

Effective Environmental Standards, Law and Governance Speech

Jim Martin, Chair, Environmental Standards Scotland

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Good evening.

It's an honour to have been invited to deliver this lecture and many thanks to Brodies for the invitation. I know from conversations I have had that Charles Smith was a highly respected and popular lawyer and man. I hope that my contribution tonight will do his memory justice.

I am really pleased to have the chance to speak about the work of Environmental Standards Scotland, environmental law, and environmental governance more generally, especially in the post-Brexit context. I hope that you will bear with me if at some points I use this opportunity to think aloud a little on some of the challenges we face.

I don't intend to focus on the crises we all know we face on climate and on biodiversity decline and more generally on the environmental issues that are pressing for all of us today and tomorrow. I hope with this audience that if I were to do so you'd all agree that I was preaching to the choir.

Instead, I want to talk about how well equipped we are as nation and to assess whether Scotland is really in a position to ensure that we know whether we are doing all we can to meet the challenges we face.

So, I want to divide this evening's lecture into three parts:

I want to talk a little about Environmental Standards Scotland, the organisation I chair, where it came from, what it has done and what it's going to do next.

And then if you'll bear with me I want to talk a little about the context in which we, as an organisation, are operating with an emphasis on how dynamic that context is at the moment.

And finally, I want to talk about the need to strengthen our existing systems of environmental governance in ways that both support protection of the environment and give greater opportunities to individuals and communities to express their concerns about the environment and what is happening to it.

Before I start, we need to talk about Europe. We can't talk about environmental policy and law without it. Europe shaped and drove environmental policy and law in the UK and in Scotland for nearly half a century. For good or ill, Brexit marked an end to that. Whatever we may think of Brexit – it happened. Its after-effects are still being felt and may be for some time, as I will come to. But given that we are for the foreseeable future set to be outside of the European union, what we now need to do is work out how to develop our systems of governance so that they are effective and work for the environment and for Scotland, both now and in the future.

Having said that, I am personally delighted that Scotland is still aiming to reflect what is going on in Europe. The Scottish Government has, for obvious reasons, committed to maintaining alignment with Europe. That makes Scotland ... distinctive ... from some other parts of the United Kingdom.

We rightly pride ourselves on our commitment to maintaining and improving the quality of our environment and our commitment to strong action on climate change. There is much to be proud of - but there is still much for us to do and much for us to address. We must not allow ourselves to be over-confident and we must not be complacent. Scotland's biodiversity is being depleted alarmingly and progress to restore it appears weak at best. Scotland's waters may not suffer from the same scale of pollution problems as we see reported south of the border. But in some of our rivers, and on some our coasts, there is still a lot of work to be done.

Some progress has been made in reducing emissions of greenhouse gases since the Climate Change (Scotland) Act 2009. But reaching the target of net zero within the next twenty-two years will require a major re-engineering of our society and our

economy and, critically, a much greater honesty about how hard that is going to be for all of us, behaviourally, culturally, and economically. We also need to be frank about the need to accelerate planning for and adapting to climate change.

So where does Environmental Standards Scotland fit in?

ESS is a product of Brexit. The Scottish Parliament set us up to fill the gap left by the removal of the oversight and scrutiny that was provided by the European Commission and the European Court of Justice. Equivalent arrangements exist in the other nations of the United Kingdom, but there are important differences in how we operate. We exist to assess whether public bodies are complying with environmental law and to judge whether they are implementing environmental law effectively. The definition of public bodies covers the Scottish Government and its galaxy of public bodies and all 32 local authorities. We have considerable powers. We have the power to issue compliance notices requiring public bodies to act. We can also issue improvement reports which must be complied with where we find systemic issues. And, in extreme circumstances, we can apply for judicial review. We would prefer not have to use these powers. We would rather work collaboratively with public bodies and resolve issues informally. But, if we decide we have to use our powers then we will.

ESS is accountable to the Scottish Parliament. We are independent of Scottish Ministers and the Scottish Government. As our founding act says,

“In performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government.”

In the arcane language of public bodies, we are a non-ministerial office. That independence is important and essential. We report on how public bodies, including the Scottish Government, are complying with, and implementing environmental law.

