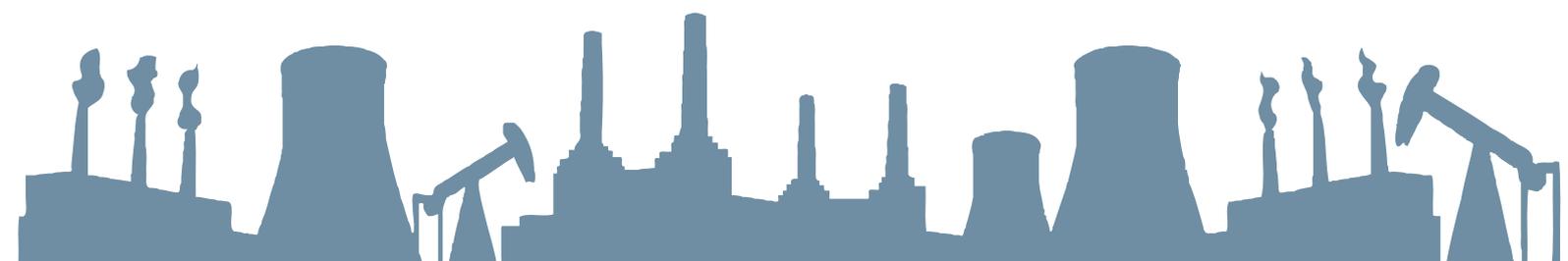




**Friends of
the Earth
Scotland**



LITIGATION OVER THE ENVIRONMENT: AN OPPORTUNITY FOR CHANGE



a report for Friends of the Earth Scotland by Frances McCartney

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Contents

Introduction	5
Chapter one: the case for change	7
Chapter two: environmental tribunals research	15
Chapter three: defining an environmental court for Scotland	22
Chapter four: adapting the current system	45
Conclusions	61

Introduction

Recent decisions of the Aarhus Compliance Committee¹ on compliance with Article 9 of the Aarhus Convention² provide urgency in considering how environmental disputes are resolved in Scotland. Although these decisions related to England and Wales, similar issues arise in Scotland.³ Combined with the infraction proceedings against the UK by the European Commission under the Public Participation Directive,⁴ there is a need in Scotland to reassess the way that environmental disputes are resolved.

This situation is also an opportunity to consider what a 'model' of Aarhus compliance could or should look like. In addition, as will be seen, the system of resolution of environmental disputes has evolved in a haphazard way, and there is a timely opportunity to look

at the resolution of environmental disputes as a whole. Accordingly, the purpose of this report is not just to examine Scotland's options in making changes to its legal system to respond to Aarhus, but also to consider an alternative model for compliance with Aarhus. The report does not claim to be comprehensive, but considers the main options: a 'new' environmental court or tribunal and where such a tribunal might sit, or alternatively, alteration to the jurisdiction of an existing court in Scotland. Lastly the report considers if that in the event that no structural alterations were made, what changes could be made to the existing system of dispute resolution to assist with Aarhus compliance.⁵

There are four main issues to be addressed in terms of Scotland's compliance with the Aarhus Convention.

1. The Aarhus Compliance Committee accepts referrals from members of the public and non-governmental organisations (amongst others) as to compliance with the Convention by signatories.

2. Its formal title is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. It is referred to throughout this report as the Aarhus Convention. The Convention was ratified by the United Kingdom Government on 24 February 2005 and by the European Community by a Council decision of 17 February 2005.

3. Decision ACCC/C/2008/33 on England and Wales and decision ACCC/C/2008/27 on Northern Ireland. At the 5th Meeting of the Parties to the Aarhus Convention in July 2014, a further decision of the Aarhus Compliance Committee that the UK had failed to take sufficient measures to ensure that the costs for all court procedures are not prohibitively expensive, and has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice was upheld http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/Decision_V9n.pdf

4. Directive 2003/35/EC. The infraction proceedings are reported as *Commission v UK* C-530/11 decision of the CJEU 13th February 2014

5. It should be noted that this report has not considered in detail the potential for the use of Alternative Dispute Resolution (ADR). Although it is recognised that ADR may have an important role to play in resolving disputes on a cost effective basis, thereby cutting down on the number of cases that have to be determined by the courts, it is inevitable that some cases will require to be determined by a court or tribunal. However, wherever possible, the report has referenced good practice from elsewhere and points to where a form of ADR could be utilised.

Three of these – costs, timing and scope of review – have been ruled on by the Compliance Committee.⁶ The last of these issues – title and interest, now reformed to a test of “sufficient interest”⁷ – has not presented a systemic problem in England and Wales, and may no longer be such a contentious issue in Scotland.⁸

The report is set out as follows. Chapter one examines the philosophy and context in which environmental law operates. Chapter two examines the advantages

and disadvantages in setting up a tribunal specifically designed to take environmental decisions in an Aarhus compliant manner, and looks at experiences from elsewhere. Chapter three considers how such a tribunal might work in Scotland. However, given that there may not be consensus to pursuing this particular route, chapter four considers how existing Scottish practice could be addressed to modify the court system allowing Aarhus compliance by drawing on good practice and examples from other jurisdictions.

6. See decisions of the Compliance Committee regarding communication ACCC/C/2008/30 (concerning England and Wales) and ACCC/C/2008/27 (concerning Northern Ireland).

7. See decision of UKSC in *AXA v Lord Advocate and others* [2011] UKSC 46.

8. It should however be noted that standing has been taken as an issue in some recent cases in England and Wales. Although it is too early to say whether this is an emerging trend, it may be that public authorities and/or developers might be more keen to take a standing argument given the comparative ease with which a Protective Cost Order can be obtained in England and Wales. See for example *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & Others* [2010] EWHC 2312 (Admin).

Chapter one: The case for change

“...the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen’s participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”

Kofi A. Annan, former Secretary-General of the United Nations between 1997-2006.⁹

Aarhus Convention

The Aarhus Convention was drawn up under the auspices of the United Nations Economic Council for Europe. It has two main objects: to provide a more transparent and open system for environmental decision-making, and to provide procedural rights for individuals within that system of decision-making. The rights provided are, broadly, a right to obtain information about the environment whether or not within the scope of a specific decision, consultation rights on specific classes and types of decisions, and rights to challenge decisions thereafter.¹⁰

Although it might have been expected that countries from the former Soviet bloc and Eastern Europe would face the biggest challenges in compliance in showing transparent decision making, Western European countries have faced challenges to comply with Article 9, the part of the Convention which requires access to environmental justice – in other words, the ability to challenge environmental decisions via a court or administrative body. Recent decisions by the Compliance Committee to the Convention have highlighted the difficulties that the UK faces in this respect.¹¹

The specific rights granted by Article 9 are wide ranging in nature and require provision for the enforcement of rights granted under the Convention, and also the enforcement of environmental law in general. The Convention requires a process to challenge decision-making which is “fair, equitable, timely and not prohibitively expensive” and which provides “adequate and effective” remedies.

In 2011, the Compliance Committee issued its final report in relation to a complaint made by Client Earth

9. Quoted on <http://aarhusclearinghouse.unece.org/about/> (last accessed on 13th September 2013).

10. For further discussion of the background and purposes of the Aarhus Convention see J Wates, ‘The Aarhus Convention: A Driving Force for Environmental Democracy’, (2005) 2 Journal of European Environmental and Planning Law 2.

11. See decisions of the Compliance Committee regarding communication ACCC/C/2008/30 (concerning England and Wales) and ACCC/C/2008/27 (concerning Northern Ireland) and the decision V.9n of the 5th Meeting of the Parties to the Convention.

and the Marine Conservation Society.¹² The complaint alleged that the provisions for access to justice in England and Wales were in breach of Articles 9(2), (3), (4) and (5) of the Convention. The Compliance Committee upheld those findings in respect of Articles 9(4) and 9(5) of the Convention in two respects: firstly in relation to costs for challenges falling under both Articles 9(4) and (5) of the Convention, and secondly by failing to implement clear time limits by which environmental challenges can be taken in respect of Article 9(5). The complaint also alleged that judicial review in England and Wales did not provide a mechanism to allow for a substantive review of the decision-making process as required by Articles 9 (2) and (3). Whilst this was not upheld by the Compliance Committee, the Committee did indicate that judicial review might require an intense scrutiny of the decision.¹³

Whilst this complaint specifically related to the position in England and Wales, it has direct relevance for the position in Scotland. Although Scotland has a

distinct legal system, there are common features between the systems that make a comparative approach useful. Notwithstanding that, it is important at the outset to note distinctions in legal culture and traditions, and the relative size and populations of the jurisdictions. What might be a solution for England and Wales may not be a suitable solution for a smaller jurisdiction such as Scotland.

Change is also, and probably more forcibly, being driven by the obligations the UK has under European law. The EU is a signatory to the Aarhus Convention, but has not wholly transposed the Convention into EU law.¹⁴ Instead, by virtue of the Public Participation Directive 2003/35/EC, amendments were made to two existing Directives introducing concepts of Article 9 of the Convention.¹⁵ Further, the Court of Justice of the European Union (CJEU) has concluded that provisions of Article 9 are of indirect effect.¹⁶ Whilst in England, changes have been made in relation to damages in environmental injunction cases and also on protective costs orders,

12. Reference ACCC/C/2008/33.

13. See paragraph 125 of decision ACCC/C2008/33 where the Committee stated, "The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords, and the European Court of Human Rights, of the very high threshold for review imposed by the Wednesbury test." The Committee went on to express its view that the use of the proportionality principle might provide compliance with a form of substantive review, but stopped short of making any findings of non-compliance with the Convention.

14. By Council decision 2005/370/EC of the 17th February 2005.

15. Amendments were made to Directives 85/337/EEC and 2008/1/EC.

16. Reference for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* in Case C-240/09.

questions still arise as to whether those reforms present full compliance with the Convention.¹⁷

Just part of justice?

