Developments in environmental justice in Scotland

Consultation analysis and Scottish Government response

September 2017

Scottish Government
Riaghaltas na h-Alba
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Abbreviations and acronyms

ACCC	Aarhus Convention Compliance Committee
Brexit	British exit from the European Union
CJEU	Court of Justice of the European Union
COPFS	Crown Office and Procurator Fiscal Service
EC	European Community
ECT	environmental court and/or tribunal
EU	European Union
NGO	non-governmental organisation
PEO	protective expenses order
RSPB	Royal Society for the Protection of Birds
SCJC	Scottish Civil Justice Council
SEPA	Scottish Environment Protection Agency
SNH	Scottish Natural Heritage
SNP	Scottish National Party
SSE	(formerly Scottish and Southern Energy)
UKELA	the UK Environmental Law Association
WWF	World Wildlife Fund

Acknowledgements

The Scottish Government would like to thank all individuals and organisations who took the time to consider and respond to the proposals contained in the consultation paper “Developments in Environmental Justice in Scotland”.

Executive summary

The consultation sought the views of interested parties on what constitutes an environmental court case, whether recent changes to the legal system in Scotland have improved how environmental cases, both civil and criminal, are dealt with, and whether further changes are necessary, in particular whether there is a need for an environmental court or tribunal. The consultation was a response to the SNP 2011 Manifesto commitment, made in the context of wildlife and environmental crime, to publish an options paper on an environmental court or tribunal, but widened in scope as the Scottish Government recognised that there were calls for an environmental court or tribunal to deal with civil environmental justice.

The consultation response indicated that “environmental justice” is a very wide-ranging term, covering aspects of civil justice, criminal justice, and administrative justice. The responses showed the difficulty in coming to a definitive view as to what constitutes an environmental justice issue. Although the consultation paper focussed on court-based issues, two of the respondents considered that environmental justice encompasses a much wider spectrum of issues than just the court processes.

Though the justice reforms that have a bearing on environmental matters have been welcomed by respondents, most did not think that they have gone far enough. This is particularly the case in relation to civil environmental justice with perceived deficiencies in the judicial review and statutory appeals being highlighted by many of the respondents including criticism of Protective Expenses Orders (PEOs) and legal aid. There were fewer comments on problems within the criminal environmental justice system with the main criticism being concerned not with the court processes but with the enforcement powers of Scottish Environment Protection Agency (SEPA).

A substantial majority of the respondents favoured the introduction of an environmental court or tribunal. The majority envisaged a specialised court or tribunal as a means to reducing costs and improving access to justice in civil environmental matters. However, there was no clear consensus on whether such a court or tribunal should deal with criminal or civil cases, whether it should be a specialised sheriff court, a specialist tribunal, or a specialised court within the Court of Session, and within each of those jurisdictions, what types of “environmental” cases should be considered.

Just under half of the respondents also considered that a wide ranging review of environmental justice was necessary, looking beyond the court system to encompass other means of resolving environmental disputes and also considering administrative environmental justice.

The Scottish Government has considered the issue carefully and is fully mindful of the views of the respondents to the consultation. The variety of views on what sort

of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape caused by Brexit lead Ministers to the view that it is not appropriate to set up an specialised environmental court or tribunal at present. The Government will, however, remain committed to environmental justice and will keep the issue of whether there should be an environmental court or tribunal or even a review of environmental justice under review.

Roseanna Cunningham	Cabinet Secretary for the Environment, Climate Change and Land Reform
Fergus Ewing	Cabinet Secretary for the Rural Economy and Connectivity
Annabelle Ewing	Minister for Community Safety and Legal Affairs
Kevin Stewart	Minister for Local Government and Housing
Paul Wheelhouse	Minister for Business, Innovation and Energy

Introduction

Purpose

1. The purpose of this analysis is to provide a summary of the key themes emerging from the responses and the argument behind these. The Scottish Government is considering the main issues raised by the respondents and its response is contained at the end of this document.

Background to consultation

2. The issue of environmental justice has been under consideration by the Scottish Government for some time. In 2006, it issued a consultation paper "Strengthening and streamlining: the way forward for the enforcement of environmental law in Scotland". This was a consultation on a wide-ranging discussion paper looks at how the Scottish environment could be improved by enforcing existing laws better. It examined ways in which the system could be more effective, including greater promotion of environmental management systems, the possible introduction of administrative penalties by regulators for those breaches which are unlikely to lead to court prosecutions, and whether environmental cases would be pursued more effectively if there was an environmental courts system established in Scotland.

3. Although the above consultation concentrated mainly on criminal issues, the Scottish Government has also be mindful of civil environmental justice matters. The United Kingdom is a signatory to the Aarhus convention – an international environmental agreement concerned with environmental protection and individuals' rights in relation to environmental decision-making. The Scottish Government has been aware of its obligations under the three "pillars" of the Convention:

- the right of access to information;
- public participation in decision-making; and
- access to justice.

4. The consultation paper "Developments in Environmental Justice in Scotland"[1] was published on the Scottish Government Citizen's Space on 18 March 2016. It was drafted to fulfil a commitment made in the 2011 manifesto:

> "We have received representations calling for the creation of an Environmental Court in Scotland, potentially building on Scotland's current Land Court. We are open-minded about this, but wish to seek wider views. We will, therefore, publish an options paper as the basis for a wider engagement on this proposal.

5. Although the manifesto commitment was made in the context of environmental and wildlife crime, it was expanded to seek opinions also on civil environmental justice and it demonstrated the changes that the Scottish Government has made to ensure that it is Aarhus compliant.

