

Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021



Ministerial Introduction



Scotland did not chose to leave the EU. The scale of impact from an unnecessarily hard Brexit, that was imposed on Scotland, is still becoming clear more than three years later.

The Scottish Government remains determined to protect Scotland from the impacts of EU exit. This includes protecting and enhancing our environmental standards. The measures in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') make an important contribution to this objective. Environmental Standards Scotland (ESS) was swiftly created following the passing of the Act, initially on a non-statutory basis and then with full statutory status from October 2021. It was vital to avoid a gap in environmental governance, and ESS is carrying out its important independent role, accountable to Parliament.

I am committed to improving environmental justice. It is important that everyone has the opportunity to enjoy a life free from poor environmental quality. It is also important that there are readily available routes for individuals to secure good environmental quality for themselves and their communities. This report outlines a number of ways in which we will be improving access to justice on environmental issues. I will continue to engage with communities and stakeholders and look forward to hearing their views in the consultation on this report.

A handwritten signature in black ink, appearing to read 'Màiri McAllan', written in a cursive style.

Màiri McAllan MSP

Cabinet Secretary for Net Zero and Just Transition

1. Background to the review

The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') contains a range of provisions to protect Scottish law and society from the effects of leaving the EU.

Part 1 of the Continuity Act provides Scottish Ministers with regulation making powers to help meet the Scottish Government's commitment to align with future developments in EU law, where appropriate. The Scottish Government has issued a Policy Statement on the use of these powers¹.

Part 2 of the Continuity Act² introduced a number of new measures to protect environmental standards in Scotland and to maintain alignment with key elements of the structure of environmental law in the EU. The three measures in Part 2 comprised the creation of Environmental Standards Scotland (ESS) with functions and powers to provide environmental governance, a statutory framework for our Environment Strategy, and the introduction of new duties on Scottish Ministers and others, to have due regard to the guiding principles on the environment.

These measures support the Scottish Government's response to the twin global crises in climate and nature, and help to ensure that we remain closely aligned to the structure of environmental law in the EU. ESS was established as a new public body, independent of Scottish Government, and accountable to the Scottish Parliament. The powers and duties given to ESS have the aim of

¹ [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021, July 2022 - regulation making power under Section 1: statement of policy - gov.scot \(www.gov.scot\)](#)

² [Part 2 of the Continuity Act 2021](#)

ensuring public authorities in Scotland comply with environmental laws and that those laws are effective, replacing in a manner appropriate in domestic law the EU institutions' scrutiny and enforcement roles.

1.1 Section 41 - Duty to consult on effectiveness of governance arrangements

Section 41³ of the Continuity Act placed a requirement on the Scottish Ministers to consult on the effectiveness of the governance arrangements introduced by the Act. The section requires Scottish Ministers to review and prepare this report on:

- 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,
- whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and
- whether and, if so, how the establishment of an environmental court could enhance the governance arrangements.

The section also requires us to publish this report and launch a consultation on the report within six months of ESS publishing their strategic plan, which was published on the 1st of December. The strategic plan sets out ESS's approach to its role, including its approach to investigations, as required by Schedule 2 of the Continuity Act. The consultation document has been published and laid in Parliament alongside this report.

³ [Part 2 - Chapter 2 - Section 41 of the Continuity Act 2021](#)

The content of this report has been informed by a series of evidence gathering sessions with a broad range of stakeholders. These sessions helped play a role in gathering evidence on the different elements listed under section 41 of the Continuity Act.

2. Overview of environmental governance in Scotland following exit from the EU

The provisions of section 41 of the Continuity Act are primarily concerned with the environmental governance arrangements put in place by that Act, as well as wider issues concerning access to justice on environmental matters.

Environmental governance is a term that can be interpreted broadly to include consideration of the administrative, regulatory and judicial structures that contribute to protection of the environment and promotion of sustainable development. In this wider sense, environmental governance includes the design of arrangements for communities and individuals to participate in decision making, and to make representations and seek routes to redress. In this chapter we shall briefly set out the Scottish Government's position on this broader interpretation of environmental governance, before turning to the specific considerations listed in section 41.

2.1 Environmental Governance following Brexit

In February 2019, the Scottish Government published a consultation paper on the design of environmental principles and governance after Brexit⁴. The purpose of that consultation was to seek wider views to help the development of a strong, proportionate and effective system to ensure the protection of Scotland's environment. As stated in that paper, Scotland did not choose to leave the EU, and the Scottish Government was determined to protect environmental standards threatened as a result of Brexit.

⁴ [Section 2: Environmental governance arrangements - Environmental principles and governance after Brexit: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/Information/Consultations/Environmental-principles-and-governance-after-Brexit-consultation)

The paper made clear that it was the Scottish Government's position that the Scottish Parliament holds government to account for meeting its ambitions and complying with internationally set standards. The paper also set out that Scottish courts have a well-understood role to ensure compliance with the law and protection of individual rights. The consultation considered whether further functions or capabilities were needed once the UK left the EU.

The 2019 consultation paper set out that the Scottish Government believed that it was essential that the environmental governance arrangements that were then under consideration would:

- help Scotland to maintain or exceed existing environmental standards and to comply with international environmental obligations.
- fit Scottish circumstances and established methods of accountability.
- be fair, open and transparent.
- respect the devolution settlement.
- be effective and proportionate in delivering strong environmental protection.