As important as compliance with international and European legal obligations are, there are other reasons as to why environmental disputes might justify a different approach. Environmental disputes frequently raise issues of wider public interest than just the interests of those bringing the cases. At its heart, environmental law might be thought of to have two aims: the prevention of harm to the environment and to human health, and the allocation of and use of resources. Both types of decisions can raise matters involving individual interests and interests of wider sections of society.

Historically the courts' main role in environmental cases was to adjudicate in 'private' disputes, such as nuisance claims. That focus no longer exists. As McAuslan notes:

"Nuisance claims are not the only occasions when courts become involved in environmental issues. We can identify four other areas: (i) other claims in tort, e.g. negligence

*and Rylands v Fletcher'; (ii) defining the ambit of the criminal law in respect to pollution offences; (iii) property law; easements, riparian rights, restrictive covenants (iv) judicial review of the actions and decision of public authorities exercising powers in respect of the regulation of the environment."*¹⁸

There are few studies analysing how and where environmental issues are raised in the courts in Scotland. As noted by the Law Society of Scotland in its response to the Regulatory Reform (Scotland) Bill that "there is clear scope for a comprehensive review towards synchronising all permit and dispute resolution systems so that they are all fully congruent and correspond" and noted "in environmental regulation there is a proliferation of appeal or dispute resolution mechanisms, all originally designated for good reasons to do with the traditional approach to appeals."¹⁹ Whilst many cases raising environmental challenges will arise via judicial review petitions or a statutory appeal, there are also appeals to the Sheriff Court, the Scottish Ministers and the Department of Planning and Environmental Appeals. For most third parties, it is likely that their right to challenge decision-making is by a judicial review

17. In March 2011, Defra consulted on the question of cross undertakings for damages in interdict cases and later a separate consultation on the issue of Protective Expenses Orders. The Civil Procedure Rules were amended in 2012 to include rule 45.41 on 'Cost Limits in Aarhus Convention Claims'. However, there are still outstanding issues as to costs in private nuisance claims in particular and further complaints have been submitted to the Aarhus Compliance Committee on private nuisance claims and Article 9.

18. P McAuslan 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' 1991 3(2) Journal of Environmental Law 195, p199.

19. Law Society of Scotland response June 2013 available at [http://www.lawscot.org.uk/media/624626/pla_env_regulatory_reform_\(scotland\)_bill_law_society_of_scotland_response_final.pdf](http://www.lawscot.org.uk/media/624626/pla_env_regulatory_reform_(scotland)_bill_law_society_of_scotland_response_final.pdf)

application.²⁰ Macrory and Woods considered statistics for England and Wales and thought there were roughly equal numbers of judicial reviews brought by industry and by third parties (defined as environmental NGOs or community/individual challenges).²¹ In Scotland it is likely that, given the combined hurdles of funding and (until recently) the restrictive definition of title and interest, most third party actions have been brought by industry.²²

Macrory and Woods have noted that there is an interest in resolving environmental disputes that is as important as the issue in dispute in any one case:

*“...it is equally important that we have in place the most appropriate legal machinery to resolve environmental disputes in a way that is fair, attracts public confidence, and provides an authoritative and coherent approach to environmental law and policy.”*²³

The need for a mechanism to resolve disputes in a fair way to maintain public confidence applies to all areas of law. Macrory and Woods argue there are special features of environmental law that give additional weight to the issue of public confidence in the system. Those features are considered below.

Are environmental disputes ‘special’?

There are other arguments for considering why environmental disputes might be thought to justify specialist treatment.

Macrory and Woods considered a number of factors that they considered merited a different approach to environmental law. Whilst accepting that not all factors were unique to environmental law, they argued, “it is the combination of all these factors which is of particular importance”.²⁴ Such factors included the complex

20. C Reid, in ‘Judicial Review and the Environment’, in B Hadfield, *Judicial Review: A Thematic Approach* (Gill and Macmillan, 1995), argues that the style of Scottish environmental regulation (where public authorities are given broad discretion to carry out complex legal duties and there are statutory procedures for consultation and appeal) means that most environmental law falls within the general public law category, with Scottish environmental law said to provide “fertile ground” (p37) for judicial review.

21. R Macrory and M Woods, ‘Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal’, (Centre for Law and the Environment Faculty of Laws, University College London, 2003), page 21, at paragraph 9.3.

22. A cursory glance at the Scottish Courts Administration (SCA) website shows that only a handful of judicial review actions are brought by third parties without a commercial interest; however, it is not necessarily a reliable guide given that not all decisions are reported on the SCA website. This area merits further research. However, see N Collar, ‘Judicial Review of Planning Decisions in Scotland’ (2013), available at <http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf>, which seems to confirm the relatively low levels of judicial review by third parties, and within that category, even lower numbers taken by individuals, community groups and NGOs.

23. R Macrory and M Woods, ‘Modernising Environmental Justice, Regulation and the Role of an Environmental Tribunal’ (UCL 2003), page 8, paragraph 1.01.

24. ‘Modernising Environmental justice’, p21.

and technical scientific questions which often arose in such cases, the ‘powerful’ influence of EU law, a substantial body of international law, overlapping remedies between private and public law and between civil and criminal law, the development of principles including the precautionary principle, the polluter pays principle and the ‘overarching’ principle of sustainable development, all of which develop, influence and shape the interpretation of domestic law.²⁵

Environmental law disputes frequently involve wider matters of public interest. Third parties who oppose developments or decisions often speak of imbalances in resources. Planning decisions are generally taken after the public has been afforded a period of consultation and thus an opportunity for participation. Many developers consider those rights of consultation extensive, and in some circumstances an unnecessary use of resources.²⁶ A difficulty can arise when the public is encouraged to participate in the process, but then cannot challenge the legality of the associated decision.

Lord Woolf has argued from the perspective of those wishing to challenge, noting that there should be “a simple perhaps single legal procedure, readily identifiable agency for the needs of customers”.²⁷

In England and Wales, the Grant report (published in 2000) considered drivers for an environmental tribunal including the lack of integration of environmental and planning decision-making and greater facilitation of access to environmental justice.²⁸ Lord Carnwath has previously argued that the lack of unified court jurisdiction for dealing with enforcement cases is a major obstacle to effective reform.²⁹

Independence and responsibility of decision-making

Notwithstanding any benefits for improved environmental decision-making for the environment itself, there remains a tension between the ability of government to take decisions – and be accountable for those

25. ‘Modernising Environmental justice’, p20.

26. See for example the CBI’s submission to the Local Government & Regeneration Committee’s consideration of the Scottish Government’s 2012 planning reforms:

http://www.cbi.org.uk/media/1506791/response_to_local_govt_cttee_-_planning_-_may_2012.pdf

27. H. Woolf, ‘Are the Judiciary Environmentally Myopic?’ (1992) 4(1) JEL 1.

28. M Grant, Environmental Court project: final report (DETR, 2000). It should be noted that the Grant report did not appear to have greatly shifted views; Woolf has noted that the “What we must recognise is that, despite the lukewarm official response to Professor Grant’s study, radical action is still needed...” Woolf ‘The court’s role in achieving environmental justice’ Env L R 2002, 4 (2) 79 at 86

29. R Carnwath, ‘Environmental Enforcement: The Need for a Specialist Court’ (1992) JEL 799. Lord Carnwath was appointed to the UK Supreme Court in 2012.

decisions – and how judicial review powers are used by courts. When courts use judicial review powers extensively, it can lead to tensions as to where lines of democratic accountability lie.³⁰ In areas where policy rather than law drives decision-making, handing a court a merits-based jurisdiction is likely to increase that tension.

McAuslan notes that granting a court decision-making powers which are wider than a narrow appellate jurisdiction is unlikely, arguing that:

*“Governments are expected to ‘deliver’ on the environment; governments sign international treaties and are held to account for their implementation; governments are called to account in the House of Commons and in the country at large; governments would be and are being taken to the ECJ for failure to comply with EEC directives and regulations. In such circumstances, it is unrealistic to suppose that governments will hand over to an unaccountable judicial body any significant environmental decisions. One cannot divorce policy from implementation here; the Minister must remain responsible to Parliament for both.”*³¹

Whatever the theory as to the exercise of such powers in practice, the reality is that there would be an unwillingness to provide too broad a jurisdiction to a tribunal.

However, McAuslan notes that many bodies have been set up which have effectively yielded power away from government, including the Planning Inspectorate which now decides over 95% of planning appeals in England and Wales.³²

Specialism

Specialised courts are said to have advantages in “efficiency, expertise and uniformity.”³³ Efficiency is usually delivered through case management rules and procedures. Expertise can be delivered in ways short of a separate court, although it is likely there would be limitations to such an approach.

Expertise derives not only through the provision of judges regularly hearing the same issues. Carnwath noted the scope for further specialist expertise:

*“A key feature of this Tribunal would be flexibility. Possible innovations would be the involvement of expertise from other professions (architects, surveyors, etc.); “multidisciplined adjudicating panels”; broad discretion over rights of appearance; power to instruct independent counsel on behalf of the Tribunal or members of the public; resources for direct investigation by the Tribunal itself; and incorporation into the Tribunal of the existing inspectorate to deal with cases of a lesser dimension.”*³⁴

30. See for example J Ely, *Democracy and Distrust, A Theory of Judicial Review* (Harvard University Press, 1980).

31. P McAuslan ‘The Role of Courts and Other Judicial Type Bodies in Environmental Management’ 1991 3(2) *Journal of Environmental Law* 195, p204-205, referred to as the centripetal argument.

32. *Ibid.*

33. R Arnold, ‘Case management, judicial specialisation and intellectual property litigation’ (2010) 29(4) *C.J.Q.* 478, p485.