As I said, we are accountable to the Scottish Parliament and the Parliament is our primary stakeholder, but our conclusions and findings are ours and ours alone. ESS' existence and independence will, I hope, strengthen further the Scottish Parliament's

ability to hold the Scottish Government's performance on environmental issues to account.

The Continuity Act, or to give it's Sunday name, the UK Withdrawal from The European Union (Continuity) (Scotland) Act 2021 established ESS. Strictly speaking, ESS is a board of five members (soon to become seven subject to parliamentary approval).

In the year and half, since our formal establishment on 1 October 2021, we have grown. We are now supported by an organisation of around 20 very able and committed people, we've completed our first investigations, secured parliamentary approval for our strategic plan, and embarked on our own analysis work to examine priority areas within what is a very broad remit.

I want to say some more about access for people and organisations to environmental justice a little later. But let me say here, while I'm describing ESS and its powers, some of the ways we currently interact with the people of Scotland.

We can and do receive representations from individual members of the public, communities and from organisations who may have concerns over how public bodies are implementing environmental law. To date, we have received 24 such representations covering areas including the use of acoustic deterrents by fish farms, the spreading of sewage sludge on land, the governance around local authorities' climate change responsibilities, to the interaction between the planning system and Scotland's network of protected sites and areas.

In some cases, we direct people to other, more appropriate organisations. In others, assuming they meet the criteria we have set for ourselves, we investigate in detail.

I mentioned that there are equivalent organisations to ESS elsewhere in the UK.

The Office of Environmental Protection covers both England and Northern Ireland. Its powers are very similar to those of ESS, but it differs from us in that it has a duty to advise the government on proposed changes to environmental law. While ESS will, where appropriate and where we have something substantive to say, contribute

to the development of environmental policy and law, we are absolutely not an adviser to government in any shape or form. I hope that clarity of our role is helpful.

The situation in Wales is different again. Only interim measures have been put in place by the Welsh Government. The Interim Environmental Protection Assessor for Wales does not have the equivalent enforcement powers that both we and the Office for Environmental Protection have. Her powers are advisory. Though I understand that, in response to a report last summer from the Senedd, the First Minister of Wales has committed to putting forward legislation to put permanent arrangements in place during the current session of the Senedd.

Clearly though, the environment doesn't care a jot about political boundaries – the catchments of the Solway and the Tweed span the Scottish/English border and pollutants in the air, and fish in the sea, are blind to lines on a map. In addition, there are also situations where the responsibilities for the environment are divided between the UK Government and the devolved administrations. This is exemplified in the marine environment, one of our priority areas within our own analytical work, where international, UK and Scottish legislative regimes all interact. Given both the environmental and political reality, we have to be able to work with our colleagues in the other environmental governance bodies. We meet regularly, we have signed a three-way memorandum of understanding, and are dipping our toe in the first piece of joint work with the OEP.

One of the differences between now and the pre-Brexit arrangements is that ESS operates here, on the ground in Scotland. We are able to be much more accessible and responsive to Scottish issues and local concerns in a way that would have been impossible for the European Commission. That's good for the public and, I think, the environment, but it does represent a shift, perhaps an uncomfortable shift, for public bodies – that will take a while to get used to.

One theme that is beginning to emerge from our work to date is the importance of monitoring. I don't mean the actual sampling and analysis of air or water or soil. I mean the oversight and scrutiny of the results of all that sampling and analysis. We can only ensure that environmental law is effective and is being implemented effectively if we monitor the outcomes it seeks to deliver. To illustrate this point I

want to draw on the conclusions of our report on Air Quality that we published last autumn.

The report followed our investigation into Scotland's non-compliance with nitrogen dioxide targets. Incidentally, an issue that was on the European Commission's radar prior to Brexit. We concluded that the system of governance and oversight of air quality in Scotland is overly complex and opaque with no clear responsibility for overseeing and reporting on progress in improving air quality. We therefore recommended that:

“The Scottish Government should identify or introduce a monitoring body with the remit to look at the system of air quality monitoring and compliance”.