These requirements remain at the heart of our approach, and were reflected in the provisions of the Continuity Act that established ESS and set out its powers and functions.

The most visible aspects of environmental governance within the EU are the system of infractions for non-compliance with EU law and the reviews of policy effectiveness by the EU Commission. However, there are other significant losses to environmental law in Scotland from leaving the EU. We have lost the

EU as a direct source of new legislative provisions and policies, and the coordinating role of the European Environmental Agency and other agencies and forums that supported effective implementation and monitoring of environmental law and standards.

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁵ (“the Aarhus Convention”) is an important international agreement for environmental rights in Scotland. As reflected in its title, the convention covers three important pillars of environmental rights. The rights of access to information are reflected in the Environmental Information Regulations (Scotland) 2004⁶ and in our regulatory agencies’ proactive approach to making information available on environmental quality in Scotland⁷. The rights to public participation in decision-making are reflected in our commitment to consultation at all levels, and our regulatory agencies’ approaches to community involvement in decision making^{8 9}. The final pillar, that of access to justice in environmental matters, is considered in detail in this report.

2.2 Environment Governance and Strategic Environmental Policy

Consideration of environmental governance has to reflect the seriousness of the twin global crises in climate and nature. The imperative to combat these crises reinforces the importance of effective environmental law and policy. Environmental governance must be fit for a situation where we are driving

⁵ [Introduction | UNECE](#)

⁶ [The Environmental Information \(Scotland\) Regulations 2004 \(legislation.gov.uk\)](#)

⁷ [Home | Scotland's environment web](#)

⁸ [Scottish Environment Protection Agency - Citizen Space \(sepa.org.uk\)](#)

⁹ [Community empowerment and Scotland's environment | NatureScot](#)

transformative change across our economy and society in response to the twin crises. The Continuity Act established a statutory framework for the Scottish Government's Environment Strategy, where we are developing policies to support the transformative change that is needed.

The Scottish Government published the Vision and Outcomes for our Environment Strategy in 2020¹⁰. This set a vision that, by 2045: By restoring nature and ending Scotland's contribution to climate change, our country is transformed for the better – helping to secure the wellbeing of our people and planet for generations to come. The Strategy is an overarching framework for environmental policy, and promotes a whole of government approach to tackling the crises in climate and nature while promoting the sustainable prosperity of Scotland. The Continuity Act introduced a requirement for reports to Parliament as the strategy is developed^{11 12}, and a duty on Ministers to have due regard to a strategy once adopted. Work is continuing on the development of the strategy, considering in detail the outcomes for the economy, society and our global footprint that support the vision, and setting out pathways of policy design to guide policy across government.

We are aiming at holistic, system-wide solutions to environmental problems, which must be reflected in the structures and mechanisms for environmental policy. ESS provides critical assurance about environmental law being effective and fully applied, in the context where we are aiming at cross-government transformation in economic and social policies in face of twin crises. As we progress with this transformation, it becomes more and more important that

¹⁰ [The Environment Strategy for Scotland: vision and outcomes - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/environment-strategy-for-scotland-vision-and-outcomes/pages/1-introduction.aspx)

¹¹ [Environment strategy for Scotland: progress report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/environment-strategy-for-scotland-progress-report/pages/1-introduction.aspx)

¹² [Environment Strategy for Scotland: second progress report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/environment-strategy-for-scotland-second-progress-report/pages/1-introduction.aspx)

environmental policies are fully integrated with other areas of policy. There are already examples of how this is happening:

- Climate Change Planning is a process that reaches into every corner of our economy. Our new National Planning Framework (NPF4) places climate and nature at the centre of our planning system, and is a significant step forward to achieving a net zero Scotland.
- Our Marine Planning Framework balances the need to increase off-shore wind generating capacity, protect and enhance the marine environment and promotion of sustainable fisheries.
- The National Strategy for Economic Transformation considers natural capital alongside the other classes of capital that support our prosperity.
- Our Infrastructure Investment Plan (2021-22 to 2025-26) sets a new definition for infrastructure, including the natural environment. We believe this gives Scotland one of the widest definitions of infrastructure internationally, and ensures that natural infrastructure is considered equally alongside social and economic infrastructure when we make out public capital investment decisions. The IIP focuses on three core themes for Government investment over this time period, and of those is "enabling the transition to net-zero emissions and environmental sustainability" – again ensuring investment is prioritised for this outcome.

2.3 Environmental Principles and Effective Decision Making for the Environment

As environmental policy becomes more integrated into the delivery of policies across government, it is important that there are structures and systems to promote good decision making, taking account of the full impact of decisions considered. The Continuity Act introduced the guiding principles on the environment, to support good decision making and preserve these important principles from the EU policy making structures.

The Continuity Act introduced duties on Ministers and on public authorities that, once commenced, will require due consideration of the guiding principles in policy making. For Ministers¹³, this applies to all policy making¹⁴, for other public authorities it applies to policies, strategies and plans that are subject to Strategic Environmental Assessment. The duties will ensure that the five environmental principles - preventative, precautionary, rectification at source, integration and polluter pays – will be considered for all decisions that could affect the environment. This will support good policy making, in particular promoting thinking about how damage can be prevented, minimised or contained before it happens.