[1] http://www.gov.scot/Publications/2016/03/6111

6. The consultation asked for views on three issues.

- What types of case, both civil and criminal, do you consider fall within the term “environmental”? Please give specific examples. Which processes are currently used to deal with those cases you have identified? Do you consider those processes are sufficient?
- This paper outlines the improvements to the justice system that this Government has delivered in relation to environmental justice. Do you agree that these changes have improved how environmental cases, both civil and criminal, are dealt with in Scotland? If you do not agree, please explain why.
- Given the extensive changes that have already been delivered to the justice system (as outlined in this paper) and the need to ensure that any further changes are proportionate, cost-effective, and compatible with legal requirements, are there any additional ways in which the justice system should deal with both civil and criminal environmental cases? If so, please detail these. In particular, do you consider that there should be a specialist forum to hear environmental cases? If so, what form should that take (e.g. a court or tribunal)? Please provide reasons for your response

The 12-week consultation period ended on 10 June 2016 although extensions were granted until 21 June 2016.

Analysis

Response overview

7. There were 22 responses to the published consultation. The respondees can classified as in table 1 below.

Table 1

Respondee type	Number
legal organisation	2
environmental lawyer	1
environmental non-governmental organisation (ngo)	5
wildlife ngo	1
planning ngo	1
energy company	2
public utility	1
animal charity	1
community group	1
Landowners' association	1
government organisation	1
individual	5

Two of the respondents stated that as well as the comments they had made, they agreed with everything in the Friends of the Earth Scotland response, and we have taken account of that in this analysis.

8. In addition, an environmental non-governmental organisation (NGO) organised an email campaign. The campaign email was addressed to the Cabinet Secretary for Justice asking him "to take steps to establish a specialist environmental court or tribunal … for Scotland within the first year of this new Government" and requesting that each be regarded as a response to the consultation. There were 205 such emails including 14 from English addresses, 1 from a Welsh address, and 1 from a German address. 9 duplicates are not included in these figures nor are campaign emails received after 21 June 2016.

Preliminary issues

9. A number of respondents provided a general introduction before going on to consider the consultation questions. Some of these raised issues about the consultation. These fall into two categories—dissatisfaction that the consultation

was not the options paper promised in the SNP manifesto and dissatisfaction with the scope of the paper.

10. Some respondents, in particular the Law Society of Scotland, Professor Reid, the UK Environmental Law Association (UKELA), and the Scottish Environment LINK, were concerned about the scope of the paper. In particular, the concern was that whereas the paper only considered court reform, environmental justice is much wider than the cases which come to court. They considered that the paper needed to address the wider system of environmental justice in Scotland.

11. The Law Society stated: "In our view, therefore, the paper is too narrow in its scope and does not embrace the range of ways in which environmental justice can be sought." UKELA commented: "The consultation paper is very disappointing in that it addresses only a narrow range of the environmental matters within the 'justice system'. In particular, by expressly excluding first instance decision-making and administrative appeals outside the court system (and in particular by expressly excluding the planning system), an important element that needs to be considered is overlooked and a very large area of activity is omitted."

12. Professor Reid, UKELA, and the Scottish Environment LINK were particularly concerned by the omission of a consideration of first instance decision-making and appeals to ministers and other non-judicial bodies. They considered that this was a very significant area of environmental justice which was omitted, affecting the resolution of conflicts and disputes as well as enforcement measures. Professor Reid went on to state that this "in effect excludes from consideration large areas of activity where environmental disputes arise, most notably the town and country planning system; not only does this skew the nature of the environmental cases being considered, but it affects the assessment of issues such as the amount of business to be covered with consequential effects for structural decisions (if - for argument's sake - an environmental tribunal were contemplated, the amount of business it would handle would be greatly affected if all planning appeals were directed to it whereas without this large stream of work its viability looks very different)".

13. Three respondents (Professor Reid, UKELA, and Ian Cowan) considered that the consultation was not the options paper promised in the SNP manifesto. For example, Ian Cowan states: "Before answering any questions, I have to say that the consultation is a massive disappointment, compared to what it could have been. It is supposed to fulfil the 2011 SNP manifesto commitment to 'publish an options paper as the basis for a wider engagement' on the proposal to create 'an Environmental Court in Scotland, potentially building on Scotland's current Land Court', but the reader has to look carefully to find any discussion of options for an environmental court or tribunal in the 16 pages of substantive text."

14. The SSE response also concentrated on the consultation's focus: "The term 'environmental' is potentially very wide – it can encompass any case that concerns protection of the environment. For the purposes of this consultation response, our own interests are predominantly in relation to judicial review applications where a challenge is made to the consent for an energy development. Where the underlying legal basis for the challenge concerns an allegation that there has been a failure to

protect an identified environmental receptor, or, more generally, to respect the public interest in protecting the environment, in our view that is sufficient to make the case of an 'environmental' nature."

Question 1

What types of case, both civil and criminal, do you consider fall within the term "environmental"? Please give specific examples. Which processes are currently used to deal with those cases you have identified? Do you consider those processes are sufficient? Please provide reasons for your response.

Types of environmental cases

15. 18 of the 22 responses provided an answer to this question. Many of the answers noted that there was a wide range of types of case. As the Law Society of Scotland wrote:

> "We believe that the term 'environmental', covers a huge range of both civil and criminal matters and it would therefore be difficult to provide a coherent list."

16. The respondents had different approaches to answering the first question. Some used a classification based on types of case, some simply gave examples of cases, and others classified environmental cases in terms of legislation and/or regulating body.

17. The Law Society of Scotland suggested that cases could be classified under three headings:

- administrative decision making and judicial review;
- civil matters; and
- criminal prosecutions.

18. It is possible to classify the suggestions and examples as to what constitutes an environmental justice issue given by other respondents under these three headings:

- Administrative decision making and judicial review
  - town and country planning cases
  - maritime cases
  - energy consent decisions
- Civil matters
  - some taxation issues where the scope of tax or duty liabilities, or reliefs and exemptions, are based on environmental criteria (or have significant environmental consequences);
  - nuisance actions;

- damages actions arising out of environmental issues;
- issuing nature conservation orders;
- regulation of activities in Sites of Special Scientific Interest;
- prevention of harm from invasive non-native species; and
- restrictions on use of land.

