



Scottish
Environment
LINK

5 Atholl Place

Perth

PH1 5NE

T: 01738 630804

E: enquiries@scotlink.org

W: www.scotlink.org

Edward Mountain MSP
Convener, Net Zero, Energy & Transport Committee
c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

(By email to: netzero.committee@parliament.scot)

6th December 2024

Dear Convener,

Effectiveness of environmental governance arrangements

Thank you again for the opportunity to provide evidence to your committee, [on 16th January 2024](#), in relation to the Scottish Government's (then) ongoing review of environmental governance arrangements.

As you will be aware, the Cabinet Secretary has now formally laid a statement to the Scottish Parliament, under section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, setting out the Scottish Government's conclusions. This was [published on 19th November](#), and also notified to your Committee by [letter](#).

Ahead of your Committee inviting the Cabinet Secretary to provide evidence, and to complement our evidence in January, I am writing to set out LINK's observations on the statement as published and, in particular, the Scottish Ministers' four recommendations.

Consultation process and analysis

The consultation process was undertaken according to standard Scottish Government procedure, mainly through the online portal but with hard copies of the report/consultation paper available and responses accepted by letter or email. In addition, a number of (online) workshops were held. While the number of responses received was not high, all those with interest and/or expertise were able to respond and the responses can be considered a fair representation of the views those affected or with appropriate expertise.



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However, LINK has some concerns about the presentation, by the Scottish Government, of “[the views expressed](#)”. While noting some concerns expressed and disagreements with the Scottish Government’s assertions in the consultation paper, these appear, in places, to be downplayed in order to support the final recommendations (which, coincidentally, do not differ significantly from the original proposals in the consultation paper).

For instance, there were 25 responses submitted, of which [24 have been published](#) (although 2 of those do not open¹). The ‘analysis’ notes that “several of the responses expressed their support for the creation of an environmental court or tribunal” and that “several stakeholders expressed their disappointment at the Scottish Government’s position”. What this omits to note, however, is that this support and/or disappointment was, in fact, expressed by the majority of those who expressed an opinion. LINK’s review of the 24 responses suggests that at least 13 responses indicated strong support for an environmental court/tribunal or, at least, further analysis and consideration of the details of such a proposal.

The ‘analysis’ further asserts that “several responses expressed their agreement with the Scottish Government position that there is no strong case to establish an environmental court at this point”. However, LINK’s review of the 24 published responses could find only one that explicitly stated support the Scottish Government’s position. Other respondents expressed no view at all.

Thus, the analysis appears to use the word “several” to describe both the majority position and a minority of one (or, potentially, two if the unpublished response was supportive of the Scottish Government).

Among those supportive of an environmental court, or further analysis, in addition to LINK and our members, such as ERCS, RSPB Scotland, etc, was notably Environmental Standards Scotland, who said:

“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.”

In addition, one individual respondent noted that “*the suggestion that environmental justice provisions in the proposed Human Rights Bill for Scotland will make a court unnecessary is not borne out by the current consultation on that proposal*”. Given the Scottish Government’s recent postponement of its Humans Rights Bill (for an unknown duration), this comment is even more pertinent.

This most recent consultation, of course, [follows similar consultation exercises in 2006 and 2016](#) where many, if not most, respondents to both consultations supported an environment court or

¹ One of responses that does not open is from the Law Society of Scotland. However, we note that their representative’s [evidence to the Committee in January](#) included the observation that “The Law Society considers that a well-designed environmental court could provide significant improvements to access to justice.”



sought a more comprehensive assessment² – and many supported a move towards an ECT. Stakeholders’ views appear to be, once again, misrepresented and ignored.

The Scottish Government recommendations

1. Environmental Governance Arrangements

The first of the Scottish Government’s recommendations is that there is no need to revise the environmental governance provisions in the Continuity Act. Subject to comments below on ‘individual cases, this may be appropriate. However, we note that s.41(2)(a) of that Act requires that the review consider “whether the provisions of this Chapter have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU”.

This is, in fact, a rather wider question than whether the “provisions in the Continuity Act” ought to be revised – as “effective and appropriate governance” post-Brexit might involve new or amended legislation or policy beyond the provisions of the Continuity Act. Indeed, the issues of access to justice and/or an environment court (addressed separately) are such matters – but respondees to the consultation process raised many other examples – and this narrow recommendation is an example of the Scottish Government’s unnecessarily narrow interpretation of the review’s remit and purpose.

This was a concern that we expressed to the Committee in January:

“Across stakeholders, there was general disappointment with the Government’s report, which was not purely with its outcomes but with the quality of its assessment; our biggest concern was probably about the lack of firm proposals. Although we welcomed the publication of the additional briefing paper during the consultation phase, it did not provide much more substance. ... from the various responses that are publicly available and have been supplied to the committee or have been published by the respondents, it is clear that the concerns are widespread and that, essentially, those concerns relate to the very narrow interpretation of the questions, the depth of the assessment and the lack of any real analysis of the pros and cons of different measures.”³

These concerns have not been addressed by the final report and recommendations.

On the issue of ‘individual cases’, LINK acknowledges and welcomes the statement’s conclusion that “there is a perceived difficulty in bringing to the attention of ESS matters concerning the application of environmental law in a particular geographical area, and the environmental impact on a particular group or community. We understand the position raised in consultation responses that communities can feel powerless in the face of circumstances leading to them suffering poor environmental quality. We recognise that it is not always straightforward to separate concerns about the

² https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/NZET-16-01-2024?meeting=15657&iob=133593#orscontributions_C2551873

³ https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/NZET-16-01-2024?meeting=15657&iob=133593#orscontributions_C2551831



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application of environmental law in a local area from the impact of individual regulatory decisions for which ESS is not a point of appeal.”