Many decisions across government have important impacts on climate, nature and environmental quality. Our ability as a country to address the twin crises in

¹³ The duties are set out in Sections 14 and 15 of the Continuity Act. The duty on UK Ministers has been modified by section 19 of the [Environment Act 2021](#)

¹⁴ Section 14(3) of the Continuity Act restricts the application of the duties on Ministers from applying to any policy or proposal so far as it relates to national defence or civil emergency, or to finance or budgets.

climate and nature and promote sustainable development will depend on policy actions across government. This potentially brings a wide range of decisions into the scope of a full understanding of environmental governance, but this has to be balanced with the fact that these are decisions aimed at balancing a range of policy goals and factors. We need to support decision making with proportional measures that ensure due consideration of environmental opportunities and consequences, while allowing the decision maker to focus on the specific objectives of the policy or programme. We need to ensure that the environmental impacts of decisions are considered proportionately, particularly where this have been duly considered in the design of the regulations, guidance and policies guiding the individual case decision.

It is this need to balance the different objectives and goals of policy that means that the environmental governance system put in place by the Continuity Act has a key role for the Parliament. The Parliament makes laws and holds the Scottish Government to account for delivery, and it is the Parliament that has the democratic legitimacy to balance the competing objectives to ensure that environmental law and policy is effective.

Administrative decision making, backed by democratic accountability, has an important role in planning and consenting regimes. Stable and effective planning and consenting regimes are important to our economy, allowing predictability in decision making and confidence that decisions once made will not be overturned without good reason. The Judiciary has a vital role in ensuring that public authorities act in accordance with the law, and as regards environmental law this is complemented by the role of ESS. However, we are

not convinced that there is a case for the Judiciary to have an expanded role in taking decisions that are currently taken by administrative authorities, normally involving assessment by appropriately trained professionals, including such decisions that are taken on review by the Scottish Ministers having initially been determined by another public authority. As part of the development of the Human Rights Bill, we will be exploring approaches to ensuring effective oversight of public decision-making and ensuring duty-bearers under the Bill are acting in compliance with the right to a healthy environment.

Courts currently can review decisions on the basis of whether they have been taken in line with the law. There have been arguments made by some stakeholders that courts should have the ability to review individual planning and consenting decisions on their merits. This, by itself, would lead to significant delay and uncertainty through to the end of the planning or consenting process, and could prevent development which is needed in the public interest. Some stakeholders argue further that a court should be able to take wider considerations of environmental law and targets into account in reviewing individual planning or consenting decisions, and potentially in reviewing the substantive content of government policies and strategies. This could potentially lead to substantial changes to the operation of policy through decisions on individual cases, that would lead to additional uncertainty and complexity, and the link to democratic accountability would be unclear. We will carefully consider these aspects as part of the development of the Human Rights Bill, including the potential role of the courts in ensuring effective oversight of public decision-making, and the impact on and interaction with the current systems in place.

We do not see the case for an expanded role for ESS in considering the merits of individual planning and consenting decisions. In chapter 3 we discuss the early operational experience of the restriction on ESS considering individual cases, and the ways in which the identification of systematic issues from individual cases can be effectively managed. We are convinced that any friction in the system from the restriction on ESS considering individual cases is manageable, and considerably less disruptive than ESS becoming a de facto appeal body for a range of planning and other consenting regimes.

Our regulatory agencies, including in particular SEPA and NatureScot, have important independent regulatory functions that they discharge. They are accountable, through Ministers, to the Parliament for the effectiveness of their role as regulators, and also as expert consultees in planning and other consenting regimes. We are a small country, and therefore our regulatory agencies are necessarily also the source of expertise and advice to government and, where requested, by the Parliament, as well as carrying out their important independent regulatory functions. This has to be managed correctly to ensure that neither role is compromised. Our regulatory agencies are respected internationally and contribute to international networks such as the Heads of European Environmental Protection. Domestically they are important leaders for innovation and sharing of good practice as members of the Scottish Environment and Economy Leaders Group, and actively seek opportunities to support other UK regulators on shared priorities.

2.4 Access to Justice

Access to justice on environmental matters is important, and the Scottish Government is committed to ensuring compliance with the terms of the Aarhus Convention (as set out in chapter 4 below). We must, however, understand that access to justice does not, and cannot mean that all parties can achieve the outcomes that they desire in each individual decision. Our responsibilities under the Aarhus Convention include providing environmental information, and consulting communities and wider society about decisions and about proposals to revise legislation and policy. We believe that there should be an appropriate balance between proper consultation and consideration of rights and impacts when developing the law and guidance, and effective administration of regulatory schemes with appropriate involvement of communities ahead of individual licensing and planning decisions. However, different views of what law and policy should be are not best addressed through challenges to individual decisions properly reached within the parameters of the law. This balance is clearly reflected in the powers of ESS, to take direct action if a public authority is acting outwith the law, and to report to the Parliament if it is the law itself that is seen as ineffective in protecting the environment.