- Criminal prosecutions
  - pollution prevention and control;
  - wildlife crime including:
    - the deliberate damage to species at a population scale (illegal killing, e.g., the deliberate and systematic removal of pine marten across Scotland); and
    - the illegal releases of species such as the release of beaver into the Tay catchment;
  - environmental crime including:
    - the deliberate or foreseeable and unsustainable or irrecoverable degradation of scheduled areas (e.g. ploughing and re-sowing protected Machair grassland habitats); and
    - pollution of water, soil and air (e.g., burying toxic waste and contaminating ground water) prosecutions; and
  - dog fouling.

19. Scottish Natural Heritage (SNH) was one of the respondents who chose to use a classification based on legislation and European Directives. The legislation listed by those who chose this method of defining environmental cases included:

- Conservation (Natural Habitats, &c.) Regulations 1994 (as amended);
- intentionally or recklessly damaging any feature of a sites designated in compliance with the European Union (EU) Birds and Habitats Directives;.
- Deer (Scotland) Act 1996 (as amended);
- Environmental Liabilities (Scotland) Regulations 2009 (as amended);
- Environmental Impact Assessment Regulations (various);
- Hill Farming Act 1946 (as amended)
- Offences concerning the timing and conduct of the muirburn code and non-compliance with a muirburn licence issued by SNH.
- Nature Conservation (Scotland) Act 2004 (as amended);
- Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003;
- Protection of Badgers Act 1992 (as amended);
- Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003;
- Town and Country Planning (Scotland) Act 1997; and

- Wildlife and Countryside Act 1981 (as amended).

20. A further way to define environmental cases was by regulating body. This was the approach of ScottishPower which defined such cases as "protection of air, land, water and wildlife should be considered as falling within the terms of 'environmental'. "In our view this will also include any cases which fall within the jurisdiction of SEPA and SNH." ScottishPower went on to state: "It is important that the definition of what cases are 'environmental' must be considered carefully in order to avoid these becoming an unwieldy burden for a new court. Any non-compliance with this environmental legislation should be considered as an 'environmental' case and treated as such."

Processes

21. Most respondents did not give details on which processes they used for environmental cases. However, SNH gave information that it seeks alternative means by which to resolve cases before seeking criminal proceedings, through discussion and occasionally arbitration. As to issues with criminal proceedings it stated that it did "have some concern that the Crown Office and Procurator Fiscal Service's (COPFS's) decisions over the disposal of wildlife crime cases may be influenced by a lack of certainty over the public interest to be served by prosecution". Scottish Water also report alleged offences to COPFS for possible prosecution through the criminal justice system.

Summary

22. As will be noted from the above, "environmental justice" is a very wide-ranging term. It has a foot in civil justice, in criminal justice, and in administrative justice. The definitions given by the respondents sometimes tried to take in the whole spectrum, whilst other respondents focussed on definitions within their own sphere of interest. Based on the responses, it is difficult to come to a definitive answer to the question as to what constitutes an environmental issue in relation to justice. As the Law Society of Scotland stated: "We believe that the term 'environmental', covers a huge range of both civil and criminal matters and it would be difficult to provide a coherent list."

23. The consultation paper focussed on court-based issues as it was issued in response to the manifesto commitment to publish an options paper on the question of whether there should be an environmental court in Scotland in the context of wildlife and environmental crime. However, the Scottish Government recognised that there were calls for an environmental court to deal with civil issues and therefore widened the consultation, some respondents considered that further issues should be addressed, in particular, administrative justice. As noted in paragraphs 10 and 11 above, the Law Society of Scotland and UKELA were concerned that environmental justice encompasses a much wider spectrum of issues than just the court processes."

Question 2

This paper outlines the improvements to the justice system that this Government has delivered in relation to environmental justice. Do you agree that these changes have improved how environmental cases, both civil and criminal, are dealt with in Scotland? If you do not agree, please explain why.

24. 20 of the respondents provided an answer and or comment on this question. The answers are summarised in Table 2 below.

Table 2

	Content with present system	Agree but with reservations about the current system	No comment on improvements – reservations about current system
legal organisation		2	
Environmental lawyer		1	
Environmental ngo		4	1
Wildlife ngo		1	
Planning ngo		1	
Energy company		2	
Public utility	1		
Animal charity	1		
Landowners' association	1		
Community group		1	
Government organisation		1	
Individual		2	1
Totals	**3**	**15**	**2**

25. The statistics in this table do not tell the full story. Some respondents considered the wide spectrum of environmental justice whereas others focused on one aspect and one organisation drew its conclusion from its experience in a single case in the Court of Session.

26. Many of the respondents welcomed the improvements to the justice system that the government has delivered in relation to environmental justice system. In particular the changes to standing in judicial review, the expansion of PEOs to environmental cases, and the introduction of specialist prosecutors in criminal cases. For example, UKELA stated: "The position has improved markedly in recent years in some areas, but there is still a lack of coherence in the system. Notable improvements to be welcomed are the expansion of standing for judicial review actions, the introduction of Protective Expenses Orders and the establishment (albeit over 10 years ago) of specialist prosecutors." Friends of the Earth Scotland also appreciated some of the changes: "We welcome a number of changes made in recent years, in particular the new test of 'sufficient interest' in judicial review and

statutory appeal cases, and the introduction and amendment of PEOs, which cap petitioners' liability in Aarhus cases before the Court of Session."

27. Scottish Land and Estates considered that it is too early to comment on the effectiveness of the changes that have taken place in the justice system which have a bearing on environmental justice.

Civil environmental justice

28. One of the environmental NGOs was not content with the changes in standing. The response was based on a case in the Court of Session where it had had the standing to bring the case but that it did not have sufficient title and interest to justify the remedy which had been given in the judicial review.

29. One of the main concerns of the environmental NGOs and of some other respondents centred on judicial review and statutory appeals of decisions made by authorities. Their concerns centred on two areas: the processes in the courts and PEOs.

