



Law Society
of Scotland

Consultation Response

Review of the Effectiveness of Environmental Governance

13 October 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Environmental Law, Planning Law, and Access to Justice committees welcome the opportunity to consider and respond to the Scottish Government's consultation: *Review of the Effectiveness of Environmental Governance* (the "**Consultation**").¹ We have the following comments to put forward for consideration.

General Comments

We welcome the publication of the Report into the Effectiveness of Governance Arrangements (the "**Report**"),² the Consultation, and supplementary briefing paper on an environmental court (the "**Briefing Paper**").³ We consider that there is a clear need for consideration of the issues in this area, particularly following the UK's exit from the EU, and welcome the Consultation.

We note the high level of generality with which the Report and Briefing Paper engages with these issues, in relation to which there have been considerable developments and legislative activity over recent years, particularly with the passage of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the "**Continuity Act**"). As detailed below, even if the broad pattern of relationships is considered to be adequate, there are a number of areas where we consider that improvement is needed – many of which pre-date the UK's exit from the EU – and reforms intended to remedy gaps in environmental governance following the UK's exit from the EU are not the only matters which merit attention.

We note also the interaction between environmental governance more generally and human rights law in Scotland. We recently provided detailed comments on the Scottish Government's

¹ [Review of the Effectiveness of Environmental Governance](#)

² [Environmental Governance Arrangements: Report](#)

³ [Environmental Governance Review Briefing Paper on an Environmental Court](#)

ambitious plans to create a new framework for embedding international human rights in Scotland through the introduction of the prospective Scottish Human Rights Bill.⁴

Our response noted that we welcome measures aimed at better securing and enforcing environmental rights, and we offered detailed comments on the proposed introduction of a right to a healthy environment in Scotland (as detailed at Part 5 of the consultation on the proposed Bill).⁵ Whilst the right to a healthy environment is relied on in the Report as filling some of the gaps within the wider environmental governance framework, we note that it could be a number of years before such a right is enshrined in law – and as highlighted in our response, we call for greater detail and guidance around the procedural and substantive aspects of the rights proposed in relation to a healthy environment, and how these will be implemented.

Overview of environmental governance

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

The approach taken in this review is to consider the structures at a high level, without addressing the many unresolved concerns raised before the UK's exit from the EU about aspects of environmental governance and access to environmental justice in Scotland.

We note that such issues include concerns regarding the nature of appeals in areas including planning law, the cost of going to court and related access to justice implications (both issues also raising concerns over compliance with the Aarhus Convention), the fragmentation of the regulatory appeal structure, ensuring that enforcement action is taken, and the extent to which consultation and public participation processes are genuinely meaningful. These were all the subject of debate and criticism even before the emergence of the “governance gap” as a result of the UK's exit from the EU. We consider that these matters require attention at a more detailed level, even if the overall pattern setting the roles, functions and powers, executive oversight, and judicial bodies is broadly appropriate.

The Report considers the “effectiveness” of environmental governance arrangements in Scotland. The term “effectiveness” is vague in this context, and we would welcome consideration of these issues against a more tangible metric. There are many considerations here which do not appear to have been addressed in detail, such as how “effectiveness” should be measured and what the test is for a good outcome. If the relevant metrics are unclear, then this gives rise to challenges in tracking and measuring key performance.

⁴ Accessible [here](#).

⁵ [A Human Rights Bill for Scotland: Consultation](#)

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

The Report defines “environmental governance” as including “administrative, regulatory and judicial structures” (page 6). However, there is very little attention paid to the initial administrative stages of regulatory decision-making. We consider key considerations, such as who is making regulatory decisions, by what procedure, and with what levels of stakeholder and public participation, require greater attention. If the initial process is one that all parties consider to be fair and that leads to “getting it right first time”, this reduces the need for the inevitably more formal, expensive, and time-consuming review and redress procedures.⁶ Finding consensus (as far as possible) on the overall policies that will guide individual decisions and giving the public confidence that any representations they make are being taken seriously are key elements of this. It is important that there is public confidence that initial decisions are being taken in a fair way that balances all relevant interests appropriately (although we are mindful that views will differ on what is “appropriate”), particularly to minimise pressure on appeal and review mechanisms.

There are many duties on public bodies to have regard to various environmental considerations, e.g. biodiversity (Nature Conservation (Scotland) Act 2004 ss 1-2A), climate change and sustainable development (Climate Change (Scotland) Act 2009, ss 44-46) (and in future the environmental principles under ss 13-18 of the Continuity Act).

We note that Scottish Government targets on climate change have not yet been met,⁷ which raises concerns whether these duties are making a material difference to the weight such considerations have in competition with more tangible economic issues. This suggests that a lot more must be done to ensure that the climate and biodiversity emergencies are truly taken seriously in all elements of environmental governance. Given the transboundary effects of environmental impacts, such concerns around the importance of meeting environmental targets and sufficient weight being given to such considerations are similarly applicable to the UK Government’s approach to environmental governance.

We consider it important that there is effective monitoring and enforcement action being taken against those apparently in breach of, for example, planning, pollution, and other laws – and that this is appropriated resourced and prioritised by the relevant authorities. We are aware of

⁶ We welcome in this context the recent publication of the third edition of the Scottish Government’s *Right First Time* guide, accessible [here](#).

⁷ We note, for example, that the annual emissions reduction target for 2021 was not met – as set out in the Scottish Greenhouse Gas Statistics 2021, laid before the Scottish Parliament by the Scottish Ministers under section 33 of the Climate Change (Scotland) Act 2009, dated June 2023, accessible [here](#).

concerns about these aspects being recurring themes raised by those affected by environmental issues. Until the public is confident that the rules in place will be properly enforced, there will be a lack of confidence in the regulatory system as a whole, as well as unresolved grievances about specific instances. These concerns could be pointed to as indicative of failings in effective environmental governance.

