

Contact: Shivali Fifield, Chief Officer

Edward Mountain MSP
Convener, Net Zero, Energy & Transport Committee
Scottish Parliament
Edinburgh
EH99 1SP

CC: Gillian Martin, Acting Cabinet Secretary for Net Zero and Energy
Charles Stewart-Roper, Head of the Environmental Governance and Strategy Unit, Future
Environment Division

9 December 2024

Dear Convener,

Response to Scottish Ministers' Statement on Environmental Governance

We are writing in response to the Scottish Ministers' Statement on the Effectiveness of Environmental Governance Arrangements ('the Statement'),¹ which was laid in Parliament on 19 November and sets out their recommendations in response to the views raised in the consultation on the Review of the Effectiveness of Environmental Governance Arrangements ('the Review').

To inform the Committee's scrutiny of Environmental Governance in Scotland, ERCS submitted written evidence in October 2023² and was grateful to provide oral evidence in January 2024,³ where we shared our concerns on the Review. Although very delayed, it was helpful to read the summary of views expressed in response to the consultation which broadly reinforce ERCS's concerns on the quality, scope and assumptions of the Review.

We understand that now the Statement has been published, you will invite the Cabinet Secretary for Net Zero, Energy and Transport to give evidence on environmental governance. We welcome further scrutiny of the Ministers' recommendations, and additional consideration of how best to strengthen Scotland's environmental governance regime.

¹ Scottish Government (Nov 2024) [Statement on the Effectiveness of Environmental Governance Arrangements](#)

² ERCS (Oct 2023) [ERCS submission to NZET Committee: Review of the Effectiveness of Environmental Governance consultation](#)

³ Net Zero, Energy and Transport Committee (Jan 2024) [Official Report: Net Zero, Energy and Transport Committee 2nd Meeting 2024, Session 6](#), p.26-43



Below is our response to the Ministers' recommendations which we hope will be helpful in informing questions for the evidence session.

1. Having fully considered the views raised in the consultation, the Scottish Government's recommendation is that there is no need to revise the environmental governance provisions in the Continuity Act.

This recommendation continues to assume that the establishment of Environmental Standards Scotland (ESS) has fully met the governance gap arising from the UK leaving the EU. Our reasons for disagreeing with this are clearly set out in our response to the Consultation⁴ and are referred to in the Statement.

We maintain that ESS alone is unable to meet all dimensions of the gap, primarily because it does not have the powers to consider individual cases and cannot replace a judicial route to remedy which is affordable, accessible, fair, timely and effective.

2. Having fully considered the views raised in the consultation, the Scottish Government's recommendation is that ESS, when they revise their strategy, should give further consideration to the conditions where it would be appropriate to investigate the individual circumstances of a local area, group or community, given the restrictions on the exercise of its functions. We further recommend that the Parliament considers this matter in their oversight of ESS's activities and in particular when reviewing a draft revised strategy in due course.

This recommendation seems to contradict the first. ESS does not have the statutory powers to investigate individual cases, and we broadly support the three provisions of the Continuity Act which set this out (Sections 27 and 32, Schedule 2, para 1(1) and Section 26(2)).

The arguments that we, and others, have raised about these provisions is that there remains a gap in environmental governance arrangements that cannot be met by ESS. Our solution is to have a judicial route to remedy which is affordable, accessible, fair, timely and effective.

We do not agree that ESS should consider how to extend their powers in this area. ERCS has now made eighteen representations to ESS and we support their remit to address systemic failures. All our representations have been based on cases from our Advice Service where we have been able to identify the systemic problems arising from individual cases. From the 340 enquiries now received, we do not have any examples of cases which are outwith this remit that we would want to submit for investigation.

The Scottish Public Service Ombudsman (SPSO) already exists as an independent scrutiny and enforcement body to address individual complaints about organisations providing public services

⁴ ERCS (Oct 2023) [Review of the Effectiveness of Environmental Governance - Consultation Response](#)



and ESS has referred us to them on several occasions. Adding ESS would only result in further fragmentation to an already confusing, complex and time-consuming system with limited remedies.

A dedicated Scottish Environment Court (SEC), acting as a one-stop shop for environmental cases, would provide a more appropriate route to remedy for individual cases, especially if designed to incorporate the option of alternative dispute resolution. Such a court could also improve ESS' own effectiveness in enforcing environmental laws, by giving them an affordable means of exercising their enforcement powers.