34. Lord Woolf, Garner Lecture to UKELA, quoted in R Carnwath ‘Environmental enforcement: the need for a specialist court’ *JPL* 1992 Sep 799 at p800

Although he was later less inclined to advocate an all-encompassing model noting the changes made to the civil court system in England and Wales, he still considered that an environmental tribunal had a role. He also considered that environmental merits based review could be delivered by incorporating the Planning Inspectorate within an environmental tribunal.³⁵

It is more difficult to measure whether specialist courts provide better decisions. Do such courts “qualitatively improve outcomes for litigants and society”?³⁶ Whilst there are differing conclusions as to the value of specialisation amongst the judiciary,³⁷ an impressive array of judges and academics have concluded that:

“...independently and successively, judicial authorities in all regions have determined that without providing more specialized environmental judicial authority,

environmental legislation is too randomly applied and enforced. We concur.”³⁸

It is difficult to argue that there is conclusive evidence of improved decision-making as a result of a specialist court. The argument for an environmental court might be better focused on whether the enforcement of environmental law improves under a specialist court. As the Pring study noted:

“...judges and tribunals across the board think the world is better off because of their ECT [environmental courts and tribunal] and its decisions. Conversely, some developers and other private market interests see the ECT as an unnecessary interference with economic development, but many applaud the speed, reduced cost, and informed and often creative decision-making processes that characterize ECTs.”³⁹

35. R Carnwath, ‘Judicial Protection of the Environment at Home and Abroad’ (2004) 16(3) JEL 315.

36. G Pring and C Pring, ‘Specialized Environmental Courts and Tribunals’ paper presented at the Oregon Review of International Law Symposium on The Confluence of Human Rights and the Environment, University of Oregon, Eugene, OR, February 20, 2009, published in 11 Oregon Review of International Law No. 2 (2009) quoting David B. Rottman, Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?, 37 COURT REV. 22 (2000). In a Scottish context, the argument of the merits of specialisation appears to have been accepted by the Gill Review Board, who noted mixed views for Court of Session cases but that there was “a strong call from practitioners and court users for a greater degree of specialisation at the Sheriff Court” (paragraph 11). In England, Lord Jackson Review of Civil Litigation Costs Final Report recommended in the chapter on case management that: “Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.”

37. See also Damle, ‘Specialize the Judge, Not the Court’ (2005) 91 Va. L. Rev. 1267; Baum, ‘Probing the Effects of Judicial Specialization’ (2009) 58 Duke L.J. 1667; J Stempel, ‘Two Cheers for Specialization’ (1995) 61 Brook. L. Rev. 67; L Kondo, ‘Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases’ (2002) 6(1) UCLA J. L. & Tech.; L Baum, ‘Probing the Effects of Judicial Specialization’ (2009) 58 Duke L.J. 1667, and J Rachlinksi, C Guthrie and A Wistrich, ‘Inside the Banruptcy Judge’s Mind’ (2006) 86 Boston U. L. Rev. 1227.

38. S Zavala, A Benjamin, H Davide Jr, A Dunn, P Hassan, D Kaniaru, R Macrory, B Preston, N Robinson and M Wright, ‘An Institute for Enhancing Effective Environmental Adjudication’, (2010) 3(1) Journal of Court Innovation 2.

39. Greening Justice, at page 6, paragraph 1.2.

Advantages of an environmental court

The Prings give a number of arguments for an environmental court.⁴⁰ Firstly, such a court can provide greater efficiency. They argue that quick hearings can be arranged, avoiding the delays cited by developers as additional costs to the project. A specialist court gives the opportunity for fast-tracking, and thus efficiency.

In this vein, the Scottish Government has been critical of the delays to the infrastructure projects as a result of challenges. Whilst the Scottish Government's solution appears to be a suggestion that appeals should be restricted to being heard by the Inner House only,⁴¹ it is worth noting that the Inner House has in some cases remitted an Inner House appeal to the Outer House, which might show a preference (at least to some degree) to seeing the Inner House as an appeal court.⁴² This might be particularly important given the likely restrictions to be introduced on further appeals to the UK Supreme Court.⁴³

The Prings also refer to reduced operating costs, given that a specialist court can introduce its own controls

over procedures. This might include the prioritisation of urgent cases. The Prings consider this flexibility could include dispute resolution procedures. Examples of such procedures include pre-trial conference calls to focus on the issues and the use of ADR.⁴⁴ The rules could also require the compulsory use of ADR or similar procedures.⁴⁵

An environmental tribunal also gives the potential to provide incentives for compliance with environmental law. The Vermont Environmental Court has the powers to impose a financial penalty over and above the penalty for the specific violation in question. In effect, it offers an opportunity to level out the playing field between businesses that comply and those that do not. As a former judge of the Vermont Environmental Court put it:

*"The environmental enforcement statute thus recognizes that effective environmental enforcement depends on accounting for the economics of the violation from the point of view of the violator. The principle is to create an economic incentive for compliance, that is, to make it more expensive to commit a violation of the laws and regulations than to comply with them."*⁴⁶

40. See Greening Justice, p14-16.

41. See paragraph 41 of the Explanatory Notes to the Regulatory Reform (Scotland) Bill currently before the Scottish Parliament which proposes appeals under the Marine Licensing (Scotland) Act 2010 should be to the Inner House only. The case being referred to in paragraph 41 of the Explanatory Notes is not clear.

42. The Inner House can remit an Inner House appeal to the Outer House and although no statistics are available it did do so in *Walton v Scottish Ministers*. It is also worth noting that the Ministers have made the motion to remit in other cases, including in *Uprichard v Scottish Ministers*.

43. Courts Reform (Scotland) Bill – Consultation on the treatment of civil appeals from the Court of Session, May 2013 <http://www.scotland.gov.uk/Publications/2013/05/6753>

44. M Wright, 'The Vermont Environmental Court' 2010 3(1) *Journal of Court Innovation* 201.

45. As an example, the Land and Environment Court of New South Wales has powers to order the use of 'conciliation conferences' (Land and Environment Court Act 1979, S34).

46. M Wright, 'The Vermont Environmental Court' 2010 3(1) *Journal of Court Innovation* 201, p206.

Chapter two: Environmental tribunals research

This chapter considers existing research on environmental tribunals. The chapter begins with a consideration of what constitutes an environmental court, before moving on to a review of the studies already carried out in the context of the UK and elsewhere (including the Environmental Tribunal of England and Wales), and finally considering the issues of establishing a tribunal in a smaller jurisdiction.

Definition of environmental tribunal

There is no single type of environmental court. Grant⁴⁷ identified 10 characteristics that helped to identify an environmental court:

1. A specialist and exclusive jurisdiction.
2. Power to determine merits appeals.
3. Vertical and horizontal integration, meaning a wide environmental jurisdiction that integrates both subject matter and different types of legal proceedings.
4. The hallmarks of a court or tribunal.

5. Dispute resolution powers, including over disputes to the formulation of policy and more traditional adjudication.
6. Expertise in environmental issues amongst its members.
7. Broad rights of access to the court.
8. Informality of procedures, such as the use of alternative dispute resolution procedures.
9. Costs, this is linked to the need for access and involves means of overcoming the problem of high costs inhibiting access.
10. Capacity for innovation.

The Prings identified 12 critical “building blocks”. In effect these building blocks are design decisions, ranging from jurisdiction to case management.⁴⁸ The Prings’ research reveals the variance in types of environmental courts and tribunals, without providing an exhaustive definition. They included a tribunal within an agency as falling within the definition of an environmental tribunal, even though such a model appears to lack independence. Rather than define an environmental tribunal by its structure, the Prings

47. M Grant, *Environmental Court Project: Final Report* (Department of the Environment Transport and the Regions (UK), 2000).

48. Greening Justice, p xiv. The full list of building blocks are: “1. Type of forum (whether to choose a judicial court or administrative tribunal and at what level of independence) 2. Legal jurisdiction (over what substantive laws, policies, and principles will the ECT be given authority) 3. ECT decisional levels (should the ECT’s level(s) be trial (first instance), intermediate appellate, and/or supreme (final review) and should its power(s) be civil, criminal, administrative, or a combination) 4. Geographic area (what territory should be covered by the ECT, from a town to a city to a state or province to an entire nation) 5. Case volume (will the jurisdiction make the workload appropriate or too low or too high) 6. Standing (what qualifications will be required of

focused on measuring outcomes such as efficiency of process, consistency in decision-making and specialisation of decision-making.

Review of studies already carried out in the UK

The first major UK study on environmental courts and tribunals was the Environmental Court Project, carried out by Professor Malcolm Grant.⁴⁹ The report explored the feasibility of establishing a specialist environmental court for England and Wales. It made no firm recommendations on how desirable such a tribunal would be.

It noted that there is limited experience of environmental tribunals in Europe with the closest models being in Denmark (an Environmental Appeals Board), Ireland (An Bord Pleanála) and Sweden (a system of environmental courts). The report also included a detailed study of four jurisdictions in which various models of environmental courts are in operation (New Zealand, New South Wales, Queensland and South Australia).

The study evaluated a number of existing environmental court systems against 18 criteria. The research concluded that the performance of the Australian models

scored well with regard to their use of expertise, rapid decision-making, use of alternative dispute resolution and enforcement mechanisms. The report was less impressed by public access and attempts to reduce formality and costs of litigation. Although the report noted the challenges associated with translating a model into a different context, it proposed 6 potential models that could be established in England and Wales, ranging from a Planning Appeals tribunal to a comprehensive environmental court.

In 2002 the Royal Commission on Environmental Pollution published 'Environmental Planning', which considered a number of aspects of the regulation of the environment.⁵⁰ Its recommendations were somewhat varied, but included streamlining consents procedures between different agencies, and improvements to public participation on plans and programmes. The Commission also recommended the establishment of Environmental Tribunals to handle not just appeals under environmental legislation, but also planning matters handled by inspectors.

