

Review of the Effectiveness of Environmental Governance consultation

ERCS submission to NZET committee 6 October 2023

1. Introduction

The Environmental Rights Centre for Scotland (ERCS) assists the public and civil society to understand and exercise their rights in environmental law and to protect the environment.

We carry out advocacy in policy and law reform to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.

This is ERCS' response to the Net Zero, Energy and Transport Committee's letter of 20 September 2023 requesting views on the Scottish Government's Review of the Effectiveness of Environmental Governance consultation ('the Consultation').

The Consultation was accompanied by a 'Report into the Effectiveness of Governance Arrangements as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021' ('the Report').

2. Overall assessment

ERCS is deeply disappointed by the Consultation and the Report.

We have significant concerns regarding the poor quality of the Report. The Report is superficial in its analysis, narrow in scope, and appears pre-determined in its conclusions. We enclose a copy of our full consultation response.

Our view is that the Report was unlawful for the reasons explained under heading three below.

The key points made in our consultation response are that:

- The Report contains no analysis of the various entrenched problems of environmental governance which exist in Scotland (e.g. the lack of enforcement of environmental laws, the



lack of access to justice in environmental matters and the limited scrutiny of the implementation of environmental laws).

- The Report contains no assessment of the environmental problems facing Scotland, such as the pollution of water and air and the biodiversity and climate crises.
- The Report fails to identify the clear causal connections between the problems of environmental governance and environmental degradation.
- The Report assumes the establishment of Environmental Standards Scotland ('ESS') has filled the 'environmental governance gap' which was left post-Brexit, yet it does not analyse the work of Environmental Standards Scotland in any detail.
- ESS lacks the powers to fill the post-Brexit environmental governance gap - ESS cannot deal with individual cases.
- The Report identifies that individual cases are excluded from ESS' remit yet proposes no solutions to remedy this problem.
- We have several concerns about ESS' policies and practices, including that ESS is slow to act even when presented with clear breaches of environmental laws, that ESS does not use its enforcement powers and that ESS lacks the necessary legal expertise to fulfil its statutory role.
- The Report accepts that Scotland is in breach of the access to justice requirements of the Aarhus Convention, yet it provides no proposals to remedy this.

3. Unlawful failure to consider establishment of an environmental court

The Report was published by the Scottish Government in response to a statutory duty set out in Section 41(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

Section 41(2)(c) of the 2021 Act required the report to cover, "whether and, if so, how the establishment of an environmental court could enhance the governance arrangements referred to in paragraph (a)."

The Report failed to consider whether the establishment of an environmental court enhance environmental governance arrangements.



On 14 July 2023, ERCS wrote to the responsible Minister (Mairi McAllan MSP) to express our concerns that the Report was unlawful. Her response disputed this.

We instructed the opinion of John Campbell KC on the question of whether the Report was unlawful (copy enclosed).

John Campbell KC's opinion is very clear: the Report was not consistent with the Scottish Ministers' statutory duty.

The Scottish Ministers acted unlawfully in their failure to publish a Report which covers the matters required by statute.

We are very disappointed that the question of whether the establishment of an environmental court enhance environmental governance arrangements has not been considered.

The prohibitive expense of taking legal action meant that ERCS did not consider it viable to seek judicial review on the failure of Ministers to discharge their duty under S41 of the Continuity Act.

4. Recommendation

We recommend that the Scottish Government establishes a special committee or working group to revisit the question of whether the establishment of an environmental court could enhance environmental governance arrangements.

This could be something akin to the Grouse Moor Management Group which provided recommendations on grouse moor reform.

Alternatively, a special working group could be established through the NZET committee.