The Scottish Government has committed to bringing forward a Human Rights Bill in this parliamentary session, which will recognise and include the human right to a healthy environment. The right will be guided by the underpinning international framework including the UN Framework Principles on Human Rights and the Environment and the Aarhus Convention. Recognition of the right in Scots law will aim to ensure that Scottish Government and other public authorities exercising devolved public functions demonstrate that they are

protecting, respecting and fulfilling the right in their policies and regulatory schemes. Ensuring effective access to justice for rights holders in relation to the rights and duties contained in the Bill is a critical policy objective. Policy development in this area is at an early stage and could involve strengthening and development of both non-judicial and judicial routes to seek redress.

2.5 Concluding comments of the overview

This overview chapter has considered the wider context of environmental governance across our governmental and legal systems. We have set out the importance of democratically accountable decision making, and of legislation being a matter for the Parliament, alongside the role of the courts in upholding the law and the particular role of ESS in holding public bodies to account with respect to their compliance with environmental law. There is a pressing need for ambitious, transformative policies in the face of the twin crises in climate and nature. This will require a greater integration of environmental policies across government. The integrity of environmental law, and high environmental standards, must be protected. However, the mechanisms to achieve this protection must recognise the integration of environmental policies with other policy objectives, and support and promote effective decision making to protect the environment, promote sustainability and achieve the wide range of policy goals across government.

The recognition and inclusion of the right to a healthy environment as a part of the rights framework in the forthcoming Human Rights Bill is intended to give added protection to the environmental quality enjoyed by individuals.

The Scottish Government recognises the strengths in the current balance of parliamentary, administrative and judicial roles in decision making on environmental matters, and does not see any strong argument for the creation of a specialist court. Our objective must be to protect environmental standards and rights without individuals and communities having to go to court, a process that can be daunting and stressful. Court action is expensive in time and in money, whether the costs fall on the individuals or are met by government. It is also clear that any major change to permitting and consenting systems at this time would be disruptive and could significantly delay the infrastructure we need for the transition to Net Zero. As we will explain in detail in the following chapter, we are content that the provisions establishing ESS have satisfactorily filled the major gap in environmental governance created by Brexit. However, we accept that there is a need to consider improvements to access to justice which we set out in chapter 4.

3. Whether the provisions of the Continuity Act 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 chapter discusses the first of the three matters specified in section 41. We will first describe the implementation of the measures in the Continuity Act that provide for a system of environmental governance overseen by ESS. We shall then briefly discuss some of the early cases that have been considered under the new system. Finally, we shall present some conclusions on the effectiveness and appropriateness of the governance arrangements. In drawing these conclusions, we have to recognise that these are still quite early days in the operation of ESS and the system of environmental governance.

3.1 Environmental Standards Scotland: Establishment and functions

After a period of non-statutory operation, ESS was formally established on 1 October 2021 under the provisions of the Continuity Act, and has the status of a Non-Ministerial Office. ESS is independent of Scottish Ministers and has the role to ensure environmental laws and standards are adhered to in Scotland, replacing the European Union's scrutiny and enforcement role in a domestic body. ESS is made up of members, with a chairing member, appointed by Ministers subject to approval by the Parliament. The members of ESS have arranged themselves into a Board to run the organisation and to discharge its functions. ESS has a permanent staff, who are civil servants, led by a Chief Executive.

ESS's remit covers a broad definition of environmental law, including all aspects of environmental protection and harm, particularly in relation to human beings and their enjoyment of the environment. ESS monitors and can

take action to improve the effectiveness of environmental law and its implementation. The Continuity Act gives ESS enforcement powers through a system of compliance notices against public authorities, including the Scottish Government if they are not complying with environmental law in the exercise of their functions. Other powers include issuing information notice and presenting to the Parliament improvement reports into the effectiveness of environmental law and its delivery, which creates an obligation for Ministers to respond.

ESS also has the ability to report a public authority to the Court of Session if they fail to comply with a compliance notice. The Court of Session then may make such an order for enforcement as it considers appropriate, or deal with the matter as if it were a contempt of Court. ESS also has the power to apply for judicial review or intervene in civil proceedings if a public authority's conduct a serious failure to comply with environmental law, and it is necessary to make the application to prevent, or mitigate, serious environmental harm.

ESS published its strategic plan¹⁵ in December 2022 after laying it in draft in the Parliament for approval under the terms of section 22 and schedule 2. The strategic plan includes a more detailed description of the powers and functions of ESS. The strategic plan sets out how ESS will work to deliver their roles and responsibilities through each of their five strategic outcomes, and describes its approach to investigations.

¹⁵ [ESS Strategic Plan 2022-25 \(environmentalstandards.scot\)](https://www.environmentalstandards.scot.nhs.uk/strategic-plan-2022-25)

3.2 Investigations

ESS has carried out a number of investigations since its formation, with work commencing when the organisation was operating on a non-statutory basis from January 2021, and continuing once formally established. ESS sets out information on all of its ongoing and completed casework on its website¹⁶. In its strategy, ESS sets out the factors that it considers when deciding which matters to investigate, including the representations that are made to ESS by members of the public, community organisations and environmental NGOs. The strategy also sets out ESS's approach to conducting investigations.

The casework completed to date shows that ESS has taken different approaches to resolving issues in different cases. In some cases, ESS has been able to reach informal resolution with the public authority on the issue under investigation. Other cases have been paused following initial investigation, with ongoing monitoring of the issue. There are positive indications from these outcomes that the flexibility built into the provisions, and the encouragement for ESS and public authorities to cooperate to resolve issues informally, is working effectively.