The Department for Environment, Food and Rural Affairs (Defra) responded by commissioning a report

parties to bring an action in the ECT or otherwise participate in a case) 7. Costs (what are the expenses for parties from the time of filing to a final decision and what are the mechanisms to reduce those costs) 8. Access to scientific and technical expertise (how will the ECT manage to get adequate, unbiased input on the increasingly complex scientific-technical issues in environmental cases) 9. Alternative dispute resolution (ADR) (can ADR – often a cheaper, faster, better way to resolve environmental conflicts – be incorporated, as it is by a majority of the ECTs studied) 10. Competence of ECT judges and decision-makers (including qualifications, training, tenure, and salary are needed for quality decision-makers) 11. Case management (what process mechanisms will permit ECTs to move cases through the decision making process more efficiently and effectively and less expensively). 12. Enforcement tools and remedies (what powers will be needed to make the ECT's decisions effective, from mediated agreements to injunctions to criminal fines and incarceration, and all the creative alternatives in between)".

49. M Grant, Environmental Court Project: Final Report (2000, DETR).

50. Royal Commission on Environmental Pollution, '23rd Report: Environmental Planning' (RCEP, 2002).

to examine the case for an Environmental Tribunal. The Macrory and Wood report was published in 2003.⁵¹ It concluded that simply altering existing jurisdictions (such as the Lands Tribunal and the Planning Inspectorate) would be unlikely to be able to meet future demands. Part of these future demands were thought likely to come from substantive law – changing regulatory responses and the need to ensure public confidence in the system – but the recommendations for change were based on the recognition that the Aarhus Convention would be a driver for change. The report noted:

*“The need for a new institutional framework is all the more pressing given the changing context of the role of environmental regulatory appeals. The Aarhus Convention, in particular, promotes the concept of a more active environmental citizenship, and introduces a new concept of environmental justice ... an Environmental Tribunal is likely to provide a more appropriate basis for meeting the aspirations of Aarhus than relying on current procedures.”*⁵²

The Macrory and Wood report recommended a more modest model of an environmental tribunal than had been considered in previous studies, envisaging a

single tribunal able to convene in locations around the country, similar to the way that the Lands Tribunal operates, with non-legal expert members. Jurisdiction would cover matters relating to appeals from specialist environmental agencies such as the Environment Agency and English Nature, industrial process regulation by local authorities, contaminated land appeals and statutory nuisance abatement notices (excluding those concerning private residences). Jurisdiction would not include criminal law issues nor matters currently dealt with by the Planning Inspectorate, but matters concerning environmental assessment could be transferred to the tribunal.⁵³

The Macrory and Wood report appears to have been received positively by Defra and others. However, a 2004 report from the Environmental Justice Project (EJP) considered the model recommended by Macrory and Wood of too limited a scope to provide Aarhus compliance.⁵⁴ It favoured the creation of an environmental court, together with a host of procedural and other changes aimed at increasing the resources available for such cases (including public funding, resources and judicial training). A theme running through the report was that costs prevented many cases proceeding; arguing that

51. R Macrory and M Woods, ‘Modernising Environmental justice: Regulation and the Role of an Environmental Tribunal’ (UCL, 2003).

52. *Ibid*, p9, paragraph 9.

53. Although the report indicated that criminal law issues could be later considered, and in any event Macrory and Woods argued that the tribunal would help improve criminal law enforcement by providing authoritative interpretations and rulings on environmental law.

54. Environmental Justice Project, ‘A Report by the Environmental Justice Project’ (Environmental Justice Project, 2004).

many judicial review cases did not go ahead due to the expense involved.⁵⁵

The EJP proposed a tribunal with a comprehensive jurisdiction; not only judicial reviews and statutory appeals, but also ‘toxic tort’ cases.⁵⁶ It suggested a wider basis on which judicial reviews could be raised which would include a substantive legality challenge – in other words a merits-based challenge.

This was followed by a report from an NGO, Capacity Global.⁵⁷ It made a wide range of recommendations including some directed at the resources available to potential litigants such as the setting up of legal advice centres. It also recommended the setting up of an environmental court, but where the court worked by an informal process, with independent powers of investigation. Around the same time, support for an environmental court also included members of the judiciary.⁵⁸

Developments in England and Wales

In 2010 a first tier Environmental Tribunal was created to hear appeals from various civil sanctions that environmental regulators can impose.⁵⁹ Initially established with a fairly narrow remit, its remit has recently been expanded, with proposals to expand the jurisdiction further.⁶⁰ Macrory noted the lack of strategic oversight to determine where appeal routes should be, and suggested a presumption for any new appeals being created through statute to go to the Environment Tribunal.⁶¹

Macrory and Woods distinguished between regulatory appeals where the appeal would consider or reconsider the application on merit, and judicial review being concerned only with the legality of the decision-making. Their report did not recommend moving judicial review from courts to a tribunal, although it did consider that allowing third parties the right to access regulatory

55. In their survey of practitioners and NGOs, it was noted that 97 % of respondents believed that “the civil law system fails to provide environmental justice”, although it appears that the responses were largely from those represented NGOs/third party interests. The reasons for the failure went beyond costs although that was the largest issue; lack of judicial understanding of environmental issues was cited, together with the narrow scope of judicial review.

56. Toxic torts refer to claims for compensation with an environmental dimension, e.g. nuisance claims.

57. Capacity Global, ‘Using the Law: Barriers and Opportunities for Environmental Justice’ (Capacity Global, 2004). Capacity Global is now known as the Living Space Project.

58. See R Carnwath, ‘Judicial Protection of the Environment: At Home and Abroad’, (2004) 16(3) *Journal of Environmental Law* 326, where Lord Justice Carnwath’s support seems to be lessening.

59. The regulators are Natural England, the Environment Agency or the Countryside Council for Wales.

60. R Macrory, ‘Consistency and effectiveness: Strengthening the New Environment Tribunal’, (Centre for Law and the Environment University College London, 2011). For a list of the tribunal’s jurisdiction, see <http://www.justice.gov.uk/tribunals/environment>.

61. *Ibid* p6

appeal mechanisms might reduce the pressure on judicial review cases.⁶²

The Environmental Tribunal in England and Wales deals with its limited jurisdiction in a cost effective manner.⁶³ Although it is still relatively early in the tribunal's life to assess its impact, it is unlikely to resolve wider Aarhus problems unless third party cases come before it. Its present jurisdiction, as Macrory has noted, does not include judicial review, nuisance claims, criminal environmental claims nor does it affect the jurisdiction of the Planning Inspectorate.⁶⁴ However, a tribunal once set up provides an obvious route for new appeals, and Macrory argues that:

*"...from its fairly humble beginnings the tribunal is now well placed to develop further and play a significant role in the handling of environmental law in this country."*⁶⁵

Notwithstanding that possibility, as of June 2014, designated judges will hear judicial reviews in significant planning cases in the Administrative Court in England & Wales,⁶⁶ a move that was designed to speed up the conclusion of such cases.⁶⁷

Developments in Scotland

There has been little research on environmental courts in a Scottish context.⁶⁸ The Scottish Government has produced two pieces of work on environmental courts:

62. "Failure to tackle the existing weaknesses and gaps in appeal mechanisms will only increase the pressure on judicial review as a default appeal route to which it is not best suited", R Macrory and M Woods, 'Modernising Environmental justice: Regulation and the Role of an Environmental Tribunal', (UCL, 2003), page 6, paragraph 5.

63. "Paradoxically, the two main drivers for change providing the opportunity for establishing the environmental tribunal were not environmental factors. Rather, the new tribunal system was established as a result of a general recognition that the existing tribunal system could be run more efficiently and with greater flexibility. The new civil sanctions and rights of appeal to a tribunal are derived from a review of regulatory sanctions cutting across all areas of business regulation", R Macrory, 'Environmental Courts and Tribunals in England and Wales – A Tentative Dawn', (2010) *Journal of Court Innovation* 77, available at http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf.

64. R Macrory, 'The Long and Winding Road Towards an Environmental Court in England and Wales' *Journal of Environmental Law* (2013, forthcoming).

65. *Ibid.*

66. The Civil Procedure Rules have been amended by the introduction of Rule 54.22(3) which provides that specialist planning judges will deal with significant Planning Court claims; judges will be nominated by the President of the Queen's Bench Division; see *The Civil Procedure (Amendment No. 5) Rules 2014*.

67. For the policy behind the change, see Ministry of Justice press release 5th February 2014 found at <https://www.gov.uk/government/news/new-planning-court-gets-go-ahead-to-support-uk-growth>

68. Although see J Rowan-Robinson, 'Environmental Protection – The Case for a New Dispute Resolution Procedure' 1993 *JLSS* 5. It should also be noted that there has been research on environmental justice in the context of social justice: see Scotland & Northern Ireland Forum for Environmental Research, 'Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation', (SNIFFER, 2005) and Scottish Executive, 'Public Attitudes and Environmental Justice in Scotland', (Scottish Executive Social Research, 2005).

a short document taking a comparative look at environmental courts elsewhere, and a more substantial piece of discursive work examining options for enforcement of environmental law, 'Strengthening and Streamlining' (already briefly considered).⁶⁹ 'Strengthening and Streamlining' rejected the need for an environmental court in Scotland.

However, it is important to note the context of that study which was mainly concerned with considering the effective enforcement of environmental law by criminal law. Many environmental courts do not have a criminal law jurisdiction, and the reports considered in chapter two do not seem to suggest that criminal prosecutions need to be an integral part of its jurisdiction. Although 'Strengthening and Streamlining' mentions the Aarhus Convention, it gives it relatively short consideration and it does not appear to explore the full implications of wider access to challenging environmental decision making.⁷⁰ Whilst the discussion paper did not accept that the current system does not comply with Aarhus, it considered the creation of environmental statutory appeals to the Sheriff Court as a mechanism for providing access to

justice.⁷¹ Insofar as civil law was concerned, it proceeded on the basis that existing systems could be altered to provide Aarhus compliance. That analysis may not be correct given that 'Strengthening and Streamlining' was published in 2006 and the full implications of the Aarhus Convention may not have been known at that time.

