

October 2023

ESS response to the Scottish Government consultation on their Report into the Effectiveness of Environmental Governance Arrangements

Introduction

1. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been part of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
 - monitor and take action to improve the effectiveness of environmental law and its implementation.
2. The Scottish Government has produced a report on the effectiveness of environmental governance arrangements as required under the UK Withdrawal From The European Union (Continuity) (Scotland) Act 2021 ('the Act'). ESS is a statutory consultee for this consultation, and our response is included below.

Response

Chapter 2. Overview of Environmental Governance

In summary, Environmental Standards Scotland's (ESS) overall views on environmental governance are:

- The review of environmental governance has taken an overly narrow scope. It concludes that the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') has filled the major governance gap created by the UK's exit from the European Union. However, the review represents a missed opportunity to consider the system of environmental governance more broadly and assess whether there is the potential to strengthen the system further in the post-EU exit context. For example, it has not considered whether there is scope to increase accountability with enhanced systems for the monitoring and reporting of environmental data and performance.
- ESS welcomes the broadly positive response from Scottish Government and stakeholders in the report about its work to date. ESS acknowledges that it is too early in ESS' organisational lifetime for a fuller judgement to be made.
- ESS' position is that greater access to environmental justice and compliance with the Aarhus Convention¹ is essential and should be a key outcome in any consideration of the system of environmental governance.
- ESS is not set up to fill all the environmental governance gaps left following the UK's exit from the European Union. When the UK was a member state of the EU, the Court of Justice of the European Union (CJEU) could take a more holistic view of an issue considering complex evidence and reviewing the legality of a complaint. As Scotland is no longer subject to oversight by the CJEU, this leaves a

¹ United Nations Convention on access to information, public participation in decision making and access to justice in environmental matters

gap in governance. The Aarhus Convention Compliance Committee (ACCC) is currently considering the absence of merits-based review in judicial review.

- In principle, a court, tribunal or other judicial measures, whether new or a development of existing structures, would help support better access to environmental justice for Scotland and compliance with the Aarhus Convention, provided it was well constituted and issues such as standing, cost and merit-based review were also considered.

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

The review of environmental governance review has taken a narrow scope, strictly tracking the requirements of section 41 of the Continuity Act. The Scottish Government concludes that provisions of the Act have filled the major governance gap created by the UK's exit from the EU. However, it has not taken the opportunity to consider the system of environmental governance more broadly and assess whether there is the potential to strengthen the system further in the post-EU exit context.

During the passage of the Continuity Act, debate in the Parliament resulted in inclusion of a duty to consult on the effectiveness of governance arrangements due to the 'gaps in governance that are likely to occur when the transition period ends.' In particular, it was argued at stage 2, that an amendment to the Bill would require the Scottish Ministers to bring forward and consult on proposals to address fully all the gaps in governance that were left by the inability to access the CJEU². At Stage 3, Roseanna Cunningham, the then Cabinet Secretary for Environment, Climate Change and Land Reform welcomed an amendment and its 'aim of ensuring robust and meaningful scrutiny of our arrangements in relation to environmental governance and access to environmental justice—particularly as we seek to keep pace with developments in Europe'.³

²Official Report, Environment, Climate Change and Land Reform Committee, Scottish Parliament, 24 November 2020, Session 5. UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 2 [<UNSPECIFIED>](#) ([parliament.scot](#))

³ Official Report. Meeting of the Parliament, 22 December 2020 UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 3. ([parliament.scot](#)) page 127,128

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

ESS is part of the environmental governance system in Scotland. This system incorporates:

- the development of environmental policy and law by the Scottish Government;
- the implementation of environmental policy and law by the Scottish Government, local authorities and public bodies such as SEPA and NatureScot;
- scrutiny and oversight of compliance with, and effectiveness of, environmental law, by ESS (which is accountable to the Scottish Parliament);
- overarching oversight by the Scottish Parliament; and
- independent judicial scrutiny and decision-making.

Prior to EU exit, environmental governance in the UK and Scotland also relied on governance functions at a European level - these are illustrated in Figure 1. Whilst parts of the European Commission (EC) structure have been replicated and adapted for the domestic level, which includes ESS, there are areas where functions have not yet been replicated or replaced. In the absence of these, without consideration of the broader picture and an assessment of where remaining or new governance gaps exist, it is unclear how effective environmental governance is (and will be).

