitor compliance by the reporting of further issues.

#### **Do you have any comments on our proposed approach to determining what constitutes a systemic failure, set out in chapter 4?**

In relation to the intended criteria for issuing an improvement report (paragraph 4.14), it is not clear what sort of action by the Scottish Government may be in mind, for example, is this expected to include initiating proposals for new legislation, or be limited to the exercise of specific powers (for example, the direction powers in many statutory regimes)?

#### **Do you have any comments on our proposed approach to determining whether a compliance failure could be addressed more effectively by a compliance notice than an improvement report, set out in Chapter 4?**

We have no comments.

## **Do you have any comments on our proposed approach to determining whether a compliance failure or environmental harm is serious, set out in chapter 4?**

In relation to the content of the Strategic Plan on judicial review generally, the text suggests that judicial reviews will be rare with a high bar set (for example, paragraph 4.19), but it is not clear whether this relates only to judicial reviews that ESS will initiate or whether it will equally apply to ESS considering joining actions raised by others. In addition, the Plan does not set out any detail on how actions by others might be discovered and tracked.

In relation to the factors to be considered by ESS in determining whether any environmental harm that has been caused is serious or whether there is a risk of serious environmental harm which requires to be prevented (paragraph 4.20), we suggest greater clarity is required as to the interpretation of 'negligence'. For example, it is not clear whether simply failing to monitor or enforce something would be included within scope of this or whether it concerns how functions are being fulfilled. We recognise that there may be thought to be a difference between neglect (for example, a public authority not taking action or omitting to do something it should) and negligence (for example, a public authority deliberately not doing something), however, greater clarity as to the intended meaning of 'negligence' in the context of the Plan would be welcome so as to ensure certainty as to how ESS will apply these factors.

## **Do you have any comments on our proposed approach to deciding whether, and how to prioritise and carry out our investigations, set out in chapter 5?**

We are of the view that the factors to be considered by ESS in deciding whether to immediately investigate a representation are appropriate (paragraph 5.2). In particular, we note that consideration of the possibility of undermining of public confidence is welcome. Upholding the law is important in creating certainty and clarity for the public and creating the impression that the law can be ignored in any one area may affect the view of the law in other areas.

We welcome the commitment to keeping parties who have been involved in ESS' consideration of a matter updated during any period of monitoring and evidence-gathering, however, we consider that it is also important to make the wider public aware of what ESS is doing. In addition, while the publicity proposed for investigations (paragraphs 5.6 and 5.14) is welcome, we consider the strategy could usefully detail how the public is to be informed of issues that have been considered by ESS but are not being taken forward to a formal investigation, and matters where early action leads to an informal resolution before an issue formally crystallises. We note the reference to publication of pre-investigation casework on the website at paragraph 7.8 but consider this could usefully be made clearer in chapter 5.

## **Do you have any comments on our proposals for monitoring compliance and effectiveness, and taking account of different types of information, as set out in chapter 6?**

We note the reference to ‘keeping pace’ at paragraph 6.2 and note that the reports required under section 11 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 on how the ‘keeping pace’ powers have been exercised may be of assistance in this regard. Is it intended that ESS will review these?

In addition, it is not clear to what extent ESS will examine compliance with the UK’s international obligations – we note reference to compliance with the Aarhus Convention in the issues identified for initial analytical work listed at paragraph 6.13, however, it is not clear if compliance with other treaties will be examined, and if so, how this will be done. We do question whether ESS will have the resources to do either of these.

## **Do you have any comments on our draft priority topics for further analysis? Do you have any suggestions for key sources of data and intelligence that we should consider, as set out in chapter 6?**

In reference to the environmental topic areas and priority topics for further work, we make the following comments:

- Biodiversity – we agree that this is a significant topic which merits consideration. We question what is envisaged regarding interface with Police Scotland and with COPFS on the issue of wildlife crime?
- Population and human health – in connection with noise, we note that there are a number of complex issues in this area particularly around the application of the law and difficulties in assessing relevant data. Noise nuisance also brings in aspects of the licensing system and we suggest that this is a facet which ESS may want to consider even though this is not traditionally considered as ‘environmental’ regulation as such.
- Resource use and waste – we note particular issues in this area, particularly around littering and flytipping, and therefore we welcome action in this area. We note the recent Scottish Government consultation on a National Litter & Flytipping Strategy<sup>2</sup> and Murdo Fraser MSP’s consultation on a Proposed Fly-tipping (Scotland) Bill<sup>3</sup>.
- Water – we note that salmon farming in freshwater environments (and associated pressures on the water environment generally) and river pollution are current issues receiving significant publicity. We are aware of work ongoing in England on the subject of sewage discharge into rivers. We note that sewerage regulation is primarily based on legislation which is now of some age and we consider that more could usefully be done to improve the law in this area.

In addition, we note that the practicality of applying the law in some areas can be challenging and therefore we support ESS considering both the effectiveness of the law and how it is being applied.

<sup>2</sup> <https://consult.gov.scot/environment-forestry/national-litter-and-flytipping-strategy/>

<sup>3</sup> <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/murdo-fraser-consultation-document-final.pdf>

## **Do you have any comments on our proposed approach to receiving and handling representations, set out in chapter 7?**

As per our comments in relation to chapter 3, we note that clear communications and engagement about ESS' role will be crucial to managing expectations of stakeholders and the public in relation to receiving and handling representations.

## **Do you have any comments on our proposed approach to avoiding unnecessary overlap with other regulators, oversight and scrutiny bodies, as set out in chapter 7?**

Engagement with other environmental governance bodies will be crucial to ESS' work and should involve good information sharing. We therefore welcome the close collaboration with other environmental bodies and the proposed Memoranda of Understanding (MoU) are welcome. We do consider that MoU should also be considered for those other bodies specified in Schedule 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and whose roles might also overlap, notably the Scottish Public Services Ombudsman, the Commissioner for Ethical Standards in Public Life in Scotland, the Scottish Information Commissioner, and Audit Scotland.

## **Do you have any comments on how we maintain our ambition to be a high performing organisation, as set out in chapter 8?**

We have no comments.

## **Measuring Our Performance**

### **Do you have any comments on our proposed approach to measuring our impact, as set out in chapter 9?**

We consider that ESS should publish data on the number and subject of the representations the organisation receives.

At paragraph 9.6, we note the intention to “develop ways of assessing the impact” that ESS is having “for example, monitoring whether the changes made have had the desired effect”. We agree that this will be important in order to measure success and note that it will also be important to understand why changes have not had the desired effect (where relevant), so as to make use of the information to enable future improvements.

We do not consider the reference at paragraph 9.10 to assessing progress on the Scottish Government's Environment Strategy indicators is clear - is this intended to be a review of progress by the Scottish Government or a benchmark for ESS' activities?

## **Do you have any comments on our proposed key performance indicators, as set out in Annex B?**

We suggest that the KPIs relating to investigations and representations should be framed in proportions as well as numbers, including their related output and intermediate outcomes.

## **Any final comments**

### **Are there any other factors that you think we should consider before exercising our functions?**

We have no comments.

### **Do you have any other comments on our draft Strategic Plan and our proposed approach to fulfilling our remit?**

We have no comments.

### **Do you have any comments on the interim conclusions of our impact assessments, as set out in Annex A?**

We have no comments.

### **Are there any sources of information that you can suggest we use to assess the potential impact of our Plan?**

We have no comments.

**For further information, please contact:**

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