More recently, in its consideration of the Court Reform (Scotland) Bill, the Scottish Parliament's Justice Committee considered evidence on proposed reforms to judicial review including on the impacts of introducing time limits on environmental cases and others. In relation to the scope of judicial review, the Justice Committee heard evidence on what Article 9 of the Aarhus Convention may require in terms of a substantive review of environmental decisions.⁷² The Justice Committee, in response to the question of substantive review, noted:

*"The Committee notes the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law. The Committee is sympathetic to calls for the introduction of an environmental tribunal for Scotland."*⁷³

69. Scottish Executive, 'Environmental Courts – Experience in Other Countries', (Scottish Executive, 2005), available at <http://www.scotland.gov.uk/Resource/Doc/921/0017251.doc> and Scottish Executive Environment Group, 'Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland', (Scottish Executive, 2006).

70. See paragraphs 2.105 to 2.107 of the report.

71. See paragraph 2.150. Statutory appeals to the Sheriff were created under certain appeals under the Land Reform (Scotland) Act 2003 on access rights (which included provisions for standing for community groups) and for some appeals under the CAR Regulations. More recently rights of appeal to the Sheriff have been created under Schedule 1 of the Water Resources (Scotland) Act 2013 regarding extensions of water shortage orders.

72. Article 9 (2) of the Aarhus Convention refers to the right "to challenge the substantive and procedural legality of any decision, act or omission...."

73. Scottish Parliament Justice Committee, 5th Report 2014, Stage 1 Report on Court Reform (Scotland) Bill, published 9th May 2014 at paragraph 322; available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/jur-14-05w.pdf

Whilst the Aarhus Compliance Committee has not comprehensively defined what it considers to constitute a procedural review versus a substantive review,⁷⁴ at the very least the Justice Committee's comments assist in focusing on a further challenge for Scotland in meeting both objectives.

The current Scottish Government committed in its 2011 manifesto to consult on options for an environmental court or tribunal in Scotland. While such a consultation remains outstanding, the present Cabinet Secretary for Justice, Michael Matheson, recently told the Justice Committee:

"I am always open to considering how we can improve access to our justice system in an appropriate way. You may recall that, a number of years ago, there was resistance to having over-specialisation of courts because of

*the potential diluting effect that that could have on those who would operate within them. However, mindsets have changed and we now have more specialist courts than we had. The first specialist court that I experienced was the drug court in Glasgow, which was an innovative approach. When I witnessed it at first hand, I could not help but recognise the real value that it had. I recognise the importance of having different specialist courts, and I am open to considering how such specialisation can be continued in the future. I am also open to considering what the shape of our specialist courts should be in the future, including whether we should have an environmental tribunal or court."*⁷⁵

Furthermore, the current Lord Advocate Frank Mulholland has very recently voiced his support for an environmental court with a criminal jurisdiction that would send a "huge and powerful message" about the seriousness of environmental crime.⁷⁶

74. See footnote 13 for the Aarhus Compliance Committee's comments

75. Official Report, Justice Committee, 25 November 2014; c 44

76. 'Lord Advocate lends backing to environmental court' Holyrood Magazine December 2014 <https://www.holyrood.com/articles/news/lord-advocate-lends-backing-environmental-court>

Chapter 3: Defining an environmental court for Scotland

Introduction

This chapter considers the potential role and place of an environmental court in Scotland. The report argues, for the reasons set out below, that implementation of Lord Gill's Scottish Civil Courts Review and Sheriff Principal Taylor's Review of the Expenses and Funding of Civil Litigation would not meet all concerns about environmental civil claims, and further reform is required.

The Scottish Ministers have recognised that the Scottish Civil Courts Review recommendations are only one part of the review of civil justice, and noted that tribunals had to be considered alongside the court system.⁷⁷ The Scottish Civil Courts Review, whilst devoting a chapter

to judicial review, did not consider the implications of the Aarhus Convention in any conclusive detail.⁷⁸ The Taylor Review⁷⁹ on the issue of the cost of litigation had no specific function to consider Aarhus compliance in Scotland and its resultant report does not consider environmental actions.⁸⁰ Whilst implementation of the recommendations of the Gill Review (in relation to case management and time limits) might make differences in the practice and speed of judicial review it is unlikely to resolve concerns regarding the cost to the public purse with an increased number of cases.

The distinction between tribunals and courts has blurred. As noted by then Minister for Community

77. See the introduction to the Scottish Government response to the Gill Review, available at <http://www.scotland.gov.uk/Publications/2010/11/09114610/1> (accessed 27/09/13). The Administrative Justice and Tribunals Council has already considered a number of the implications that might arise from Tribunals if the Gill Review was to be implemented; see discussion paper by Elaine Samuel found at <http://www.justice.gov.uk/ajtc/docs/implications-for-tribunals.pdf> and also the current discussion paper on the structure of tribunals in Scotland found at <http://www.justice.gov.uk/ajtc/docs/tribunal-reform-scotland.pdf>.

78. B Gill, 'The Report of the Scottish Civil Courts Review' (Scottish Civil Courts Review, September 2009). See for example Chapter 12 paragraph 19 which noted arguments that the tests around standing would need to change to comply with the Aarhus Convention, and paragraph 61 to 73 of the same chapter which considered the question of Protective Expenses Orders and the Aarhus Convention.

79. J Taylor, 'The Taylor Review' (Review of Expenses and Funding of Civil Litigation in Scotland, 2013). The Taylor Review had terms of reference to "review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review", see <http://scotland.gov.uk/About/Review/taylor-review/terms-of-reference>.

80. The consideration of environmental cases within the review is confirmed by a written response from Kay McCorquodale Secretary for the Review which confirmed that "the Taylor remit does not extend to specifically examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the UNECE Convention on Access to

Safety and Legal Affairs, Roseanna Cunningham, in the foreword to the Scottish Government's consultation on a new tribunal system:

*"...tribunals are especially important protections against unfair treatment by the state and increase individual resilience and public confidence by providing an efficient and accessible form of legal dispute resolution. The character of tribunals has changed over recent decades: they are no longer considered to be administrative bodies but are now rightly perceived to be an integral part of the justice system."*⁸¹

In considering a new tribunal model, the fundamental question is one of jurisdiction – a tribunal could be a tribunal of environmental law, or of law and the environment. In other words, should a tribunal have jurisdiction over all disputes affecting the environment, or a limited role within specific limits? The second question is where such a tribunal would sit within the justice system, and how it would relate to other courts

and tribunals. The third issue is where such a tribunal might fit in the court structure in Scotland given the major changes to be implemented in light of the Gill Review.

Jurisdictional issues

Lord Woolf's vision was of a court that would act as a 'one-stop shop' handling all aspects of an environmental dispute, including criminal matters, judicial review, and civil liabilities.⁸² His approach was that such a tribunal would have "a general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment."⁸³ He envisaged a flexible procedure with expertise from other professionals acting as "multidisciplined adjudicating panels".⁸⁴ He also argued the tribunal should have the power to instruct independent counsel and resources for direct investigation by the Tribunal itself. Grant had suggested there could be 6 models, ranging from an environmental division of the High Court, a planning appeal tribunal to an entirely separate environmental court.⁸⁵

Information, Public Participation and Access to Justice (more commonly known as the Aarhus Convention). Nor does its scope include availability of legal aid in environmental cases, nor the wider issues of what reforms would be required in Scotland to achieve wholesale compliance with Article 9 of the Aarhus Convention. The Review is considering, amongst other things, the cost and funding of public interest litigation, including environmental actions. However, that is solely in the context of Protective Expenses Orders. Questions 25 and 26 of the consultation paper address that issue" (email from Kay McCorquodale dated 15th March 2010). The report considered the issue of protective expenses orders and made recommendations for their availability in public interest cases generally and multi-party actions. It made no specific recommendations on protective expenses orders in environmental cases.

81. R Cunningham, in Scottish Government, 'Consultation on The Scottish Government's Proposals for a New Tribunal System for Scotland', (Scottish Government, 2012), p1.

82. H Woolf, 'Are the Judiciary Environmentally Myopic' (1992) 4(1) Journal of Environmental Law 1.

83. Ibid, page 13.

84. Ibid.

85. M Grant 'Environmental Court Project: Final Report' (DETR, 2000).

Statutory appeals from the decisions of an environmental regulator (in a Scottish context mainly the Scottish Environmental Protection Agency and Scottish Natural Heritage) are likely to fall under the jurisdiction of a new environmental tribunal. The Regulatory Reform (Scotland) Bill, which received Royal Assent in February 2014, is designed to streamline licensing, and create fixed penalties. It is proposed that an environmental tribunal would hear appeals against such penalties.⁸⁶ Whilst the detail of the tribunal is still to be determined, in evidence to the Scottish Parliament, then Environment Minister Paul Wheelhouse indicated that an Environmental Tribunal would be set up in Scotland, advising:

“...the Tribunals (Scotland) Bill is following a similar timetable to the Regulatory Reform (Scotland) Bill. We intend to set up the appropriate tribunal in regulations at a future point. We will be in a position to identify the most

appropriate appeals route once we know the landscape of the new tribunals system for Scotland.”⁸⁷

It is likely that, at least initially, appeals will be heard by the Scottish Land Court, as the preferred route of the Scottish Government. Grounds for appeal under the Act are broad, including: error of fact, error in law or unreasonableness.⁸⁸

The Tribunals (Scotland) Bill received Royal Assent in April 2014. The Act brings all devolved tribunals in Scotland under a single tribunal structure, with provision for separate chambers. There have been criticisms raised of several parts of the Bill; for example that the President of Tribunals is to be a post reserved to a judge of the Court of Session,⁸⁹ and that tribunal judges will only be appointed on a part-time basis for 5 year terms.⁹⁰

86. The Regulatory Reform (Scotland) Bill was introduced to the Scottish Parliament on 27 March 2013. The accompanying memorandum to the Bill notes at paragraph 15 “appeals from the fixed and variable monetary penalties are expected to be heard in an independent tribunal to be established at a future date. It is estimated that SEPA may serve around twenty financial penalties per year of which, based on current practice in relation to regulatory appeals, it is estimated two or three may be appealed. The proposed Tribunals (Scotland) Bill will inform the relevant tribunal to hear such appeals, and it is expected that this will be attached to an existing jurisdiction within the tribunal system where the costs will be absorbed within existing baselines, offset by savings from the criminal courts.” The memorandum sets out that there may only be two or three appeals per year. However, given the potential size of the penalties, a specialist court may be appropriate (see for example the £2.8 million carbon fine imposed on Exxon Mobile reported at <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-17089378>).