Figure 1. European Union Governance Functions⁴



Law making

⁴ SPICe Briefing, Environmental governance in Scotland after EU Exit, Dr Annalisa Savaresi. 9 January 2020

As a devolved nation, Scotland can develop and make laws through the Scottish Parliament. Much of Scotland's domestic environmental law, estimated around 80%⁵, has ultimately derived from EU environmental law and policy. Whilst Scotland is no longer required to comply with EU rules, Scottish Ministers have indicated that, "where appropriate", they would like to see Scots law continue to align with EU law⁶.

Following EU exit, the Continuity Act put in place provisions to help manage this gap by giving Scottish Ministers powers to make provisions corresponding to EU law, where appropriate, in line with amendments or new legislation created by the EU, for a limited time. There is also a requirement to report to the Parliament on the use of this power annually, including how Scottish Ministers intend to use it in the future. Reports show limited use of this provision to date. Further information on the scope and transparency of Scottish Government decision-making related to the use of the 'keeping pace power' and to what extent Scottish Government routinely monitors EU legislative developments that may fall within the scope of the Continuity Act, has been sought by Parliament⁷. Additional reporting has been proposed by Ministers and is expected in October 2023 to expand on how the commitment is being applied.⁸ The Scottish Government has noted that the UK Internal Market Act (2020) and its implications for devolved competence is a significant constraint to their ambition to keep pace with the EU.

Review

Monitoring and reporting are significant elements of the role performed by the EC and the European Environment Agency (EEA), both on behalf of member states and to ensure that EU environmental law is effectively implemented. The EC produces an annual report

⁵https://archive2021.parliament.scot/S4_EuropeanandExternalRelationsCommittee/General%20Documents/SB_15-71_The_impact_of_EU_membership_in_Scotland.pdf, p.5

⁶ [Alignment with EU law and the Continuity Act | Scottish Parliament](#)

⁷ [continuity-act-draft-annual-report--letter-from-the-convener-of-the-constitution-europe-external-aff.pdf \(parliament.scot\)](#)

⁸ [EU Alignment - Continuity Act - Explanatory Note on Representations on 22 Report - LAID - 28 Jun 2023 \(parliament.scot\)](#)

on monitoring the application of EU law⁹. The report details infringements, complaints and enforcement activity by member state and area of law, including the environment.

Monitoring, and reporting on, the state of the environment is central to the EU's system of environmental governance¹⁰. The EEA has a significant role in monitoring, aggregating and reporting data on the state of the environment that supports the implementation and evaluation of environmental law and policy and provides a mechanism for accountability.

Whilst some of this falls within the responsibility of ESS, elements of the EC and EEA functions have not been fully replicated in Scottish environmental governance functions post-EU exit. Currently, it is unclear where monitoring as a replacement for that undertaken by the EC and EEA is delivered and its provision is fragmented. It is essential that there is a clear and effective system of monitoring and reporting to ensure that:

- environmental law and policy is fully and effectively implemented;
- there is means of reporting to assess (and provide) data on the application and efficacy of law and policy; and
- the public are kept informed on environmental performance.

Some pieces of ESS' work to date have identified and are considering potential gaps in how environmental performance is monitored and reported. For instance, in the delivery of the Climate Change (Scotland) Act 2009 public sector duty to contribute to meeting climate targets¹¹. ESS is also currently undertaking work on a range of topics including air quality, climate change and sewage in the aquatic environment and will report publicly on these issues in due course.

Enforcement

The EU has supranational oversight for compliance with environmental legislation by member states. The EU seeks to resolve issues informally (where possible) but can apply infraction as a tool to enforce legislative requirements where needed.

⁹ [Annual reports on monitoring the application of EU law \(europa.eu\)](https://ec.europa.eu/eia/annual-reports)

¹⁰ Environment policy: general principles and basic framework | Fact Sheets on the European Union | European Parliament (europa.eu).

¹¹ [ESS - Investigations-Climate-change-website-information-June22 \(environmentalstandards.scot\)](https://www.environmentalstandards.scot.nhs.uk/ess-investigations-climate-change-website-information-june22)

At the EU level, the CJEU has frequently engaged in complex evidential issues, reviewing the legality of acts, decisions or omissions and explicitly considering the EU environmental principles in deliberation. Concerns have been referred to the ACCC in 2017 that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the requirements of the Convention that both types of review be made available for eligible challenges).