There is one instance to date – the investigation into air quality – where the provisions for an improvement report have been worked through all stages, with the Parliament approving the Scottish Government's Improvement Plan in response to ESS's tabled Improvement Report. The issue under investigation was a continuation of concerns that had been raised before leaving the EU,

¹⁶ [Ongoing and Completed Casework - Environmental Standards Scotland](#)

leading to a March 2021 European Court of Justice judgment on statutory air quality limit values in respect of nitrogen dioxide.

The report of ESS's investigation included six recommendations for improvement, which ESS presented to the Parliament as a formal Improvement Report under the provisions of sections 26-29 of the Continuity Act. As a result, the Scottish Government prepared an Improvement Plan under the provisions of section 30 of the Act, that they presented to the Parliament in March 2023. This Plan responded to ESS's recommendations. The Net Zero Energy and Transport Committee of the Parliament led the consideration of the issues, and took evidence on the improvement report and plan during April 2023¹⁷.

The air quality investigation demonstrates the provisions working effectively in giving ESS a route to the Parliament to raise concerns and make representations in an Improvement Report. Ministers are obliged to respond to the Improvement Report, and responded positively to the recommendations, seeking ways to improve the delivery of their air quality strategy.

3.3 Effectiveness of provisions

It is still early to judge the effectiveness of the provisions in the Continuity Act for environmental governance. ESS has been successfully established, has developed its strategy and had it approved by the Parliament, and has carried out investigations under the provisions. Some of the powers and functions have been tested in practice, including the presentation of recommendations,

¹⁷ [Air quality in Scotland | Scottish Parliament Website](#)

seeking ways to improve the delivery of the Scottish Government's air quality strategy. However, at this stage some of the provisions remain untested. This, however, can be seen as a positive result of the objective built into the provisions for matters to be settled between ESS and public authorities without resort to formal powers wherever possible. It may also be a sign of a generally high level of compliance with environmental law by public authorities in Scotland.

ESS has developed its own corporate values and principles to guide its work, which were set out in its strategy as approved by the Parliament. As well as its work in promoting compliance and effectiveness, including through carrying out investigations, ESS has developed plans for its work to be informed by its own monitoring and analysis function. As a small body, ESS can never expect to develop and hold expertise on the full scope of environmental law, and is developing its knowledge base to assist in its own assessment of priorities and to carry out overall monitoring of environmental performance. The early exchange of information and knowledge will remain an important part of individual investigations. ESS has also developed its plans to increase engagement with public authorities, and with other stakeholders. ESS has taken a constructive approach to receiving representations, providing advice and support to those who need help in setting out their concerns, and helping people to identify the appropriate route to redirect concerns that are not within ESS's own remit.

As a still relatively new body, it is not surprising that there are still some gaps in awareness of ESS in public authorities and in the wider community. As time passes, more people working in public authorities will have had contact with

ESS, and will be aware of its role and purpose. ESS's work with stakeholder groups has helped to raise awareness of their role. We believe that, where there is awareness of ESS, there is a broad appreciation of their independence and integrity, and a view that they have started their work in a positive and effective manner.

3.4 Continuation of effective governance

The arrangements put in place by the Continuity Act are designed for a domestic setting, and therefore have differences from the system of governance in the EU. In operation, the main differences seen in the operation of the system of environmental governance are:

- The approach is more localised and accessible to stakeholders,
- There is less focus on the mechanics of transposing EU law into domestic law,
- The involvement of the Parliament in receiving Improvement Reports and Plans, and forming conclusions about the effectiveness of the response from Ministers,
- Cases generally move through their stages more rapidly.

However, there are key aspects of the arrangements provide for continuation of effective environmental governance:

- ESS has discretion to determine and prioritise matters for investigation,
- ESS can obtain necessary information from public authorities' to carry out investigations,
- ESS is able to resolve matters where appropriate without recourse to formal powers,

- Public authorities are responding positively, cooperating as required by the Act in sharing information and knowledge for investigations, and seeking to resolve concerns.

3.5 The exclusion of individual cases from ESS's remit

The exclusion of individual cases from ESS's remit was discussed at length during the passage of the Continuity Act, and is still a concern for some stakeholders. The Scottish Government remains convinced that this exclusion is appropriate, and that it should remain the case that it is not ESS's role to act as a point of appeal for individual planning and consenting decisions. ESS's role is to ensure that public authorities comply with environmental law in the exercise of their functions, not to review their judgement on individual decisions. ESS can also consider the effectiveness of the environmental law and policy that sets the framework for individual regulatory decisions.

We do, however, acknowledge that the exclusion of individual cases from ESS's remit can add some friction to the system, alongside the provision that ESS should only intervene once other processes are complete. These provisions could, potentially, lead to an individual who has concerns, that they think should be considered by ESS, deciding that they first have to take a case or a number of cases to a regulator for consideration to demonstrate that all other routes have been tried. There are concerns that this could slow consideration of issues, although regulators are generally subject to statutory time limits for considering any representations.

Some friction is inevitable in the system, in order that ESS does not duplicate existing processes. However, we believe that this friction can be minimised by good communication between ESS and regulators, consistent with what is appropriate for their separate roles. In addition, there may be opportunities for those raising concerns to engage with the regulators and ESS about the nature of their concerns, which may help to identify at an earlier point if there is an issue for ESS to investigate within their remit.