Setting targets for profoundly complex, long-term problems like climate change and biodiversity is difficult, enshrining them in law is difficult. Making the necessary changes to achieve meaningful targets is really, really difficult. Having a means of independent oversight to monitor and scrutinise progress against those targets is an important means of providing assurance and accountability. With regard to climate change, to some extent this role is played by the Committee on Climate Change, although their powers are limited and the Scottish Government has never formally identified it as a monitoring body, despite having the power to do so.

The Scottish Government's recent draft biodiversity strategy proposed the introduction of statutory targets to reverse nature loss. Establishing those targets will be technically difficult, perhaps more so than for the emissions reductions target contained within the 2009 and 2019 climate change acts. The draft biodiversity strategy noted the importance of monitoring, but went no further. It is a governance gap in the making. Of which more later.

I now want to turn to my second theme of how the context for ESS' work is changing.

I said earlier that the after-effects of Brexit are still being felt. In some ways, they are only starting to become visible. The most immediate, and perhaps most notorious, example of this is the UK Government's Retained EU Law (Revocation and Reform)

Bill. I don't want to dwell on the well-rehearsed challenges the bill poses from a practical point of view, such as the transfer of powers to the executive and the constraining of parliamentary scrutiny, but there is one fundamental constitutional point that is worth stressing in a devolved context.

Taken together with the Internal Market Act and the Levelling Up and Regeneration Bill, the REUL Bill has the potential to reduce the scope of devolved powers over the environment. This marks an abrupt change from the past quarter of a century of devolution. It could well constrain the Scottish Parliament and Scottish Government's ability to act "effectively" to protect and improve the environment, which is what ESS is directly concerned with. It may well also place constraints on the Scottish Government's aspiration to maintain alignment with European policy and legislation, given that other parts of the UK may politically have a different agenda.

Assessing whether the Scottish Government is meeting its aspiration to keep pace with Europe and internationally is a key strategic priority for ESS and one which cuts across virtually all the areas of our remit. Given the scope and scale of the Green Deal that the European Union is proposing, monitoring what is happening at the European level is a major task for small organisations. To help in this, we are in the process of establishing an advisory panel to help advise us of European, and wider international developments.

The Scottish Government's current programme for government contains a number of pieces of proposed legislation that relate to the environment, some directly, some indirectly. The most obvious is the Natural Environment Bill which, as I have mentioned, looks likely to introduce statutory targets for reducing nature loss, similar to the emissions reductions targets that have been in place for over a decade.

Perhaps the most profound proposed piece of legislation is the Human Rights Bill which appears likely to give people the right to a healthy environment. This human rights based approach to environmental protection is potentially powerful but does raise a number of questions including: what defines a healthy environment, how do we assess that and how do we enforce that right.

In addition, there's a Circular Economy Bill, an Agriculture Bill, a Land Reform Bill and the potential for a bill establishing a Future Generations Commissioner – a similar role already exists in Wales.

For us in ESS, that means there's a lot of keep on top of. And then there is the changing international context.

Russia's invasion of Ukraine just over a year ago has had a stark economic impact in addition to the tragedy for the people of Ukraine. The profile of environmental issues and their fundamentally long timescales tends to decline at times of economic pressure as short-term priorities dominate both public concerns and political debate. The 2021 Act requires ESS to focus on the protection of the environment. That focus is really beneficial. We can, as the Act says, consider the "health and wellbeing of Scotland's people, and achieving sustainable economic growth" but only within the context of environmental protection. It is encouraging that the Scottish Government is prioritising its net zero aspirations and, increasingly, nature loss. But it must not lose sight of better resource management, improving air and water quality, in what will be a climate changed Scotland.

ESS' job is to ensure that it does that. The war in Ukraine has had another effect. At a European level, it has shifted the nature of discussions about environmental policy. Concerns about energy and food security are now increasingly integrated with environmental issues in way that was less the case prior to the invasion.

So that is the broad context in which ESS seeks to operate in the best interests of Scotland's environment, conscious that we are only one piece in the environmental governance jigsaw.

So, let's talk a little about environmental governance.