- Court processes

30. These respondents considered that the system in the Court of Session is too slow and that the time limits for applications (3 months for judicial review or 6 weeks for planning statutory appeal) are too short and this means there is often insufficient time to locate a pro bono legal team to undertake the work.

31. There was also particular concern regarding the scope of judicial review and statutory appeal are not able to look at the merits of a decision and are being confined to a challenge on a point of law (i.e., that the decision was illegal or made by an authority that was not empowered to make the decision). The point was made that members of the public and some small groups are unaware when considering judicial review or statutory appeal. The John Muir Trust was one of the NGOs that commented on what it considered to be the flaw in judicial review as a remedy: "Judicial review can usually only be applied for if there is a fault in the process as the substance of the decision cannot generally be challenged. This is the 'Wednesbury unreasonableness' test[2]. This is one of the main reasons that judicial review is a very unsatisfactory and partial remedy, and why [judicial review] does not comply with the Aarhus Convention."

32. In addition, one of the environmental NGOs pointed out that PEOs only apply in the Court of Session and cannot be made in environmental cases in the sheriff court.

- Protective Expenses Orders (PEOs)

[2] A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223). The test is a different (and stricter) test than merely showing that the decision was unreasonable.

33. These respondents consider that despite the possibility of a PEO, the system is too expensive and this means that it is not affordable for many individuals or groups. They also believe there are a number of flaws in the system:

- firstly, an applicant must provide sufficient financial information to demonstrate that they would find the proceedings prohibitively expensive. This may deter applications for fear that personal financial details would be in the public domain;
- RSPB argued that in judicial review, the Court may decline to make a PEO if it considers that the applicant has no real prospect of success, and that this delay in costs protection until permission to proceed has been granted does not comply with the requirements of the PPD and the Aarhus Convention;
- although court rules provide that applications for PEOs must be made quickly after the case is raised, this is often impracticable given the level of detail expected in a PEO application and the short time period for raising challenges.

34. ScottishPower, whilst supporting the access to environmental justice delivered through PEOs was concerned about what it considered to be the current lack of clarity in interpretation around application of PEOs.

35. Both the RSPB and Professor Colin Reid acknowledged progress in environmental justice with the introduction of PEOs and other changes. Firstly, RSPB stated: “RSPB welcomes recent amendments to the current regime regarding standing and eligibility for Protective Expenses Orders (PEOs) as highlighted in the consultation paper. However, this response explains why further amendments are necessary to ensure full compliance with international and EU law (principally the access to justice provisions of the EC Public Participation Directive and the Aarhus Convention).” Professor Colin Reid’s comment was: “There have been significant improvements in recent years (e.g. widening of legal standing, protective expenses orders, specialist prosecutors) but there remains the need to do more to ensure that environmental cases are handled in a way that ensures expertise at all levels. Specific legal matters, such as ensuring that all environmental cases are covered by expenses rules that meet the Aarhus Convention requirements, can be addressed but equally significant is ensuring that there are the resources available to enable the improved structures, such as dedicated prosecutors, to deliver real changes in how effectively environmental matters are dealt with.”

36. WWF-Scotland, whilst agreeing that PEOs do not go far enough in providing access to justice, was also concerned about legal aid. It disagreed with the Scottish Government view that no change was needed to the legal aid rules taking the view that the legal aid test should be that in Article 9 of the Aarhus Convention. The response states that this means access to the legal process for challenges to environmental decision-making is “fair, equitable, timely and not prohibitively expensive”.

37. RSPB was also concerned about legal aid and in particular Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. It considers that Regulation 15 has an "overbearing influence" on the ability of applicants to receive legal aid in cases with an environmental impact. It goes on to state that “above problems with regard

to legal aid are compounded by the introduction of a cap on the expenses of a [judicial review] to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000" which it considers to be an entirely unrealistic figure to run a complex environmental judicial review case.

38. A different view of PEOs was taken by SSE. It considered that the court rules are in need of further attention. It's concern is that the "Rule of Court makes no distinction between individuals and NGOs with a cap of £5,000 on the applicant's liability in expenses for both". It suggested that the cap on expenses for NGOs should be raised with perhaps £30,000 as a more suitable figure.

39. Planning Democracy was concerned that, in the light of the planning review publication of 31st May 2016,[3] there was an inequality of arms when it comes to planning decisions and its implications for environmental justice. They argue that environmental justice and the public interest is served through public engagement in planning decisions and that this is in the spirit of the Aarhus Convention.

40. The NGOs and the other respondents who raised these issues argue that as a result of these issues, Scotland is not complying with the access to justice pillar of the Aarhus Convention, especially with regard to the issues of costs, standing, and the availability of merits review.

Wildlife and environmental crime

41. Other respondents were more focussed on wildlife and environmental crime. For example, the Game and Wildlife Conservation Trust were concerned about shortcomings in the recording of wildlife crime in that statistics do not always differentiate between reported crimes and successful prosecuted crimes, the statistics are limited by the types of crimes and the level of detail recorded, and there is no assessment of the impact of crime or civil breaches on the environment or species affected.

42. ScottishPower stated that it "has yet to see any substantial improvement as to how environmental cases are dealt with. However as the Regulatory Reform process has yet to implement several key changes, such as changes to SEPA's enforcement powers, we believe such key changes should bring about improvements". It was concerned in particular about the current lack of enforcement options for SEPA (to be resolved by the regulatory reform proposals) and what it sees as a lack of understanding of the issues by the courts. The Avich and Kilchrenan Community Council was also concerned about the lack of effective options for SEPA suggesting that there is a "need for some environmental enforcement cases to be heard in a criminal court in order to provide a deterrent for the most serious offences".

[3] Empowering planning to deliver great places. This can be viewed at: http://www.gov.scot/Resource/0050/00500946.pdf.

The environmental justice system

43. Three of the respondents were concerned about what they described as the "fragmented" nature of the environmental justice system. Ian Cowan, an environmental lawyer responding as an individual, stated: "If anything this review demonstrates just how fragmented, tangled and incoherent the 'environmental justice system' of Scotland is, and exactly why a proper analysis of what needs to change in order to deliver environmental justice (even in the narrow sense of the term used in the document) is required, followed by a detailed appraisal of the available models."

