Response to the Scottish Government consultation on Developments in Environmental Justice in Scotland

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Scottish Working Party.

UKELA makes the following comments on the proposals and we shall be very happy to discuss further any of the matters raised here.

PRELIMINARY OBSERVATIONS

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 (Chapter 1, para.7) 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. The nature of the first instance procedures is vitally important in determining what has to be provided by way of appeal or review, whilst very many disputes and instances of enforcement activity which affect the legal rights of the parties never reach the court system which is the sole focus of this paper. Moreover, even with such a focus, the paper does not consider "ordinary" civil actions which have a major environmental dimension (e.g. private nuisance cases [see e.g. *Austin v Miller Argent (South Wales) Ltd* [2015] 1 WLR 62], landlord and tenant disputes and other property-based matters). This is significant, not least because the obligations under the Aarhus Convention apply to all environmental cases, so that the statutory provisions in Rule 58A of the Court of Session Rules on Protective Expenses Orders are too narrow to satisfy the obligation to ensure that prohibitive cost is avoided.

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Moreover, the paper concentrates on recent (and in some cases, not so recent) reforms in Scotland, whereas there is wide experience across the world of environmental courts and tribunals of various sorts, offering a variety of models in jurisdictions large and small for the handling of environmental cases, defined in different ways. By taking such a restricted view of the topic and viewing it solely through the lens of the existing domestic courts, the opportunity for a proper "options paper" on the ways of satisfying the need for environmental justice in Scotland has been lost.

CONSULTATION QUESTIONS

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?

As noted above, the narrow focus of the consultation paper means that many large and important areas are not considered. In particular, the town and country planning system is an important area where the vast majority of disputes do not reach the courts but must be seen as raising environmental justice issues.[1] Wide areas of agriculture, fisheries, forestry and mineral law can properly be seen as environmental, as can maritime and energy issues, whilst an expansive approach might extend as far as 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). Environmental issues can arise in almost every area of law.

To provide more concrete examples, payment of support for farmers is underpinned by obligations to protect the environment, and breaches of those obligations can lead to the reduction or complete withholding of agricultural support payments. This may also involve overlapping criminal investigation and prosecution. Agricultural support payments are dealt with initially by administrative decision-making, with a further right of appeal to the Scottish Land Court. On the other hand, nuisance actions, or damages actions arising out of environmental issues, will be heard in the sheriff court or Court of

[1] Even within the restricted sense of the term used here, without exploring matters of substantive environmental justice, e.g. the planning system's failure to secure restoration of opencast coalmines, which affects disadvantaged communities disproportionately.

Session. The Lands Tribunal for Scotland deals with cases where title conditions restrict what use might be made of land, and where the proposal requires planning consent neighbouring proprietors often try to use these procedures to re-run planning objections. SEPA and local authorities are the regulatory authorities dealing with waste issues, and SEPA is the regulatory authority for pollution prevention and control. Other environmental subjects, such as preventing harm from invasive non-native species, issuing nature conservation orders and regulating activities in Sites of Special Scientific Interest, are carried out by Scottish Natural Heritage, with in some cases rights of appeal to the Scottish Land Court under the Nature Conservation (Scotland) Act 2004. There are therefore many different processes in existence which control the environment in many different aspects. Many of these processes are initially administrative, but then provide a system of appeal to a court or tribunal of some sort in order to provide an independent and impartial tribunal.

One area where we feel that the present system is lacking an appropriate process to deal with environmental issues is in the context of civil court actions with an environmental aspect. The nature of the problems which can arise in such actions is that they have the potential to affect significant numbers of people, rather than single individuals or households. Despite being recommended by the Gill Review and the Scottish Law Commission, as yet there is still no process in Scotland which allows for class actions to be brought. As a result, multiple actions have to be raised by litigants individually, even though the subject matter of each action has a common cause and the only distinction between the actions is the impact and damage to the individual pursuers. What is more, it is quite possible that the effect of court reform legislation is that such actions might require to be raised in the sheriff court, whereas the nature and complexity of the litigation mean that such actions would be more appropriately dealt with in the Court of Session.

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?

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. In identifying where further steps are necessary, two points in particular can be made:

1. We need to start by considering what prevents cases reaching the stage of formal judicial proceedings; this can be because alternative procedures exist for their resolution (which may or may not be proportionate, fair, effective and efficient) or because of obstacles which are only partly attributable to the court system but are vital parts of the overall justice system (e.g. resources for prosecutors, costs for litigants).

2. We need to reform the current fragmented and inconsistent structure of regulatory appeals and reviews, where there is no apparent pattern in establishing the nature of the reconsideration (full merits appeal or mere review?) or the nature (administrative or judicial?) or level (sheriff court or Court of Session?) of the body to which it is directed.

Any assessment of the adequacy of the environmental justice system in Scotland must take account of these issues as well as those discussed in this paper.

Further, with regard to the protective expenses orders (PEO) regime, there are significant concerns that it is not compliant with either the Aarhus Convention or the EIA Directive (2011/92/EU). It is limited to Court of Session proceedings under Rule 58A and, unlike the English Rule (CPR 54) where a protective costs order is granted automatically in an Aarhus case, in Scotland the applicant has to establish that to continue would be prohibitively expensive. This has resulted in PEO hearings lasting days, where the costs and risks of not getting a PEO are significant compared to the likely costs of the court action itself. For example, in an application by the John Muir Trust the PEO hearing lasted 3 days, which was the same time it took for the judicial review itself, and the application for a PEO for the reclaiming motion itself lasted a day.

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)?

As noted above, a more far-reaching consideration of the way in which environmental matters are handled is required, which is likely to call for adjustments at all stages, from initial decision-making to ultimate judicial disposal. The end result should be a system that ensures that there are effective, efficient and affordable procedures for resolving disputes, involving expertise at all levels. The pieces can be organised in different ways

to achieve this goal, and decisions as to functions must come before decisions as to structures; a regulatory appeals body might be very different from a court established to provide a strong response to environmental crime. Decisions as to functions also affect the scale of business and thus the feasibility of any potential new structure. In a small jurisdiction such as Scotland, a body with a wider jurisdiction is more likely to have a sufficient case load to justify the resource and ensure the maintenance of the relevant expertise. Combined planning and environment bodies are common in many jurisdictions – although there can be concerns over a dilution of expertise.

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. Such consideration may well also consider the role for mediation in avoiding or resolving at least some environmental disputes. Further current developments, such as the implementation of the review of wildlife crime, the fuller implementation of the Regulatory Reform (Scotland) Act, and the development of sentencing guidelines, must be undertaken within the context of such holistic review.

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