This is, in fact, of acknowledgement of the issues that LINK and others have raised – not least, during the consideration of the (then) UK Withdrawal from the European Union (Continuity) (Scotland) Bill. As such, it is welcome development.

However, the proposed solution to this issue is that (a) the exclusions in s.27 and s.32 of the Continuity Act are appropriate and should remain, as it is “not ESS's role to act as a point of appeal for individual planning, licencing and consenting decisions” and (b) ESS “should give further consideration to the conditions where it would be appropriate to investigate the individual circumstances of a local area, group or community” when they revise their strategy.

This recommendation by Scottish Ministers has a number of issues. First, if ESS’s role is never to be “a point of appeal for individual planning, licencing and consenting decisions” (or a non-judicial route to remedy), then there must be others. On the one hand, if a non-judicial route to remedy is envisaged (formerly the Commission, now ESS), but it is not to be ESS, where/who is it? On the other hand, if there are to be no non-judicial route, the should be judicial routes – yet, these do not, for most, exist because of issues related to access to justice and the absence of an environment court. As these issues are not addressed properly (see below), this recommendation in relation to ESS leave the problems faced by communities unresolved.

Secondly, while LINK welcomes the acknowledgement of the issue, the recommendation that ESS seeks to resolve the matter in revising its strategy appears confused. How can a revised strategy both comply with the exclusions in s.27 and s.32 of the Continuity Act (as it would be required to) and, at the same time, adopt an approach to investigate cases that are excluded?

2. Access to justice on environmental matters

It is welcome that the Scottish Government’s review acknowledged issues related to access to justice on environmental matters, and non-compliance with the Aarhus Convention. This acknowledgement is maintained in the final statement.

However, we said in our evidence to the Committee in January that:

“The Government refers to five current pieces of work that are on-going to aid access to justice. ... The five processes that are referred to are welcome and positive. They might lead to solving the problem, but there is no clear demonstration that they will.”⁴

The final statement and recommendation that “the Scottish Government will continue to work to improve access to justice on environmental matters” does not offer such a demonstration. Indeed, of the five proposed processes, it acknowledges that one (the planned Human Rights Bill) has now been postponed. Thus, while the statement notes that “majority of the 25 responses to the consultation

⁴ https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/NZET-16-01-2024?meeting=15657&iob=133593#orscontributions_C2551893



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raised concerns about access to justice on environmental matters”, there is no definitive proposal as to when and how the Government will address these concerns.

We note, therefore, that the Scottish Government continues to make no progress in addressing its breach of the Aarhus Convention’s Article 9 access to justice requirements and the actions needed to meet the 1 October 2024 deadline (now extended to 27 November) set by the Convention’s governing institutions⁵.

3. Environment court

The earlier review indicated that “the Scottish Government does not see any strong argument for a change in the balance of parliamentary, administrative and judicial roles in decision making on environmental matters, or for the creation of a specialist court”. The final statement reaches, in effect, the same conclusion, with the Scottish Government remaining “of the view that the creation of a specialist court is not necessary”.

This conclusion was reached despite acknowledging that “there was strong support from environmental NGOs and ESS for the establishment of an environment court” and that “some stakeholders called for a further process to consider the possible creation of a specialist court”. Indeed, as explored above, in LINK’s view, a great majority of the responses supported an environment court, or further consideration, or offered no view. Only one response could be identified that supported the Scottish Government’s position.

It is welcome, however, that the Scottish Government acknowledges that “environmental courts play a valuable role in the environmental governance structures in some jurisdictions” – albeit that LINK would consider that over 2500 jurisdictions across nearly 70 countries where environmental courts and tribunals exist to be more than “some”. We also welcome the observation that “role of the Land Court will continue to develop following the merger with the Lands Tribunal” and commitment that 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”.

However, we are concerned that no details of this case-by-case consideration are offered – and how, indeed, this might be carried out without the more in-depth options appraisal of the type requested by many stakeholders. This approach also appears to be one of ‘incrementalism’ that would do little to address the current fragmentation in routes to remedy and not provide a court with comprehensive jurisdiction.

However, notwithstanding the above, this commitment appears to leave open the option of the new (merged) Land Court evolving into a Land and Environment Court. This is one option that LINK and its members have frequently proposed as one possible way forward – and, thus, this possibility is welcome. However, it remains only a possibility and one ‘offered’ in absence of any comprehensive

⁵ https://www.ercs.scot/wp/wp-content/uploads/2024/06/ERCS_Aarhus-access-to-justice-briefing_June24-1.pdf



analysis of the pros and cons, or the alternatives. The Scottish Government's conclusion and recommendation remains contrary to the majority of responses to the consultation – and based on the assertions presented with limited evidence.

In conclusion, while welcoming some limited aspects of the statement, as presented, LINK considers that the concerns outlined in our response to the consultation and in our evidence to the Committee in January remain unresolved. In our view, the Scottish Government has not offered a credible argument to support its four key recommendations (which, in effect, amount to 'doing nothing' for the time being).

I hope these additional comments, which complement our evidence in January, are of value to the Committee and that you are able to take them into account when discussing this issue with Cabinet Secretary and when determining your next steps.

Yours sincerely,

Lloyd Austin
Convener, Scottish Environment LINK's Governance Group



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