Chapter 3. Environmental Governance Post-Brexit

- 1. Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?***
- 2. Do you have any further comments on the existing environmental governance arrangements?***

ESS welcomes the broadly positive response from Scottish Government and stakeholders in the report about its work to date and acknowledges that it is early in ESS' organisational lifetime for a fuller judgement to be made. The timing of the review, although required by the Act, is very early in the post-EU exit arrangements and this limits the evidence on which to be able to make detailed comment on efficacy and appropriateness. This is also reflective of:

- The need for ESS and public bodies to adjust to new process and procedures introduced by the Act.
- ESS having yet to fully utilise the range of enforcement powers provided by the Act, for example issuing a compliance notice or seeking judicial review. However, this aligns with ESS' expectations, thresholds and the circumstances in which the organisation would use formal powers and expect to join or apply for a judicial review. ESS welcomes the collaborative approach from stakeholders and public authorities to date, including through the process of informal resolution.
- The complexity of the environmental governance system. As part of that system ESS recognises the importance of effective communication and engagement about who we are, our role and how to raise concerns with us. This is set out within the strategic outcomes, and wider content of our [Strategic Plan](#). We look forward to continuing to work closely with stakeholders and communities to deepen that understanding and broaden our reach.

ESS recognises that its establishment and its operation represents a change from the pre-EU exit arrangements, particularly in terms of immediacy and accessibility of ESS and also the scope of its remit. ESS' functions and powers do not extend to the consideration of individual cases. Whilst ESS' investigations may take into account the way individual cases have been handled, this will often be to evaluate any wider or

systemic issues arising from these cases. ESS' governing legislation is clear that it cannot take enforcement action in relation to a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case). It is not ESS' role to act as a means of appeal for individual regulatory decisions made by public authorities.

ESS normally expects that the relevant public authority will have first had the opportunity to respond to any concern before ESS is contacted. This means that ESS will generally not consider a representation until the public authority has responded to the concerns. If a response has been received and concerns remain that the public authority is not compliant with environmental law or is not applying it effectively, a representation can be submitted to ESS.

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

More information on our progress can be seen in our [interim annual report](#) published in October 2022, we will also shortly (before the end of October 2023) be publishing our first full annual report and accounts covering the period October 2021 – March 2023. This is our key means of accountability to Scottish Parliament. It sets out an overview of our work and demonstrates our progress in support of our vision that Scotland's people and nature benefit from a high-quality environment and are protected from harm through the consistent application of effective environmental laws, which are recognised internationally as setting high standards.

Chapter 4 – 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?**
- 2. Do you have any further comments on existing access to justice on environmental matters?**
- 3. Do you have any further information or evidence on the issues presented in chapter four?**

Scotland, as part of the UK, is party to the United Nations Convention on Access to Information, public participation in Decision making and Access to Justice in environmental matters (the Aarhus Convention) and has specific obligations under it. Access to justice in environmental matters is critical and can empower individuals and organisations to protect and improve the environment.

ESS welcomes the Scottish Government's commitment to 'ensuring compliance with the terms of the Aarhus Convention'¹² and acknowledgement that improvement is needed. However, there is a long running history and range of known issues with Scotland's compliance with the Aarhus Convention which dates from 1998;

- Scotland has been found to be in breach of the Aarhus Convention in ten consecutive findings since 2014 by the UNECE ACCC.
- A long-standing issue identified by the ACCC has been that the Scottish legal system remains prohibitively expensive with regards to access to justice in environmental matters. Decision VII/8s of the ACCC requires the UK to submit an Action Plan to set out their strategy to implement the ACCC's recommendations, with a deadline of 1 October 2024. With input from Scottish Government, the UK Government submitted an Action Plan on 1 July 2022.
- Access to justice, the third pillar of the Convention, includes a right for parties with sufficient interest in a proposed project or activity covered by the Convention to seek a review of the decision-making process which considers the substantive

¹² [Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(www.gov.scot\)](#) Page 15.

legality of the decision, the procedural legality of the decision or both¹³. The report on the review of environmental governance notes that there are calls for merits-based review to be included within the Scottish judicial system. Scottish Government's view is that this could add delay, complexity and uncertainty, but it notes that this will be further considered in the development of the Human Rights Bill. When the UK was a member state of the EU, the Court of Justice of the European Union (CJEU) could take a more holistic view of an issue considering complex evidence and reviewing the legality of a complaint. As Scotland is no longer subject to oversight by the CJEU, this leaves a gap in governance.

- It is disappointing that the review does not consider concerns that have also been referred to the ACCC in 2017, regarding access to justice, in particular that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the Convention requirements that both types of review be made available for eligible challenges). This is a live issue awaiting a decision by the ACCC.