44. UKELA and Professor Reid agreed with the above about the "fragmented" system pointing to what they see as various inconsistences:

- some appeals go to Ministers and some to the courts;
- some ministerial decisions are appealed to the sheriff court and others only in the Court of Session; and
- some decisions are subject to an appeal looking at the full merits of a case whilst others are only subject to a review of the decision-making process.

Both respondents considered, like Ian Cowan, that a full review was necessary. Professor Reid felt that it is necessary "to rationalise and streamline the many different decision-making and appeal mechanisms which exist in different areas of environmental regulation".

Summary

45. As will be noted from the above, though the reforms to justice that have a bearing on environmental matters have been welcomed by respondents, most did not think that they have gone far enough. This is particularly the case in relation to civil environmental justice with perceived deficiencies in the judicial review and statutory appeals being highlighted by many of the respondents including criticism of PEOs and legal aid.

46. There was less comment on problems within the criminal environmental justice system with the main criticism being concerned not with the court processes but with the enforcement powers of SEPA.

Question 3
Given the extensive changes that have already been delivered to the justice system (as outlined in this paper) and the need to ensure that any further changes are proportionate, cost-effective, and compatible with legal requirements, are there any additional ways in which the justice system should deal with both civil and criminal environmental cases? If so, please detail these. In particular, do you consider that there should be a specialist forum to hear environmental cases? If so, what form should that take (e.g. a court or tribunal)? Please provide reasons for your response.

47. 21 of the respondents provided an answer to this question. The spread of answers in relation to the question about whether there should be an environmental court or tribunal are set out in the table below.

Table 3

Yes – there should be an environmental court/tribunal	There should a wide-ranging review of environmental justice before deciding on an environmental court/tribunal	No – there is no need for an environmental court/tribunal at present	There should not be an environmental court/ tribunal but a review of environmental justice
6 environmental NGOs 1 planning NGO 1 community group 2 energy company 1 public utility 1 government organisation 4 individuals	1 individual 1 environmental legal organisation	1 wildlife NGO 1 landowners and business association	1 legal organisation
16	**2**	**2**	**1**

48. As this table indicates, 16 were in favour of an environmental court or tribunal. Most did not state a preference for one or the other. Of those that supported such a forum, most were strongly in favour, but a few thought that environmental justice "might" benefit by the introduction of a specialist court or tribunal. 9 of the 16 were in favour of the introduction of a specialised lower cost forum particularly to deal with civil matters but 2 advocated a specialised court within the Court of Session.

49. One of the respondents, whilst critical of some of the procedures, especially in civil justice, was hesitant about advocating the creation of an environmental court or tribunal and instead suggested that there needs to be a wide-ranging review of environmental justice. In addition, of the 14 that supported an environmental court or tribunal, five were also in favour of a review of environmental justice.

50. On the other hand, 3 respondents did not consider that there was any need for such a court/tribunal. 2 of these three have welcomed the changes that have taken place and that these need time to bed in. The Law Society of Scotland thought that "given the diversity of environmental matters and the relatively small number of cases which end up being pursued in the civil courts or prosecuted in the criminal courts" it would not be "either effective or would provide value for money to establish a separate court to deal with environmental matters". However, it did consider that a review would be beneficial and could result in greater specialisation.

Options

An environmental court or tribunal

51. One of the options put forward was an extension of the Scottish Land Court. Professor Reid suggested that "to the extent that a higher court is desirable, continuing the current practice of conferring jurisdiction on the Scottish Land Court seems sensible". Other respondents also thought that the Land Court should be considered. Friends of the Earth Scotland also saw this as a possibility, though its preference was for a tribunal: "However, the Scottish Land Court, which has many of the strengths identified in ECTs [i.e. environmental courts and tribunals], already

functions as a *de facto* ECT in certain appeals, including those from SEPA's new civil penalty powers. It may be that extending the jurisdiction – and resourcing – of the Land Court is a more cost effective approach to Aarhus compliant access to justice." RSPB stated: "Extending the scope and powers of the Land Court as a forum for Judicial Review. While this may provide a suitable forum for many cases, complex, high public interest and/or constitutionally important cases may still need to be heard in the Outer House of the Court of Session."

52. As stated above, Friends of the Earth Scotland's preferred option would be for a tribunal set up under the Tribunals (Scotland) Act 2014. It saw this as "the most obvious place to start afresh and create an accessible, flexible, efficient and affordable ECT".

53. Another supporter of the tribunal was Hilary Patrick who drew on her experience of mental health law to advocate a specialist tribunal with specialist knowledge, which she considered could offer "a more sensitive and tailored solution or resolution to issues". She saw another advantage as being the informality of the tribunal system meant that legal representation was not necessary and that would lead to savings to the public purse.

54. UKELA and Professor Colin Reid favoured that instead of just changing the court structures by introducing an environmental court, a holistic approach to a review of environmental justice was needed looking beyond the cases that come to court to consider the wide range of environmental issues both civil and criminal. UKELA argued: "The route to an improved system to secure environmental justice does not lie simply in transferring some business to a new court or tribunal, but requires a holistic review and enhancement of the decision-making and participatory procedures from start to finish." Professor Reid stated: "Expertise is a central issue and widening the scope of jurisdiction to provide sufficient business to justify establishing specialist structures may risk diluting too far the expertise which is the justification for such an approach in the first." He went on to say: "A case can be made for an environmental court or tribunal in Scotland, but it requires a much deeper and more far-ranging reconfiguration of the handling of environmental matters than is contemplated here."

55. After a wide-ranging resumé of the history of various considerations of whether there should be an environmental court or tribunal in both England and Wales and in Scotland, RSPB did not take a view on whether there should be such a forum. Instead it agreed with others that suggested a review advocating that the Scottish Government should set up an "Expert Working Group" including environmental NGO representatives to carry out a full appraisal of the various options for environmental justice.