3.5 Conclusion

The Scottish Government is content that the provisions of the continuity Act establishing ESS and providing for its powers and functions 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. As discussed in the previous chapter, there are many ways in which leaving the EU affected our environmental law and the effectiveness of implementation. The provisions establishing ESS have effectively closed the major gap in governance from the loss of the infraction and effectiveness monitoring roles of the EU institutions. The replacement cannot be an identical arrangement, in a domestic setting, and relies on the pressure of taking policy effectiveness issues to the Parliament. There is a growing awareness in public authorities of the function and role of ESS and, as is appropriate in a system of environmental governance, there is an incentive to consider the possibility of investigation.

ESS is an independent body, and it is crucial that they are independent from Ministers in setting their strategy and priorities. The provisions rightly place a

duty to co-operate on public authorities, and provide powers for ESS to gather the information that they need to perform their functions. We have some observations, emerging from existing good practice, about how the provisions can work most effectively:

- Good, early informal information exchange between ESS investigatory staff and officials can ensure effective focus for investigations, saving unnecessary effort on for both ESS and the public authority.
- The provisions allow for early and informal resolution of investigations which can be an effective means of achieving environmental gains.
- The continued focus of the Parliament is critical to the effectiveness of the arrangements.
- There may be potential for regulatory bodies and ESS to coordinate more effectively when issues relating to individual decisions are brought forward for attention, allowing the identification of any systematic issues for investigation without generating unnecessary appeals and complaints cases. There may also be potential for people bringing forward concerns to share more information about the nature of their concerns.

4. Is the law in Scotland on access to justice on environmental matters effective and sufficient?

This chapter discusses the second of the three matters specified in section 41. We will first describe some of the concerns that have been raised about access to justice on environmental matters, including by the Aarhus Convention Compliance Committee (ACCC)¹⁸. We shall then describe a number of measures that are being taken by the Scottish Government to increase access to justice on environmental matters. An important proposal is for the recognition and inclusion of the right to a healthy environment as part of an ambitious human rights framework. Finally, we shall present some conclusions on the effectiveness and sufficiency of access to justice on environmental matters, taking account of the measures that are already in development.

The Scottish Government previously consulted on environmental justice in 2016. The consultation sought views on developments in environmental justice in Scotland¹⁹.

4.1 Concerns about access to justice on environmental matters

We are aware that many stakeholders consider that the biggest barrier to access justice on environmental matters is legal costs that prevent individuals, community groups and NGOs from taking action. Stakeholders have indicated that concerns over costs remain despite the protective expenses order (PEO) regime offering some protection in relation to legal costs in judicial review

¹⁸ <https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom>

¹⁹ [\[ARCHIVED CONTENT\] \(nrscotland.gov.uk\)](#)

hearings. Judicial reviews are heard in the Court of Session and can be both complex and costly.

In addition, we are aware of stakeholder concerns about the lack of a specialist environmental court or tribunal. Some stakeholders have expressed the view that a specialist environmental court would allow for the development of specialist expertise in the field. There are existing initiatives to improve standards of expert witness in Scotland, such as a scheme ran by the University of Aberdeen²⁰.

4.2 Aarhus Convention Compliance Committee

The issue of legal costs has been raised by the ACCC²¹. The ACCC has found that Scotland has not achieved full compliance with the requirement under Article 9(4) of the Aarhus Convention for access to justice in environmental matters not to be ‘prohibitively expensive’.

The Scottish Government is committed to ensuring that there is effective access to justice on environmental matters in Scotland. We are aware of our obligations under the Aarhus Convention and work is in progress in relation to the areas of concern raised by the ACCC in order to ensure Scotland’s compliance with the requirements of the Aarhus Convention. Current work ongoing to aid access to justice, includes:

- the recognition and inclusion of the human right to healthy environment and proposals to enhance both non-judicial and judicial

²⁰ [Improving standards of expert witness evidence in Scotland | News | The University of Aberdeen \(abdn.ac.uk\)](https://www.abdn.ac.uk/news/2018/09/12/improving-standards-of-expert-witness-evidence-in-scotland/)

²¹ [Compliance Committee | UNECE](https://www.unece.org/ceesd/transport/airpollution/compliance-committee/)

routes to remedy in the Human Rights Bill, which will improve access to forms of redress for rights holders;

- the review of the Protective Expenses Order (PEO) regime currently being undertaken by the Scottish Civil Justice Council;
- the introduction, in July 2022, of an exemption from court fees for Aarhus cases²² in the Court of Session;
- legal aid reform, which will consider extending legal aid availability to “legal persons”, such as NGOs, and also facilitate more targeted provision of legal aid services (by area of law and/or by geographical location);
- we continue to explore means to provide further expert support to prosecutors and the judiciary on environmental matters, such as through further training opportunities.