The Scottish Government has set out in its review a range of mechanisms which are in development and work is underway to help realise their commitment to ensuring that there is effective access to justice on environmental matters in Scotland. Whilst these measures should support better access to justice, it is unclear when these will come into effect, whether they will be sufficient and how their effectiveness will be monitored and evaluated.

On the specific proposals, ESS welcomes the proposed human right to a healthy environment and associated duties on public bodies, which may be another route to increase access to justice. However, without the full detail, especially around how the right will be defined and enforced, it is too early to judge what the practical implications of the new right will be. Also, in an already complex environmental governance landscape, it will be important that public bodies are clear on their responsibilities, and individuals on how to exercise the right, for it to be effective.

¹³ [Aarhus Implementation Guide interactive_eng.pdf \(unece.org\)](#)

It is positive that the range of tools available through judicial remedies could be reviewed as part of the Human Rights Bill proposals and it is important that the inter-related issues of cost, merit and standing are also considered in combination. The Scottish Government should strive to ensure full compliance with the Aarhus Convention by demonstrably meeting the requirements and ensuring that the Scottish legislative and judicial framework fully embeds the rights as set out in the Convention.

The review of environmental governance also makes reference to the pending Scottish Civil Justice Council (SCJC) review of Protective Expense Orders (PEOs) and plans for legal aid reform. Reforming the fee structure may support compliance with Aarhus Convention procedures. ESS has considered this as part of a pre-investigation on compliance with the Aarhus Convention. This investigation is paused, pending the environmental governance review and the SCJC's considerations. ESS looks forward to seeing the outcome of the SCJC's review on PEOs and whether this would help address the "prohibitively expensive" barrier in Scotland.

Another important element of access to environmental justice includes the existence and availability of environmental data and information. Our [Baseline Evidence Reviews](#) and initial analysis on priority analytical topics has found that the availability of environmental data is variable, with some areas and topics having better coverage than others. However, being able to access information is an important part of being able to monitor change and understand implications for the environment. This is also fundamental to being able to raise evidence-based concerns.

Chapter 5 – 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?**
- 2. Do you have further comments on whether an environmental court can enhance governance arrangements?**
- 3. Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?**

The Scottish Government's review is clear that it 'does not see any strong argument for a change in the balance of parliamentary, administrative, and judicial roles in decision making on environmental matters, and, in particular, for the creation of a specialist court'¹⁴.

ESS' position is that greater access to environmental justice and compliance with the Aarhus Convention is essential and should be a key outcome in any consideration of the system of environmental governance.

ESS welcomes the additional information provided by Scottish Government on their reasoning, which brings in stakeholders' views and draws on the United Nations Environment Programme Environmental Courts and Tribunals – 2021: A Guide for Policy Makers. The absence of this was a weakness in the Scottish Government's review of environmental governance. However, as the UNEP report sets out, there are a range of different examples of how environmental courts/tribunals are working across the world and the number and spread of environmental courts have been increasing.¹⁵ An analysis of the pros and cons of different models and how they would fit into the Scottish environmental governance systems would have been valuable.

The Scottish Government notes the 'numbers of environmental crime cases prosecuted in the courts is relatively small'¹⁶ and from its 2016 consultation that 'there would be relatively few cases heard in a specialist environmental court given the diversity of

¹⁴ [Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(www.gov.scot\)](#)

¹⁵ [UNEP Environmental Courts and Tribunals – 2021: A Guide for Policy Makers](#)

¹⁶ [Environmental Governance Review Briefing Paper on an Environmental Court.pdf \(consult.gov.scot\)](#) p.8

environmental matters and the relatively small number of cases which end up being pursued'. The review also notes that ESS has yet to use judicial measures, which is part of the reasoning for the position that Scottish Government does not see any strong argument for the creation of a specialist court. There are already concerns about the impact of prohibitive cost on access to environmental justice. Without a fuller understanding of whether the current system discourages environmental cases to come to court and whether desired outcomes are achieved, the potential barriers to access to environmental justice should be considered further as part of any decision on an environmental court or tribunal.

ESS' view is that in principle, a court, tribunal or other judicial measures, whether new or a development of existing structures, would help support better access to environmental justice for Scotland, provided it was well constituted and issues such as standing, cost and merit-based review are effectively addressed. This could help address issues of the prohibitive cost of seeking a review and provide the opportunity to have substance examined rather than just procedural issues.