87. Paul Wheelhouse The Minister for Environment and Climate Change in evidence to Rural Affairs, Climate Change and Environment Committee, 5 June 2013

88. New Environmental Enforcement Framework – Consultation on New Enforcement Measures for the Scottish Environment Protection Agency and the Relevant Offences Order, July 2014 <http://www.scotland.gov.uk/Publications/2014/07/6322/7>

89. See the response from the Administrative Justice Scotland Committee and the response from the Faculty of Advocates to the Bill, available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66140.aspx> (accessed 27/09/13).

90. The Lord President’s submission to the Justice Committee noted “It would be useful if the Bill provided for the possibility of permanent salaried posts. Where appropriate, it would give appropriate tenure and standing to such posts and, furthermore, would assist in ensuring suitable recruitment and retention”.

However, a tribunal designed along Lord Woolf's view is more radical, and there is likely to be less consensus as to whether private law nuisance disputes, judicial reviews of environmental decisions, statutory appeals (such as under the planning acts or roads legislation) and criminal cases involving environmental harm should be included within its jurisdiction. Each will be looked at in turn.

Criminal jurisdiction

The 23rd Report of the Royal Commission on Environmental Pollution (RCEP) (2002) was of the view that criminal offences are probably better handled by "ordinary courts".⁹¹ The Environmental Justice Project considered that the criminal law framework was satisfactory.⁹² Grant suggested the deployment of planning inspectors as special stipendiaries for criminal cases

under planning and environmental legislation, and for related environmental issues.⁹³ This approach is adopted from the New Zealand model, and has advantages in bringing to the magistrates' court appropriate expertise and skill. However, it may not apply to the same extent in Scotland given that most, if not all, environmental cases will be prosecuted in the Sheriff Court. The landscape for the use of criminal law to regulate environmental offences may also have shifted given the proposals to provide SEPA with powers to impose fines for breaches of certain environmental laws.⁹⁴

However, there are doubts as to whether the current arrangements in respect of criminal law can provide an effective regulatory system for the environment. One of the main complaints is the low level of fines issued in criminal prosecutions, which has been a common

91. Cited in Scottish Executive Environment Group, 'Strengthening and Streamlining The Way Forward for the Enforcement of Environmental Law in Scotland', (Scottish Executive, 2006), at page 39.

92. Environmental Justice Project, 'A Report by the Environmental Justice Project' which noted at page 14 of the report that in "contrast to the civil law system, respondents and workshop participants do believe the existing criminal justice framework is one within which environmental justice can be obtained. We do not, therefore, recommend any substantial change to present structures within the criminal system".

93. M Grant, 'Environmental Court Project: Final Report' (DETR, 2000), which noted "the deployment of planning inspectors as special stipendiaries for criminal cases under planning and environmental legislation, and for related environmental issues (e.g. statutory nuisance; contaminated land remediation notices; minimum compensation provisions for listed buildings acquisition). This approach, which would adopt and build upon the New Zealand model, has advantages in bringing to the magistrates court the appropriate expertise and skill to handle casework across the whole range of planning and environmental law. Some planning inspectors already are legally qualified; several others are also magistrates", at page 426. However, there would likely to be issues as to experience and training of planning inspectors to enable them sit as judges in the criminal courts, particularly given the complexities and development of criminal law post Human Rights Act 1998.

94. See Regulatory Reform (Scotland) Act, <http://www.legislation.gov.uk/asp/2014/3/contents/enacted>.

theme throughout the UK.⁹⁵ However, there are some signs of a change in approach in the courts. In 2010 the High Court of Justiciary upheld a Crown appeal and imposed a fine of £90,000 rather than the £9,000 imposed by the Sheriff.⁹⁶

In 2004 Lovat published results of interviews with environmental protection officers (EPOs) in SEPA that

considered attitudes and enforcement techniques. She noted that:

“...most of the EPOs do not associate the enforcement of IPC with prosecution. This suggests that negotiation and communication with potential and past offenders is the most important part of the enforcement process.”⁹⁷

95. See for example C. DuPont and P. Zakkow (2003) Trends in Environmental Sentencing in England and Wales, London: DE-FRA. The Environmental Justice Project's report referred to above also has some empirical data. A. Ogus and C. Abbot, 'Sanctions for pollution: do we have the right regime?' (2002) 14 JEL 283, and the short response from top prosecutors in the Environment Agency, R. Navarro and D. Stott, 'A brief comment: sanctions for pollution' (2002) 14 JEL 299. M. Grekos, 'Environmental fines: all small change' [2004] JPL 1330 and R. Malcolm, 'Prosecuting for environmental crime: does crime pay?' (2002) 14(5) ELM 289. Another approach is the 'name and shame' policy adopted by the Environment Agency. A discussion of this can be found in P. De Prez, 'Beyond judicial sanctions: the negative impact of conviction for environmental offences' (2000) 2(1) Env LR 11. Finally, P. de Prez, 'Excuses, excuses: the ritual trivialisation of environmental prosecutions' (2000) 12 JEL 65 provides a real-world view of the ways in which companies address environmental crime and the mitigation they put before a court when sentencing. See also G. Richardson, A. Ogus, and P. Burrows (1982) Policing Pollution: A Study of Regulation and Enforcement, Oxford: Clarendon Press, K. Hawkins (1984) Environment and Enforcement: Regulation and the Social Definition of Pollution, Oxford: Clarendon Press, and B. Hutter (1988) The Reasonable Arm of the Law, Oxford: Clarendon Press, all of which provide an examination of environmental enforcement officers' experience of enforcing the law in the real world. In the latter category, K. Hawkins (2002) Law as a Last Resort: Prosecution Decision Making in a Regulatory Agency, Oxford: Oxford University Press, examines the process of prosecutions brought by the Health and Safety Executive, and I. Ayres and J. Braithwaite (1992) Responsive Regulation, Oxford: Oxford University Press, provides an alternative view of regulatory enforcement. B. Lange, 'Compliance construction in the context of environmental regulation' (1999) 8 Social and Legal Studies 549 brings out the complexity of the very concept of compliance in an environmental context and D. Farber, 'Taking slippage seriously: non-compliance and creative compliance in environmental law' (1999) 23 Harv Envtl LR 297, although using US examples, is helpful; J. Rowan-Robinson and A. Ross, 'The enforcement of environmental regulation in Britain' [1994] JPL 200. There are two articles that examine the practices and opinions of industrial pollution control enforcement officers: A. Mehta and K. Hawkins, 'IPC and its impact: perspectives from industry' (1998) 10 JEL 61; C. Lovat, 'Regulating IPC in Scotland: a study of enforcement practice' (2004) 16 JEL 49.

96. HMA v Doonin Plant Limited [2010] HCJAC 80 Appeal No: XC750/09 found at <http://www.scotcourts.gov.uk/opinions/2010HCJAC80.html>. The largest fine said to be imposed in a criminal environmental case is £200,000 in December 2012 also against Doonin Plant; see <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-20712978>. See also June 2013 press release from SEPA detailing the first confiscation order for an environmental crime; found at http://www.sepa.org.uk/about_us/news/2013/borders_company_handed_first.aspx.

97. C Lovat 'Regulating IPC in Scotland' (2004) 16(1) JEL 49. The study also showed dissatisfaction with prosecutions after reports left SEPA, with both the Procurator Fiscal and the courts and support for a specialist environmental tribunal, presumably with criminal jurisdictions.

Thus the low level of fines imposed appeared to influence decisions as to which mechanisms should be used to achieve compliance.

Perhaps because of, or at least influenced by that background, civil sanctions are increasingly favoured to enforce environmental law.⁹⁸ The Regulatory Enforcement and Sanctions Act 2008 provides for civil sanctions for certain matters with appeals to the Environmental Tribunal created under the Act. These included sanctions under the EU Emissions Trading Scheme, some waste matters, and the Carbon Reduction Commitment.

As noted above, the Regulatory Reform (Scotland) Act gives SEPA a range of powers to impose civil sanctions, with appeals to be considered by an independent tribunal. As such, it might be that in future only the most serious offences will be dealt with by criminal prosecution. Although studies have suggested that a criminal jurisdiction should be given to a tribunal,⁹⁹ it may be more appropriate for the full cultural 'shame' of a criminal conviction to remain, at least for some matters. Whilst a network of specialist environmental fiscals was set up

to concentrate knowledge,¹⁰⁰ if there was a drop in the numbers of cases coming through the criminal system, issues might arise as to how such prosecutions can be delivered both effectively and with expertise. However, it may be that the current levels of prosecution remain, and civil penalties are used for acts that are currently not being prosecuted.

In light of the likely increased use of civil penalties, it may not be desirable to give a tribunal a criminal jurisdiction but rather review in the light of experience regarding the use of civil penalties.