4.3 Environmental Standards Scotland

The introduction of ESS, discussed in the previous chapter, can be understood in itself as an additional route for individual and groups to seek environmental justice. ESS’s role to scrutinise, investigate and secure improvements in public authorities’ compliance with environmental law, the effectiveness of environmental law, and the way environmental law is being implemented and applied in Scotland will help to ensure that environmental justice is effective and sufficient. ESS is also providing advice and information on how individuals and groups can make representations, and working with individuals and groups as they develop and submit representations. Since the establishment of ESS, there have been several investigations launched following representations that

²² An Aarhus case refers to a case one or more members of the public, or an environmental non-governmental organisation, bringing forward litigation which is within the scope of the Aarhus Convention.

have been made by individuals and groups, and there is a general acknowledgement that ESS is more accessible and responsive than previous arrangements.

4.4 Human Right to a Healthy Environment

The proposed recognition and inclusion of the human right to a healthy environment in the Human Rights Bill²³ is intended to provide additional methods in which groups and individuals can hold public authorities to account for their actions which impact the environment. This is widely appreciated as a means to enhance access to justice, and will help deliver environmental justice and hold public authorities to account.

We have committed to introducing a new Human Rights Bill which will strengthen domestic legal protection of international human rights by making them enforceable in Scots law. The Bill is intending to incorporate rights from four international human rights treaties, and will also recognise and include the human right to a healthy environment. The right has been recognised and introduced in some form in more than 100 countries, primarily via their constitutions, and was recognised by the UN General Assembly in July 2022²⁴.

In countries where a right to a healthy environment has been recognised in law, it is generally agreed that this has helped to raise awareness of the interconnected and mutually reinforcing nature of realising people's human rights and ensuring a healthy environment in which to live, work and play. This has helped raise the profile and importance of environmental protection and

²³ [New Human Rights Bill - gov.scot \(www.gov.scot\)](https://www.gov.scot)

²⁴ [UN General Assembly declares access to clean and healthy environment a universal human right | UN News](#)

provided a basis for the enactment of stronger environmental laws. Evidence suggests that where, a right to a healthy environment is recognised in law, enforcement of that right through the courts has helped to provide a safety net to protect groups and in some cases individuals against gaps in statutory law or poor environmental practice and has created opportunities for better access to justice²⁵.

A human right to a healthy environment will help to build on already existing goals in Scotland to promote a healthy and sustainable environment for everyone. The right is understood as inherently linked to the realisation of other rights, such as the right to health and the right to an adequate standard of living, to be incorporated in the Human Rights Bill. Our development of the right will be guided by the underpinning international framework including the UN Framework Principles on Human Rights and the Environment, the Aarhus Convention, and other guiding materials provided at the international level.

4.5 Exempting Aarhus cases from court fees in the Court of Session

In response to some of the concerns raised about legal costs, in July 2022, following a public consultation, environmental cases within the definition of an “Aarhus case” are exempt from court fees in the Court of Session²⁶.

4.6 Protective Expenses Orders regime

A system of Protective Expenses Orders (“PEOs”) is available for environmental appeals and judicial reviews in the Court of Session. An applicant can apply for

²⁵ UN Framework Principles on Human Rights and the Environment A/HRC/37/59

²⁶ [Scottish court fees 2022-2025 – analysis of consultation - Scottish court fees 2022 to 2025: consultation analysis and Scottish Government response - gov.scot \(www.gov.scot\)](#)

a PEO, which the court can grant if satisfied that the individual has a sufficient interest in the issue, and the proceedings would otherwise be ‘prohibitively expensive’. If a PEO is granted, cost caps will apply, restricting the applicant’s liability in expenses to the respondent to £5,000 and the respondent’s liability to the applicant to the sum of £30,000. Both of those caps can be altered if the court is persuaded that it is appropriate to do so. Since their introduction in environmental cases in 2013, a relatively small number of PEOs has been applied for.

The Scottish Civil Justice Council, a statutory body independent of the Scottish Government, is carrying out a review of the Court Rules governing the PEO regime.

4.7 Commitment to introduce legislation to reform legal aid

The Scottish Government has committed to working towards Scottish Legal Aid reform which will consider extending legal aid availability to “legal persons”, such as NGOs, and also facilitate more targeted provision of legal aid services by area of law and/or by geographical location. It is intended that legislative reform be brought forward during this Parliament. The Scottish Government has committed to retain a demand-led legal aid fund.

4.8 Other initiatives for environmental cases

There are a number of initiatives that have been introduced and are being introduced to improve the consideration of environmental cases including:

- establishing the environmental crime taskforce, which brings together experts to support delivery of our commitment to tackling environmental crime.
- improving standards of expert witness evidence in Scotland. In September 2020, Aberdeen University launched a programme for expert witnesses to give them the qualifications and experience to enable them to give expert evidence and the skills needed to be an expert witness.

4.9 Third party right of appeal in planning

We are aware that some stakeholders take the view there are inequalities in the right of appeal in planning and other consenting regimes because of the disparity of rights between applicants for planning or other permission and members of the public. In particular, they have called for the introduction of a third party right of appeal in the planning process to give members of the public the right of challenge over planning decisions and create what they consider would be a fairer process.

The Scottish planning system is already inclusive, engaging all interests as early and effectively as possible. The planning system allows the public to input into and influence the process and decisions, including new and enhanced opportunities introduced recently, but it also needs to balance such representations with other issues and views of other stakeholders. All parties also have recourse to the Courts to challenge a point of law. Local authorities and Scottish Ministers are also ultimately accountable for the decisions they make in relation to planning decisions.