56. Some respondents pointed to other jurisdictions such as Australia, Canada and New Zealand. World Wildlife Fund-Scotland (WWF) referenced India's National Green Tribunal which was set up in 2010 as a specialised court for environmental matters. WWF states: "Since its establishment it has become the primary authority on environmental jurisprudence in India and has created a field of judicial activism of its own. Importantly, the Tribunal is a court of law with original and appellate jurisdiction. It is able to review both the factual aspects of environmental cases as

well as the substantive legal issues of cases – an important issue from the environmental aspect."

- Jurisdiction of a specialist court or tribunal

57. Whilst many of the respondents saw the replacement of judicial review and statutory review by a specialist environmental court outside the Court of Session as offering a more affordable tool for those who wished to challenge the decisions of authorities and also offering benefits to the public purse, Ian Cowan considered that, were such a court to be set up, there should be a "one-way shifting of costs (qualified or unqualified) to the public purse in order to increase access for public interest litigants". RSPB took a similar view stating that there should be further consideration of the availability of public funding for environmental cases.

58. SSE was content that judicial review and statutory appeals under the Town and Country Planning Act should remain in the Court of Session. It did consider that there would be benefits in creating a specialist panel of judges within the Court of Session to hear environmental, planning, and infrastructure cases with the facility to sit locally where that was expedient, rather than in Edinburgh.

59. Scottish Water considered that there would be benefits in creating a "specialised forum to hear environmental cases" but was concerned that such a forum might delay criminal cases being heard in line with the requirements of Article 6 of the European Convention of Human Rights. It thought that other avenues of dealing with environmental cases should also be explored including alternative dispute resolution for both civil and criminal cases, greater use of fiscal fines, and broader application of civil penalties.

60. The Game and Wildlife Conservation Trust favoured specialisation in criminal environmental justice owing to the complexity of criminal environmental law. It did not consider that there would be enough cases to warrant an environmental court but considered that it might be worth exploring the possibility of "peer to peer tribunals".

61. SNH was also concerned with wildlife and environmental crime. Its view was that whilst the majority of crimes would still be heard in the sheriff court, there might be benefit in the more complex environmental crimes being heard in a specialist court or tribunal.

62. There were other views expressed on changes needed. Pat Spence was concerned about planning issues and advocated a legal requirement for compensation to be paid when lives and properties were affected by planning and energy consent cases.

Email campaign

63. Towards the end of the consultation period, one of the environmental NGOs ran an email campaign urging the Cabinet Secretary for Justice "to take steps to establish a specialist environmental court or tribunal for Scotland within the first year of this new Government". There were 205 identical emails (excluding duplicates) and one similar email which included text stating that, contrary to the text in the

consultation, Scotland was in breach of the Aarhus Convention. This latter email has been included a separate substantial response to the consultation.

64. The email stated that the "Scottish Government has an opportunity to create a world class [environmental court or tribunal] that provides for affordable access to justice, reduces costs to the public, speeds up decisions and provides a more level playing field for developers". It went on to say that the Aarhus Convention should be at the heart of any thinking about such a court or tribunal and that it would lead to "improved engagement and decision making from developers and public authorities". The email claimed that the benefits claimed would be "specialism, strong case management, an inquisitorial approach, and powers to prioritise urgent cases would result in greater efficiency and speedier decision-making, lower costs to the public purse, and avoid lengthy delays to high value and high public interest cases".

65. Although each campaign email asked that it be regarded as a response to the consultation, there was little in the email that addressed the questions asked in the consultation document. There was a clear implication in it that those who responded by using the campaign email considered that planning, and possibly energy consent, issues should be dealt with by a specialist environmental court or tribunal.

Summary

66. 18 (78%) of the respondents to the consultation proper would welcome an environmental court or tribunal although 2 (9%) of those thought there should first be a review. Only 1 respondent (4%) specified that the specialist forum should be a tribunal, although a further 4 (17%) thought a tribunal should be considered as a possible way forward. Though a few saw an advantage of such a forum for criminal cases, the majority envisaged a specialised court or tribunal as a means to reducing costs and improving access to justice in civil environmental matters. However, there was no clear consensus on whether such a court or tribunal should deal with criminal or civil cases, whether it should be a specialised sheriff court, a specialist tribunal, or a specialised court within the Court of Session, and within each of those jurisdictions, what types of "environmental" cases should be considered.

67. 42% of the respondents also considered that a wide ranging review of environmental justice was necessary, looking beyond the court system to encompass other means of resolving environmental disputes and also considering administrative environmental justice.

The Scottish Government response

68. The Scottish Government notes that there were only 22 responses to the consultation and that there was a variety of interests represented within this relatively low response with some respondents interested in criminal issues, some in civil issues, and others in both.

Further developments in environmental justice in Scotland

69. Since the consultation ended, there have been further developments with some relevance to environmental justice in Scotland and matters raised through this consultation. Some of these are aimed particularly at environmental justice whilst other developments have a more general application which includes environmental justice. The latest developments are outlined below.

- **Protective expenses orders**

70. The Scottish Civil Justice Council (SCJC) consulted on rules for PEOs from 28 May to 23 June 2017. The SCJC stated: "The draft rules seek to ensure that, where applicable, the rules regulating applications for PEOs in environmental proceedings operate so as to give proper effect to the requirement, under the Aarhus Convention and EU Law, that proceedings should be 'not prohibitively expensive'."[4] Following the closing date, all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on draft rules for protective expenses orders.

71. The main areas that the consultation sought views on were:

- how 'prohibitively expensive' should be defined so as better to reflect how it has been interpreted by the Court of Justice of the European Union (CJEU) and the Supreme Court;
- whether the procedure for the determination of PEO applications should be simplified to avoid protracted and expensive hearings;
- whether an applicant's liability in expenses in an unsuccessful application should be capped at £500 unless the court is satisfied that there are grounds for removing that cap;
- whether a PEO granted in a first instance case should be extended to an appeal, and if so, the circumstances in which this should happen; and
- whether reclaiming motions to the Inner House should have a presumption that there will be no hearing and that the appeal will be determined in chambers based on consideration of the papers in order to speed up the process and reduce expenses.