What I mean by environmental governance is the system of law, regulation, scrutiny and oversight and accountability that exists to protect and improve the environment. Formally, it involves local authorities, public bodies like SEPA, NatureScot, Marine Scotland, the Scottish Government, ourselves at Environmental Standards Scotland,

the Scottish Parliament and, of course, the courts. Further checks and balances are provided by the diverse range of national and local environmental NGOs that exist in Scotland.

This issue of environmental governance is highly pertinent. The 2021 Act that established ESS also requires the Scottish Government to conduct a review of environmental governance and then to consult on it. That consultation must begin by the end of May this year. The Act, and section 41 specifically, is very prescriptive about what the review should cover. It must consider:

1. whether there continues to be effective and appropriate governance relating to the environment following the UK's withdrawal from the EU
2. whether the law in Scotland on access to environmental justice is effective and sufficient
3. whether and how the establishment of an environmental court could enhance environmental governance arrangements.

So, a nice, small, straightforward topic.

As the sole named statutory consultee for this review, this is very much a matter of priority for Environmental Standards Scotland.

This review should not be about ESS. Assessment of how we are doing is important, but it is far too soon in our history to say much apart from how we've done in getting going.

However, the Government's review is an opportunity to take a proper look at how our environmental governance model as a whole should be structured and operated. What is best for Scotland now, and in five or ten or twenty years' time. A sustainable, effective governance structure. ESS is a part of that, but only a part. We all have a duty to ensure that environmental governance works for a devolved Scotland that is outside of the European Union, for the moment, but in ways that are effective and integrate, based on sound principles.

The second element of the review focuses on access to environmental justice. Scotland, along with the UK, has not complied with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The third element of this – access to justice – is the problematic one. The Aarhus Compliance Committee has repeatedly (in 2011, 2014, 2017 and 2021) stated that the Scottish legal system remains prohibitively expensive with regards to access to justice in environmental matters. ESS has considered a representation received from the Environmental Rights Centre for Scotland regarding Scotland's non-compliance with the Aarhus Convention. We have paused our investigation on this, pending the Scottish Government's review and the deliberations of the Scottish Civil Justice Council which is currently considering the Protective Expenses Order regime.

The third element of the review of environmental governance, and connected to access to justice, is the question of whether Scotland should have an environmental court. This has been an unresolved question for a number of years. Internationally, there are a growing number of environmental courts and tribunals. These terms cover a wide variety of different types of institutions, with different powers, and different modes of operation across different jurisdictions. From an ESS perspective, we are interested in how such a body might interact with ESS and its powers and, how it would fit with the wider Scottish governance, and legal, systems. It will be interesting to see how the Scottish Government frames that part of its consultation.

However, as an outcome, what I am keen to see is a mechanism that better enables individual members of public and local communities to take legitimate legal action, minimising the "chilling effect" of financial risk. We currently have in real terms a significant access and governance gap.

ESS as a body does not have a view, yet, on the merits or otherwise of Scotland having an Environmental Court, or Tribunal. But maybe while acknowledging that, you might allow me this opportunity to think aloud for a moment or two on some of the issues that this discussion may throw up.

I'll put some of my cards on the table.

Instinctively, I am personally drawn to the proposition that ordinary people and their community groups and environmental champion organisations should have affordable access to justice, through whichever mechanism is most appropriate, as part of a coherent governance structure.

As things stand today, for ordinary people, our justice system, including on environmental concerns is largely inaccessible and expensive.

For example, to challenge the decisions of most of our public bodies including government who make crucial decisions on the environment, the statutory route of challenge is through Judicial Review.

But Judicial Review is effectively the justice system's version of the glass ceiling. You can see it, you know it's there, but in reality, unless you are a public body using public funds, or a corporation or business, or a large NGO, or have very deep pockets, it is a route to justice in name only.

When setting the budget for ESS we had to make provision for possible Judicial Reviews that we might undertake ourselves or in which we would intervene, or which we would be required to defend.

Our advice is that it is likely that we would need to be prepared to spend around £40k as a minimum to see through a JR - and be prepared to meet almost the same cost again if we lost and had to meet the other sides costs as well as our own. Around £75k we were advised would be a prudent figure to keep in mind. Granted were we successful and had our costs met by the other side we might only have to find as little as £6k.