3. Having fully considered the views raised in the consultation, the Scottish Government will continue to work to improve access to justice on environmental matters. We will carry out further engagement with stakeholders on our approach to environmental rights.

This recommendation offers no specific details on how to fully address Scotland's long-standing breach of the Aarhus Convention's access to justice requirements or how the Scottish Government will implement the Convention's Meeting of the Parties' (MoP) recommendations outlined in Decision VII/8s;⁵ the UK Final Progress Report published on 29 November 2024 contained no further details in this regard.⁶ ERCS sees no need for further stakeholder engagement when clear and actionable recommendations by the Convention's governing bodies remain unmet.

ERCS has consistently detailed the reforms needed to make access to justice not prohibitively expensive: repeal regulation 15 of the Civil Legal Aid (Scotland) Regulations, overhaul the Protective Expenses Orders (PEO) regime to make access to justice affordable, and replace the 'loser pays' rule with Qualified One-Way Cost Shifting.⁷

Aswell as the evidence sessions on the barriers to access to justice convened by the NZET Committee in January and March, ERCS, ESS and the Law Society of Scotland gave evidence to the Equalities, Human Rights and Civil Justice Committee in November restating the need for an effective and affordable judicial route to remedy for environmental matters, and to ensure access to justice is based on the needs and merits of the case, not on the parties' ability to pay.⁸

ERCS's initial analysis of Scotland's contribution to the UK Progress Report indicates that most of the MoP recommendations have not been implemented. The Scottish Government refers to further action which will be taken on various matters, but the next steps detailed in the report are vague and lack clear timescales.

⁵ Economic Commission for Europe (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#)

⁶ Defra (Nov 2024) [UK Final Progress Report to the Aarhus Convention Compliance Committee](#)

⁷ See ERCS (July 2024) [Scotland's new protective expenses rules remain non-compliant with the Aarhus Convention](#); ERCS (June 2024) [Scotland's lack of progress delivering access to justice](#); and ERCS (July 2022) [Evaluation of Scotland's action plan on access to environmental justice](#)

⁸ Equalities, Human Rights and Civil Justice Committee (Nov 2024) [Official Report: Equalities, Human Rights and Civil Justice Committee, 24th Meeting 2024, Session 6](#)



There are no details on the changes made to the PEO rules and, while we welcome the Scottish Civil Justice Council (SCJC) commitment to consult on extending the PEO rules to some sheriff court actions, this does not go far enough. ERCS, together with RSPB, Friends of the Earth and Client Earth is preparing a formal response to the UK Progress Report and will share this with the NZET Committee in due course.

4. Having fully considered the views raised in the consultation, the Scottish Government will continue to consider on a case-by-case basis whether new or amended environmental legislation should specify that cases should be heard by the Land Court, taking full account of the capacity of that Court.

ERCS, along with many other stakeholders, has advocated for a dedicated Scottish Environment Court (SEC) to increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.⁹

This recommendation suggests that the jurisdiction of the Land Court may be expanded over time. However, we are concerned that a reliance on the discretion of Scottish Ministers to expand the jurisdiction of the Land Court on a 'case-by-case basis' will not resolve the current fragmentation in legal routes to remedy for environmental cases. Instead, it would result in a piecemeal and incremental approach to reform over a very long time period, and not provide the clarity afforded by the establishment of a dedicated SEC.

We maintain the need to establish a specialist committee or working group, that can revisit evidence for a dedicated SEC and consider the institutional design most appropriate to Scotland.

Overall, ERCS remains concerned that Scottish Ministers have presented no credible solutions to address Scotland's persistent procedural and substantive environmental governance failures. We hope our comments can provide helpful input to inform the views and approach of Committee members when assessing appropriate steps to be taken forward in this area.

Yours sincerely,

Shivali Fifield
Chief Officer,
Environmental Rights Centre for Scotland

⁹ ERCS (May 2023) [Briefing: The clear and urgent case for a dedicated Scottish Environment Court](#); ERCS/Gemmell (Feb 2023) [The Clear and Urgent Case for a Scottish Environment Court](#); and ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#)