The aim of the SCJC proposals is to streamline that application process for PEOs and to reduce expenses. If adopted, it would strengthen arrangements to support cases requiring access to environmental justice.

[4] http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders

- **Simple procedure**

72. From 28 November 2016, simple procedure replaced the current small claims procedure and part of the summary cause procedure. Simple procedure is a court process designed to provide a speedy, inexpensive and informal way to resolve disputes, including environmental disputes, where the monetary value does not exceed £5,000.

73. The new simple procedure rules were prepared by the SCJC and the Chair, the Rt. Hon. Lord Carloway, stated: "The simple procedure has been designed with the party litigant in mind, using accessible language and incorporating user-friendly guidance into the rules."

- **Review of the Scottish Planning System**

74. The Scottish Government has committed to bring forward a Planning Bill during this parliamentary session. In January 2017, the Scottish Government published a consultation paper "Places, People and Planning", proposing 20 key changes to the planning system within 4 themes covering (i) plans, (ii) people, (iii) housing and infrastructure and (iv) leadership and resourcing. Over 470 responses to the consultation were made, from people, businesses and organisations across Scotland.

75. In June 2017, the Scottish Government published an analysis of responses, along with a position statement describing the key changes which Scottish Ministers are considering taking forward through the Planning Bill, secondary legislation and other, non-statutory approaches. Shared priorities of inclusive growth and community empowerment underpin this programme of planning reform. Proposals include strengthening development planning, more closely aligning community planning and spatial planning, giving people a new right to plan their own place and keeping planning decisions local by allowing more review decisions to be made by local authorities.

- **Energy**

76. In developing the new Scottish Energy Strategy, the Scottish Government is committed to drawing on views from a wide range of representatives from industrial, environmental and academic communities. It consulted on its draft Energy Strategy between 24 January and 30 May 2017. The consultation included proposals to develop new approaches to public engagement and participation in order to raise awareness of the 2050 vision for Scotland's energy system and enhance the delivery of the final Energy Strategy.

77. The Scottish Government has been greatly encouraged by the response to the Energy Strategy Consultation. 256 responses have been received, giving a very rich set of views on the Scottish Government's 2050 vision that we put forward through our draft Energy Strategy consultation. The consultation has been extremely valuable in gathering the views of engaged citizens, energy professionals and key Scottish businesses. In combination with the linked consultations on Scotland's Energy Efficiency Programme, Local Heat and Energy Efficiency

Strategies, District Heating Regulation and Onshore wind, the Scottish Government has had a total of more than 500 responses.

78. These responses will be analysed by an independent research company and the findings, alongside recommendations from the Economy, Jobs And Fair Work Parliamentary Committee and advice from the Scottish Energy Advisory Board, will help form the evidence base. This information will inform the development of the final version of the Scottish Government's Energy Strategy. This strategy will be set out in a paper on the "Future of Energy in Scotland" which is expected to be published before the end of 2017.

- **The Civil Litigation (Expenses and Group Proceedings) Scotland Bill**

79. The Civil Litigation (Expenses and Group Proceedings) Scotland Bill was introduced into Parliament on 1 June 2017. Although not specifically concerned with environmental justice, it does aim to make expenses in civil justice more predictable and if passed by Parliament, it will make group proceedings[5] possible in Scotland.

The Scottish Government view on environmental justice

80. The Scottish Government is a strong supporter of environmental justice. It is aware of its obligations under the Aarhus Convention and it is continually updating the appropriate structures to ensure compliance and to protect the environment and to enable the best decisions to be made in respect of it.

81. The Scottish Government notes that there is support for an environmental court/tribunal. However, it also notes that there was no unanimity amongst those consultees who supported such a forum. It considers that it is important to distinguish between criminal wildlife and environmental justice and civil environmental justice. The two strands require different specialisms amongst both the judiciary and the legal profession.

- **Wildlife and environmental crime**

82. Wildlife and environmental crime are sometimes considered together and it was in the context of this grouping that the manifesto commitment for an options paper on an environmental court was made in 2011. However, within this broad heading there are very disparate elements. For example,

- wildlife crime can involve the killing or disturbing of protected species, damaging their breeding or resting places or illegally releasing species into the wild; and
- environmental crime has at one end of the spectrum littering, smoking in public places, and dog fouling and at the other end, pollution of the environment, the deliberate degradation of scheduled areas, and sea fisheries offences.

[5] Also known as multi-party actions or class actions.

83. There are two factors that the Scottish Government considers important in relation to wildlife and environmental crime.

- Most cases are best heard in a local sheriff court rather than a centralised specialist court.
- The numbers of wildlife and environmental crime cases prosecuted in the courts is relatively small compared to crimes such as theft or drug offences[6]. It is not considered that the number of wildlife or environmental crime cases would sustain a specialist criminal environmental court or tribunal.
- The Scottish Government has brought in a number of measures to tackle wildlife crime in recent years. These include a programme to encourage the surrender of illegal poisons and new restrictions on licences on land where wildlife crime is suspected of taking place. The Scottish Government is also committed to bringing in legislation to increase penalties for wildlife crime and to working with Police Scotland to increase police resources available to tackle wildlife crime.

- **Civil environmental justice**

Aarhus Convention and European environmental law

84. The Scottish Government takes seriously its compliance with EU law and with other international obligations. There are a range of statutory frameworks in place to ensure Scotland is fully compliant with all aspects of the Aarhus Convention.

85. The Aarhus Convention required the treaty parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention". In order to meet this obligation, the Aarhus Convention Compliance Committee (ACCC) was established. The ACCC is not a judicial body and its findings do not equate to court findings. The Scottish Government contributes to the UK's annual reports to the ACCC and has informed the ACCC of updates to PEO rules and to judicial review.