As little as £6k.

The average gross salary in Scotland stands at around £27.5k. Average savings in Scotland stands at around £7.5k. The median savings and salaries are of course likely to be lower in both cases. And legal aid is not always readily available.

It begs the question then, realistically, how many of us would be prepared to risk more than a year's salary, and their savings on a Judicial Review?

Those of you of a certain vintage will remember the famous headline from the soap opera Dallas. JR is dead. Well as a route to justice, JR is a dead option for most of our fellow citizens, community groups, charities and a goodly number of our environmental NGO's.

We need to acknowledge that this is a governance gap and see how best to address it.

I approach my next point, especially with large numbers of this audience with some trepidation. I might be risking the equivalent of swearing in church.

You see, I wonder whether the legal profession and courts in Scotland are ready, and or willing, to embrace the cultural change that a more effective model of access to environmental justice might ask of them. While I accept that I may have a lay, and indeed possibly biased view, it strikes me that that recent history might suggest that the legal profession, or more properly its representative bodies, does not do change well. See for example, the effective blocking of the introduction of Alternative Business Structures set out in a 2007 Act of the Scottish Parliament for around 15 years and counting may well be a case in point.

And the history of Judge led inquiries and Fatal Accident Inquiries in Scotland have taken the term 'justice delayed' to new depths. Judge led Inquiries are in the public mind the modern day equivalent of Harold Wilson's 'set up a Royal Commission' approach to kicking difficult problems into the long grass.

Environmental issues need to be resolved quickly and I would question whether our traditional structures and adversarial court procedures, pitting the skills of advocates against each other, and may the better advocate win, is sufficient for the type of scrutiny that environmental disputes will require. In many ways the more inquisitorial approach of Tribunals may well fit the bill better.

Any new body we may consider introducing to our governance structure whether Environmental Tribunal or Court needs to be fleet of foot, capable of objective investigations and armed with strong, deterrent powers.

Over 100 environmental courts or tribunals exist around the globe. If as part of a coherent governance structure we determine that such a body would add real value and would be right for us, I suggest we should have the humility to learn from best in the world. We may not have to reinvent this particular wheel.

And it may be more appropriate to start with the question ‘how can any innovation best meet Scotland’s needs?’ rather than ‘how best can we absorb new responsibilities into our current justice model?’

Scotland is in a very different place in terms of its environmental governance to where it was five years ago. ESS is one new element of that. It is now becoming an established organisation but is still in the process of developing. That development is taking place in the context of a volatile political context, at a Scottish, UK and international level.

At the same time, the environmental challenges that we face are similar to those of five years ago, but more pressing. We have significantly reduced emissions but getting to net zero will be much, much harder and the reality of what climate change will mean is starting to bite. The scale of nature loss and the inter-relationship between climate change and biodiversity is becoming clearer and a much higher priority. Air quality has improved considerably but as the evidence mounts for the health implications of poor air quality, we can expect to see tightening of standards further.

So, our environmental law has to be effective. Environmental standards have to be scientifically grounded, have public acceptance and critically monitored and reported against. The Scottish Government’s forthcoming consultation on its review of environmental governance should provide us with an opportunity for a thorough assessment of the how effectively the system is currently working, albeit quite early in ESS’ lifetime.

My advice to Government as they consider the scope of the review of environmental governance they are about to undertake is this:

Look forward. Not backwards to the decision to leave the EU.

Whatever we decide, the important outcome we should all seek is to create an effective, coherent, accessible environmental governance structure, with or without an environmental court or tribunal, that is accessible and can address in good time the major environmental challenges we face.

Of course, we shouldn't throw the baby out with the bathwater, there is much good work being done in our current governance structure. But nor should we be constrained by the status quo, or any longer be looking backwards to solve a Brexit induced problem, this is an opportunity that comes very rarely to assess and to meet Scotland's future environmental governance needs.

I hope we don't spurn the opportunity

I encourage you all to participate in the consultation on the review when it comes out. There's a real opportunity to be taken to make Scotland's system of environmental governance as effective as it can be.

With that, I'll conclude, and I look forward to your questions.

Thank you for listening.