Third party rights of appeal were also considered by the Scottish Parliament during the passage of the Planning (Scotland) Act 2019²⁷. The amendments seeking to introduce third party rights of appeal were considered by parliament, but were not passed. Our position is that an administrative third party right of appeal is not required in the planning system for compliance with the Aarhus Convention.

4.10 Conclusion

As set out in chapter 2, the Scottish Government does not see any strong argument for major reforms to the system of justice on environmental matters. We do, however, believe that it is possible to enhance access to justice within the current arrangements, including in response to concerns raised about compliance with the requirements of the Aarhus Convention. This chapter has described a number of measures that are already under development, and we shall continue to seek ways to enhance access to justice.

The proposed recognition and inclusion of the human right to a healthy environment presents an opportunity for an important change in our understanding and protection of the environment for individuals and communities. The intention is that the Scottish Government, and other public authorities exercising devolved public functions, will have to demonstrate that they are protecting, respecting and fulfilling the right in their policies and regulatory schemes, and individuals will gain new routes to seek redress.

²⁷ [Reforming the planning system - Planning and architecture - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2019/06/Reforming_the_planning_system_-_Planning_and_architecture_-_gov.scot_(www.gov.scot).pdf)

5. Whether and, if so, how the establishment of an environmental court could enhance the governance arrangements introduced by the Continuity Act?

Section 41 of the Continuity Act requires us to consider whether the establishment of an environmental court could enhance governance arrangements put in place by Part 2 Chapter 2 of that Act.

Since the establishment of ESS and the commencement of the provisions of Part 2 Chapter 2 of the Continuity Act, there have yet to be any cases taken to court under those provisions. Under the provisions, ESS has the ability to report a public authority to the Court of Session if they fail to comply with a compliance notice. There are also enforcement provisions should a public authority fail to comply with an Information Order. In the particular circumstances set out in section 38 of the Continuity Act, ESS also have the power to apply for judicial review or intervene in civil proceedings if the public authority's conduct constitutes a serious failure to comply with environmental law, and it is necessary to make the application to prevent, or mitigate, serious environmental harm.

The fact that no cases have arisen under the environmental governance provisions is not surprising, given that the intention in framing the provisions was to promote informal resolution, and that the arrangements are still relatively new. ESS has set out in their strategic plan that they will try to resolve matters informally with public authorities, wherever possible. Public authorities also have a duty to cooperate with and assist ESS, and try to swiftly resolve any matters that are raised without the need for the formal use of the powers given to ESS in the Continuity Act.

This situation is in many ways similar to the position within the European Union, where investigations conducted by the European Commission are generally resolved before reaching the European Court of Justice.

As set out in chapter 2, 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 particular question asked of us by section 41 with respect to a possible role for an environmental court does not change this conclusion. Indeed, there are promising signs that the system of governance will continue to work as intended, with very few instances of recourse to the courts.

6. Consultation

The consultation on the report will be carried out via [Citizen Space](#), and will be open for responses over a 16-week period.

This is the text of the consultation and questions:

6.1 Overview

Following the publication of the Environmental Standards Scotland (ESS) Strategy on 1 December 2023, the Scottish Government has gathered evidence on the effectiveness of environmental governance. The evidence gathered has helped to inform the Report on The Effectiveness of Environmental Governance. The content of this consultation is closely aligned with that of the report, therefore the consultation is seeking views on the three key matters listed in section 41 (2) of the Continuity Act, including:

- whether the provisions of the Continuity Act 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?
- is the law in Scotland on access to justice on environmental matters effective and sufficient?
- whether and, if so, how the establishment of an environmental court could enhance the governance arrangements introduced by the Continuity Act?

6.2 Why your views matter

The Scottish Government is committed to ensuring that there is effective environmental governance arrangements post-Brexit. Your views are crucial to informing the Scottish Government on how environmental governance has performed following the exit from the European Union, access to justice on environmental matters and whether an environmental court can enhance governance.

6.3 Overview of environmental governance

The scope of the review is focused on matters within the Continuity Act. The content of chapter two highlights wider issues of environmental governance that are outwith the formal scope of the report. The Scottish Government welcomes general comments on the review and wider issues of environmental governance.

1. Do you have any general comments on the scope of the review and the Scottish Government approach?
2. Do you have any further comments on wider issues of environmental governance?

6.4 Environmental governance post-Brexit

Chapter three provides an overview of environmental governance following the exit of the UK from the EU, covering issues such as environmental law, existing governance arrangements, the role of Environmental Standards Scotland and how this compares to governance within the EU.

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

6.5 Access to justice on environmental matters

Chapter four covers evidence around access to justice on environmental matters in Scotland, presents stakeholders' input and the Scottish Government position on ensuring that there is effective access to justice on environmental matters in Scotland.

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?

6.6 Governance Arrangements and Environmental Court

Chapter five provides an overview of the evidence provided on whether an environmental court can enhance existing governance arrangements, and presents the current position of the Scottish Government on the issue.

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?

6.7 Additional Information

If any member of the public wants to respond to the consultation other than through Citizen's Space, they should contact the review team by email at EnviroGovReview@gov.scot



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80525-924-4 (web only)

Published by The Scottish Government, June 2023

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1296802 (06/23)

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