86. The Scottish Government's approach to public participation in its renewables policies and consenting processes were considered by the ACCC in a 2012/13 case (C68). There was no adverse finding against the Scottish Government in any of the four complaints made against it. (The single complaint against the UK Government was upheld.)

[6] Table indicating the number of wildlife and environmental cases 2009 to 2014.

	2009-10	**2010-11**	**2011-12**	**2012-13**	**2013-14**
Wildlife crime	32	57	71	77	81
Environmental crime (including dog fouling, littering, and smoking in public places)	181	199	171	128	173
Total	**213**	**256**	**244**	**205**	**261**

87. The Scottish Government does not consider that an environmental court/tribunal is necessary at present to comply with the Aarhus Convention. The consultation gave details of developments in environmental justice in Scotland which had taken place to comply with the Convention. This response has highlighted further developments that have taken place since the consultation. The Scottish Government will continue to look at ways in which it can improve access to environmental information and public participation and access to justice in environmental matters.

88. Given the plethora of types of civil environmental cases identified in the consultation, careful consideration would be required as to the definition of an environmental case and whether the same court/tribunal should hear, for example, nuisance cases and statutory appeals in planning cases. Clearly, it is not appropriate for nuisance actions to be heard in a centralised specialist environmental court. Such cases should be heard at a local court. The Scottish Government considers that it is only those cases where there is a public interest would be suitable for a hearing at a centralised specialist court, for example, cases that at present are heard as statutory appeal or judicial review hearings in the Court of Session.

- **An environmental tribunal**

89. As far as setting up an environmental tribunal is concerned, it has been suggested that the Lands Tribunal for Scotland might be a suitable forum. However, the tribunals landscape in Scotland is currently undergoing reform. The Tribunals (Scotland) Act 2014 creates a simple two-tier structure and introduces a common system of appointments, practices and procedures, bringing judicial leadership under the Lord President. There is a programme of work to transfer the currently devolved tribunals into the Scottish Tribunals in a phased process which commenced in December 2016. In addition, the Scotland Act 2016 proposed that all powers over the management and operation of 19 reserved tribunals be devolved to the Scottish Parliament.

90. In view of the above, the Scottish Government does not consider it appropriate at present to either confer the functions of an environmental tribunal onto the First-tier Tribunal for Scotland or to designate the Lands Tribunal for Scotland as an environmental tribunal.

- **An environmental court**

91. Most respondents favoured an environmental court. The same issues in relation to what types of cases should be heard in an environmental tribunal apply to an environmental court. There are a number of options which could be used to set up an environmental court.

  - As noted in the consultation, the Lord President and the sheriffs principal could act to designate a sheriff court and specialist sheriffs under a combination of sections 34 to 36 of the Courts Reform Act (Scotland) 2014.
  - Secondly, the Scottish Ministers have the power with the agreement of the Lord President to introduce a specialist all-Scotland civil environmental court under section 41 of the Courts Reform Act.

- Thirdly, it may be possible to expand the Scottish Land Court to be a specialist environmental court.

92. Some respondents argue that the introduction of a specialist environmental court at sheriff court level to hear cases which are now heard as judicial reviews or statutory appeals in the Court of Session will lower the costs of environmental justice. The Scottish Government believes that there are a number of issues related to this. Firstly, it is undeniable that such a move would reduce court costs in the first instance. However, in many cases, judicial expenses are only a small proportion of the expense of going to court as legal expenses are the main cost. If parties continue to use counsel in such actions, the cost of taking a case to court might not be as dramatically reduced as might at first seem.

In addition, it is noted that often such cases are appealed sometimes as far as the UK Supreme Court. The introduction of a lower court of first instance has the potential to add two further appeal stages, firstly to the Sheriff Appeal Court and secondly, to the Inner House of the Court of Session. If decisions go through all the appeal stages possible, the total cost of challenging a decision by an authority is likely to be much increased.

93. The Scottish Government considers that there would be relatively few cases that would fall to be heard in a specialist environmental court. The Law Society of Scotland stated the situation succinctly:

> "In all the circumstances, given the diversity of environmental matters and the relatively small number of cases which end up being pursued in the civil courts or prosecuted in the criminal courts, we do not believe that it would be either effective or would provide value for money to establish a separate court to deal with environmental matters."

- **Brexit**

94. The result on the UK referendum on membership of the EU brings into question Scotland's commitments under the Aarhus Convention and other EU law. The EU provides for most of the environmental protections in the UK and for 40 years it has acted as a monitoring body and enforcer.

95. One of the most important functions of the EU has been to supervise how member states implement their obligations. Although these processes apply to all areas of law, the majority of cases have been brought in the environmental sector.

96. At present, there is considerable uncertainty as the UK Government begins negotiations on withdrawal from the Union. Scottish policies are heavily influenced by EU legislation with Scotland Europa suggesting that more than 80% of all environmental legislation passed by the Scottish Parliament originates at EU level.

97. The Scottish Government's longstanding policy and commitment has been to membership of the EU. The Scottish Government's view has consistently been that any outcome must include retaining membership of the single market in all its aspects – trade, movement of people and protection of rights – and continued close

co-operation with EU partners on issues such as justice, research and environmental protection.

98. The Scottish Government and its agencies will continue to monitor and enforce environmental legislation, regardless of the UK's future relationship with Europe. As part of its preparations for the UK's exit from the EU, the Scottish Government is carefully considering whether any gaps could arise in existing domestic monitoring and enforcement powers that would need to be addressed to ensure Scotland maintains high standards of environmental protection and access to environmental justice.

Conclusion

99. As a result of the various reasons outlined above, the Scottish Government does not consider it appropriate to set up an specialised environmental court or tribunal at present.

100. This should not be read as a downgrading of the importance to the Government of environmental justice. It is committed to improving access to justice in this field as elsewhere in the justice system and will keep the issue of whether there should be an environmental court or tribunal or even a review of environmental justice under review.

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