For understandable reasons, the Report does not cover governance of environmental matters within reserved competence under the devolution settlement, or where UK Ministers can exercise powers within devolved areas. We note that the interplay of these matters can cause added challenges and complexity to environmental governance in Scotland, particularly if such powers are exercised in significant ways.

Environmental Governance Post-Brexit

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

The heading of Chapter Three (echoing the Continuity Act) presumes that there was “effective and appropriate governance relating to the environment” to be continued following the UK’s exit from the EU. We note that there were concerns raised around many aspects of environmental governance prior to the UK’s exit from the EU, as mentioned above.

Although following the UK’s exit from the EU there is no longer a wholly external oversight mechanism with compliance powers to impose fines that take money out of the national account (as opposed to it being moved between budgets), we note the many positives of the current scheme, particularly in comparison to the current arrangements in the rest of the UK.

We consider that the absence of a power for Environmental Standards Scotland (“ESS”) to review individual decisions is acceptable so long as single decisions can provide the spur for investigating a wider issue. We note that this approach was highlighted in Case ID: IESS.22.018⁸ on permitted development affecting designated sites, where ESS considered that the representation “raised broader concerns regarding the local authority’s guidance, policies, and procedures”.

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

We consider in many respects it is too early to come to any firm conclusions on the effectiveness of the existing arrangements. There are a range of relevant points to consider

⁸ Accessible [here](#).

in reaching a proper conclusion in the coming months and years, including: how robust and effective ESS will be, how satisfactory its informal resolution of cases proves to be in changing practice, and what happens when the Scottish Government's response to an improvement report is viewed as inadequate.

Given the important role that ESS plays in the current framework of environmental governance, we consider that it is necessary that ESS is suitably resourced, able to thoroughly consider representations made to it, and willing to act promptly to take effective enforcement action where necessary.

More generally, we consider that strong collaboration between the UK Government and devolved administrations is of considerable importance. This is particularly significant given the transboundary effects of environmental impacts and avoiding 'environmental regulatory tourism'. We also welcome the use of common frameworks where appropriate as a way of avoiding undesirable fragmentation and the potentially disruptive impact of policy divergence.

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

The current Scottish Government consultation *Tackling the Nature Emergency: Consultation on Scotland's Strategic Framework for Biodiversity*⁹ contains a proposal for an Independent Review Body to report on progress in meeting the statutory nature recovery targets (page 75). We note that the Report does not discuss the role or function of this body.

While this will provide an important element in the framework of environmental governance, we note that greater detail of the composition and role of the body would be welcomed. More widely, we highlight the need for environmental concerns to be embedded in all decision-making, with the resources to support that – such as the capacity to make the biodiversity assessments necessary for the Biodiversity Strategy to be delivered.

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?

Although section 4.2 of the Report lists a number of developments in relation to access to justice, the outcome of several of these is still uncertain and they do not promise definite

⁹ [Tackling the Nature Emergency: Consultation on Scotland's Strategic Framework for Biodiversity](#)

improvements, and certainly not in the immediate future. These are therefore not guaranteed improvements on the current position.

The plans detailed in section 4.4 of the Report for recognising a human right to a healthy environment in Scotland similarly will not lead to any enforceable rights substantially changing the legal landscape for several years, in view of the proposal for the two-stage introduction of the right, initially purely as a procedural matter for public authorities (as noted at Part 7 of the consultation on the prospective Scottish Human Rights Bill).

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

We consider that effective access to justice requires attention not just to the formal procedures for resolving disputes, but also to the much earlier stages of information and education about legal rights and processes, as well as timely access to expert advice. It is likewise essential that there is a well-funded and resourced legal aid regime in place to ensure such legal advice is accessible to all affected members of the public. Improvements in these areas are needed if effective access to justice is to be secured.

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

We have no comments to make.

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 note the discussion in the Report and the Briefing Paper on the considerations for introducing an environmental court. We welcome the publication of the Briefing Paper, noting that the discussion in the Report of the key issues is minimal and lacking detail. We note that Section 41 of the Continuity Act places a requirement on Scottish Ministers to consult on the effectiveness of the governance arrangements introduced by the Continuity Act, and for Scottish Ministers to prepare a report on “whether and, if so, how the establishment of an environmental court could enhance the governance arrangements”.

We consider it important that thorough consideration has been given to the points covered in the Report and the Briefing Paper – and understand that concerns have been raised by stakeholders in relation to whether the content of the Report and Briefing Paper is sufficient to fulfil the statutory duty under section 41(1) of the Continuity Act.

We recognise that there are a range of considerations in the question of establishing a separate court to deal with environmental matters, and since such matters can be technical in nature, it is important that there is sufficient technical expertise in the court to deal with cases arising.

We have noted previously that there may be merit in a designated court procedure for environmental matters, similar to the procedure for commercial matters, or for specialisation to be undertaken.¹⁰

We highlight more generally that there are many arguments that a well-designed environmental court could provide significant improvements to access to justice in Scotland, and would have welcomed greater consideration of these in both the Report and the Briefing Paper.

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

The current pattern of routes of appeal against regulatory decisions on environmental matters is fragmented and inconsistent. Whether or not an environmental court is created, we consider that this aspect of the overall landscape merits further attention to produce a more coherent system that is easier for all those involved to engage with and allocates decision-making to appropriate levels governed by appropriate procedures that enhance access to justice.

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

We have no comments to make.

¹⁰ In our response to the Scottish Government's *Consultation on Environmental Principles and Governance in Scotland* in May 2019, accessible [here](#).

For further information, please contact:

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