Judicial review

A tribunal with jurisdiction to determine judicial review applications might be desirable on the issue of cost – under the Aarhus Convention, challenges to environmental decisions must be 'not prohibitively expensive'.¹⁰¹ Whilst there are outstanding issues as to how such a system would work, the Court of Justice of the European Union in *Edwards* has indicated that a purely subjective approach is not permitted.¹⁰² The court considered that the financial assessment could not be:

98. Regulatory sanctions in England and Wales were recommended by a report by Professor Macrory 'Regulatory Justice – Making Sanctions Effective' 2006

99. M Grant, 'Environmental Court Project: Final Report' (DETR, 2000), and see also B Preston, 'Characteristics of successful environmental courts and tribunals', paper given to a conference in China in 2013 in which indicated sentencing for environmental crime was one of the successes of the New South Wales Environmental Court (accessed in September 2013 at http://www.legislation.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/characteristics%20of%20successful%20tribunals%20-july%202013.pdf).

100. See <http://www.crownoffice.gov.uk/component/content/article/10-about-us/296-specialist-reporting-agencies> which details a national network of Procurator Fiscals with specialist expertise.

101. See Article 9 (4) of the Convention.

102. See reference to the European Court of Justice in the case of *R on the application of Edwards and Pallikaropoulos v Environment Agency and others (Denmark and others, intervening)* [2013] 3 C.M.L.R. 18.

*“...carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since . . . members of the public and associations are naturally required to play an active role in defending the environment . . . Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.”*¹⁰³

However, the Court of Justice also permitted other factors to be taken into account; the prospects of success, the importance of the case (to both the claimant and for the protection of the environment), the complexity of the relevant law and procedure, any issues regarding whether the claim is frivolous, and the existence of legal aid.¹⁰⁴

At the present time, there are significant difficulties with funding judicial reviews for third party objectors. Before the Aarhus Compliance Committee, the UK argued that the cost associated with a judicial review was managed in a number of ways to achieve compliance. These mechanisms included the availability of legal aid, legal expenses insurance, and Protective Costs (Expenses) Orders.¹⁰⁵

The ability of Protective Expenses Orders to achieve compliance is dealt with further below. However, such orders only deal with liability for the other party's expenses, and not the funding of the petitioner's representation. The mechanisms that the Compliance Committee was told about for England and Wales do not apply in the same way in Scotland. The funding options for a judicial review in Scotland are limited. There are difficulties with the legal aid scheme in Scotland where the environmental issue to be litigated has a wider impact than to the single applicant.¹⁰⁶ In addition, there is little appetite to fund cases through after the event legal expenses insurance, because the costs of the insurance require to be funded by the litigant or his solicitors.¹⁰⁷ In any event the mechanisms for England and Wales were rejected by the Compliance Committee as providing an adequate solution in England and Wales.¹⁰⁸

The infraction proceedings brought by the Commission against the UK have encouraged the introduction of new rules on capping orders across the UK.¹⁰⁹ The rules introduced in different parts of the UK vary in

103. Ibid, para 40.

104. *Edwards and Pallikaropoulos v Environment Agency and others (Denmark and others, intervening)* [2013] 3 C.M.L.R. 18 at paragraph 46.

105. See paragraph 33 of ACCC/C/2008/33.

106. See F McCartney 'Public Interest and Legal Aid' (2010) 32 Scots Law Times 201.

107. See the Scottish Civil Courts Review (Gill Review) paragraph 96.

108. For an analysis of the decision's applicability to Scotland, see F McCartney, 'The Aarhus Convention: Can Scotland Deliver Environmental Justice' (2011) 15 Edinburgh Law Review 128.

109. *European Commission v United Kingdom of Great Britain and Northern Ireland C530/11*; Advocate-General Kokott's opinion was issued on 12th September 2013.

scope and effect, and may not comply with EU law, as set out below.

In England and Wales the Civil Procedure Rules now provide that challengers in Aarhus-type cases who successfully apply for a PCO may not be ordered to pay more than certain prescribed amounts if they are unsuccessful (£5,000 for individuals and £10,000 for groups).¹¹⁰ The rules apply to all Aarhus judicial review cases, defined as a judicial review of any decision, act or omission that is subject to the provisions of the Aarhus Convention.¹¹¹ For a judicial review to come within the scope of the rules, it must be stated on the claim form.¹¹² The defendant can object to the claim being treated as within the scope of the rules by setting out the reasons why it is not within the scope of the Aarhus Convention

within its acknowledgement of service lodged with the court.¹¹³ The court rules on the issue at the ‘earliest opportunity’¹¹⁴ and if it holds it is not within the scope of the rules, it will normally make a no costs award for that procedure.¹¹⁵

The rules in Northern Ireland¹¹⁶ similarly provide for cost caps in all Aarhus cases. The caps are £5,000 for individuals and £10,000 for groups and unincorporated associations, with a cross-cap upper limit of £35,000.¹¹⁷ Appeals are left to the discretion of the court having regard to the means of both parties, the circumstances of the case and permitting access to justice.¹¹⁸

The rules in Scotland¹¹⁹ are more limited in scope given that they only apply to cases under the Public

110. Rules 45.41 to 45.44 of the Civil Procedure Rules.

111. Rule 45.41 (2) which defines the rule to cover “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject”.

112. See rule 45.42. The rules also allow claimants to ‘opt out’ of the scope of the rules by stating this on the claim form (rule 45.42 (b) (ii)) which might be used by commercial claimants, or for those who do not wish to be limited by the upper caps on the recovery of costs.

113. See rule 45.44.

114. Rule 45.44 (2).

115. Rule 45.44 (3) (a). If the case is found to be an Aarhus case, the defender will normally be obliged to pay the applicant’s costs, even if that takes the costs over the upper costs limit to be paid by defenders as set out in the Practice Direction.

116. The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (S.R 2013/81).

117. Regulation 3(2).

118. Regulation 3(7).

119. Rules of Court of Session, rule 58A. The rules were amended by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81)) and then by Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Miscellaneous) 2013 (SSI 2013/120) to update the reference to the relevant Directive.

Participation Directive.¹²⁰ This means that an environmental challenge on national grounds, or based on a European Directive such as the Habitats Directive is not covered within the scope of the rules.¹²¹ The Taylor Review recommended that the power to apply for PEOs should be available in all cases involving the public interest, but that whether an order should be made, and if so, the level of the order, should be a matter for judicial discretion.¹²² It is likely that there will be further litigation around this restriction, and there is a possibility of further complaints being made to the Aarhus Compliance Committee.

There are common problems with the rules for both Scotland and England. Although the English and Welsh rules apply to all judicial review cases within the scope of the Aarhus Convention, the rules are limited to judicial review cases. Accordingly, litigants in private nuisance claims north and south of the border would have to apply for a protective costs order under the Corner House rules,¹²³ with potential difficulties with private interests and the more discretionary nature of the tests

under Corner House. The rules in Scotland only apply to cases that involve either the EIA Directive (2011/92/EU) or the IPPC Directive (2008/1/EC); wider environmental cases falling under the scope of the Aarhus Convention are excluded. In addition, the cross-caps are likely to make such environmental judicial review cases unattractive to solicitors and others working on a speculative or low fee basis, and arguably cross-caps create an inequality of arms in respect of resources. There are also issues as to the cap being set too high; £5,000 for an individual on a low income might be no more helpful than asking them to find tens of thousands of pounds. How willing the court will be to exercise its discretion to lower the cap remains to be seen.

Advocate-General Kokott issued her opinion in the infraction proceedings against the UK on 12th September 2013. The infraction proceedings consider compliance by the UK in respect of the Public Participation Directive as at 22nd May 2010. The Advocate-General proposed a failure to comply with the Directive on three matters concerning Scotland. Firstly, the discretion

120. Directive 2003/35/EC.

121. Although such a challenge might be able to rely on the provisions of Aarhus as indirect effect; see *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] 2 C.M.L.R. 43.

122. The Taylor Review recommended judicial discretion should apply unless rules of court already applied to the particular circumstances of the case; see Taylor Review chapter 5 para 33

123. The Corner House rules were set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. The tests for a Protective Cost Order are that the court must be satisfied that the issues raised are of general public importance; that the public interest requires those issues to be resolved; that the applicant has no private interest in the outcome of the case; that having regard to the parties' resources and the likely costs it is fair and just to make the order; and that without the order, the applicant is likely to discontinue the proceedings and would be acting reasonably in doing so. Lastly, ultimately 'it is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above'. The courts have more recently departed from strict adherence as to whether the issue of private interest in the case, and have relaxed reliance on whether the applicant for an order is receiving pro bono representation which had been seen to enhance the merits of the PCO application.

given to the court to grant costs protection (with reference to the Corner House criteria) particularly given that the discretion does not relate to the underlying aim of the Directive.¹²⁴ Secondly the Advocate-General proposes a finding of a breach on the basis of cross-caps, noting that “a one-way protective costs order is simply an initial step towards establishing equality of arms”.¹²⁵ Lastly, the inability to recover a reasonable success fee is likely to prevent the fair recovery of expenses.¹²⁶

The CJEU in considering the infraction proceedings imposed a partly subjective and objective test. The cost could not be either objectively unreasonable, nor exceed a subjective test of the person involved in the litigation. What is subjectively reasonable can be considered against the prospects of success, the issues at stake, and the complexity of the law and procedure arising in the case.

Whilst the CJEU did not consider it had sufficient evidence to rule on cross-caps, it may be that the issue arises again in the near future.¹²⁷ If the Advocate-General’s comments on cross-caps had been upheld,

further changes would have been required to be made to the PEO rules in respect of cross-caps. Changes may also have been required to the expenses that a successful petitioner could recover, including a reasonable success fee. A further point to note is that the Advocate-General’s judgement excludes reliance on a legal aid regime to show compliance, given that groups cannot apply for legal aid. That judgement unfortunately does not distinguish between the position on legal aid in Scotland and elsewhere.¹²⁸

As such, the judgement recognises that ordinary citizens are unlikely to be able to wholly fund public interest litigation.¹²⁹ In Scotland, in the absence of clear eligibility of obtaining legal aid for public interest environmental challenges, many on a low income are reliant on finding solicitors and Counsel prepared to work on a pro bono or speculative basis, and are also reliant on the Court of Session lowering the £5,000 cap. Working on a speculative basis is unlikely to be attractive given the cross-cap which will be imposed. Given the relative size of many environmental NGOs in Scotland, there may be a genuine difficulty in raising both the

124. Advocate-General Kokott’s opinion in *European Commission v United Kingdom of Great Britain and Northern Ireland* C530/11 at paragraphs 47 – 57.

125. At paragraph 74.

126. At paragraph 78. The Advocate-General also considered the issue of interim relief in interim injunction cases in England and Wales also breaches the Directive.

127. Whilst the evidence is anecdotal, it is likely that there will be fewer practitioners in private practice willing to act in circumstances where there is a limit on the amount of judicial costs (expenses) that can be recovered.

128. At paragraph 29; the Advocate-General does not appear to have taken account of the difficulties presented by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. This is discussed further in chapter 4.

129. Preston notes that “if citizens do not have a private stake in the outcome of the proceedings, little incentive exists to make the often considerable financial contribution necessary for successful litigation” B Preston ‘Public Enforcement of Environmental Laws in Australia’ *J. Envtl Law and Litigation* 1991 Vol 6 39 at p 61

figure required for the cap and being able to fund their own costs (even if the legal fees charged were on a less than commercial basis).

Aarhus compliant judicial reviews in the Court of Session will have cost implications. The current rules on legal aid would appear to be in breach of the Aarhus Convention, and will have to be reformed to be allowed in purely public interest cases. Where PEOs have been granted, public authorities will bear the cost of the judicial review even where they have successfully defended their position. The number of judicial reviews brought by third parties in Scotland has to date been relatively low,¹³⁰ but the reality is that even a modest increase in numbers will have a not insignificant impact for the public purse. Put bluntly, the use of an expensive judicial review mechanism may not be desirable when there is increased access to the courts.

The New South Wales Land and Environment Court has a jurisdiction combining appeal, judicial review and enforcement functions in relation to nominated environmental and planning laws.¹³¹ The Court was given all the powers the New South Wales Supreme Court previously enjoyed by way of judicial review. However the court is not a division of the Supreme Court, but a separate entity on the same level. The purpose seems to have been to allow the court to adopt more flexible working practices than would have been possible as part of the Supreme

Court. Jurisdiction of the court ranges from merits appeals of local councils' determinations of development planning applications, building control determinations, land valuation jurisdiction, judicial review and a criminal jurisdiction, but not tort claims. It cannot hear claims for damages for negligence, nuisance or trespass. Judges preside over certain classes of case, with assessors in other areas, who can seek a ruling on a point of law from a judge. Judges and assessors may also sit together as a multi-member panel.

Although the NSW model might be an ambitious model for Scotland to consider, it combines judicial review and planning appellate functions providing a tribunal that combines a court operating at both the highest judicial level, together with providing swift decision-making in a range of lower level cases. The combined pressures of Aarhus and the reform of civil justice, present the ideal opportunity to consider the NSW model. As has been noted:

“There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention. The matter dealt with here is a symptom of a broader issue affecting the appropriate scrutiny of decision-making, the cost and speed of judicial review and the way in which appellate responsibilities are allocated between Ministers,

130. See N Collar, 'Judicial Review of Planning Decisions in Scotland' (2013), available at <http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf>.

131. The court was established by the Land and Environment Court Act 1979.

planning reporters, courts and tribunals. This specific change should not preclude a more thorough consideration of how best to ensure genuine access to justice across a wide range of regulatory matters.”¹³²

An all inclusive court might present an opportunity to avoid the “proliferation of appeal or dispute resolution mechanisms in environmental functions”.¹³³ That combination of functions is considered further below, in the context of how the tribunal could be set up.

Closely aligned with the common law judicial review function are statutory appeals arising under planning statutes and under other statutes, such as the Roads (Scotland) Act 1984.¹³⁴ Although the court is exercising a different function when considering statutory appeals from when it is considering its common law judicial review function, generally the existence of a statutory appeal limits the ability of the court to consider a judicial review. Where the statutory appeal is the only mechanism for a challenge there are strong arguments that third parties should not have any more limited access than they would under a judicial review application.¹³⁵

Nuisance & personal injury

Carnwath argued that most of environmental law enforcement, including planning and environmental control (a tiny part consists of common law of nuisance) comprises interpretation by the courts of statutory nuisance obligations. In effect, Carnwath argued that there was no easy way of extracting out certain legal aspects of disputes, and a dispute in one area would often involve the court considering legal aspects outwith its jurisdiction. This appears to add weight to an increased function of a tribunal.¹³⁶

Tromans did not see an argument for inclusion of a personal injury claim with an environmental flavour; or, as sometimes referred to, ‘toxic torts’. He noted:

*“There is nothing to support the view that an ‘environmental’ judge would be any better equipped than a judge with a tort or personal injury background to deal with such cases: indeed if an ‘environmental’ judge came from a public law or planning law background he or she would be likely to be rather less well equipped.”*¹³⁷

132. Professor Colin Reid’s response to Regulatory Reform (Scotland) Bill [http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof_Colin_T_Reid\(1\).pdf](http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof_Colin_T_Reid(1).pdf)

133. See the Law Society of Scotland’s response to the Regulatory Reform (Scotland) Bill [http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Law_Society_of_Scotland\(2\).pdf](http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Law_Society_of_Scotland(2).pdf)

134. Other examples include the Planning (Scotland) Act 1997 and the Electricity Act 1989.

135. This was considered by the UKSC in *Walton v Scottish Ministers* 2012 S.L.T. 1211 and insofar as Mr Walton was entitled to bring the challenge.

136. R Carnwath, ‘Environmental Enforcement: The Need for a Specialist Court’ (1992) JEL 799, at page 803.

137. S Tromans, ‘Review “Environment Court Project: Final Report”’ (2001) 13 JEL 423, p424 – 425, reviewing the Grant report.

Providing an environmental tribunal with jurisdiction to hear nuisance and personal injury claims may not sit well with the current Gill proposals. In particular, the Scottish Civil Courts Review proposed a personal injury court with Scotland wide jurisdiction within the Sheriff Court, providing for a specialist personal injury court operating at Sheriff Court level.¹³⁸ Nuisance and toxic tort cases might more logically sit within this jurisdiction. The Scottish Government has accepted that there should be a national personal injury court based at Edinburgh Sheriff Court and the Court Reform (Scotland) Bill currently before the Scottish Parliament provides for this.¹³⁹

A nuisance and personal injury function may not sit neatly with the 'core' functions of a tribunal mainly concerned with public law issues. However, it is also recognised that whilst personal injury claims arise from a variety of situations and circumstances, the consideration of claims with an environmental background may require some analysis of the public law background and circumstances to such claims. There may be an argument for reviewing this jurisdiction, bearing in mind there appears to be relatively few claims pursued in Scotland.

Planning appeals and jurisdiction

For many developers in the UK, planning permission is the first regulatory permission sought. It is likely that for the majority of the public their initial contact with the environmental regulatory system will be through the planning system. The planning system is often the first regulatory consent sought for a large development, and is the part of environmental law that the public has the most opportunities to engage in. Community councils and other representative bodies frequently play a part in the planning system.

Although the question of compliance with Article 6 of the European Convention of Human Rights was settled by *Alconbury*,¹⁴⁰ there is scope for increasing public confidence around such planning decisions. Few decisions in planning appeals are taken by Ministers themselves. The majority of cases determined by the Directorate of Planning and Environmental Appeals (the DPEA) are determined by Reporters themselves, and are thus not political decisions. By shifting the DPEA from its current status as an arm's length part of the Directorate of the Built Environment within the Scottish Government, to an independent tribunal, the DPEA would be a clearly independent decision-maker.

138. See Scottish Civil Courts Review paragraphs 153 – 155.

139. See Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review, November 2010.

140. *Alconbury v [2001] 2 WLR 1389 HL*. See M Grant, 'Human rights and due process in planning' (2000) *Journal of Planning & Environment Law* 1215. However, see advice from COSLA/Improvement Service which considers whether Local Review Bodies might be susceptible to challenges on human rights grounds (available at <http://www.improvementservice.org.uk/library/download-document/2644-local-review-bodies-high-level-guidance/>).

Grant considered that “appeals from decisions of local or national regulatory agencies remain within the administrative structure, and there is a line of political accountability”.¹⁴¹ This includes planning inspectors in England and Wales (reporters in Scotland). Whilst this might be true for the small number of cases where Ministers take the final decision, it is not true for the majority of decisions. For cases where it was felt that there should still be ‘political accountability’ and Ministers should make the final decision, arrangements could be made for an inquiry into the factual and policy decisions and recommendations made to Ministers, in a similar vein to the current model with the DPEA. The Tribunal could be given similar jurisdiction to inquire into a proposal and make recommendations.

The Prings’ report suggests a minimum of 100 cases per year to allow a tribunal to properly function.¹⁴² However, there are tribunals in Scotland that exist with lower figures than that. The Additional Support Needs Tribunal has had a relatively low level of referrals, and this has fallen as low as around 40 in some years.¹⁴³ Whilst

the numbers may be low, it may reflect a poor level of awareness of rights.¹⁴⁴ However, given the proposals under the Tribunals (Scotland) Bill, the cost of tribunals operating with relative low numbers may be manageable given that administrative costs will be shared.

The Scottish Committee on Administrative Justice and Tribunals Council found there to be an ‘appellate deficit’¹⁴⁵ regarding the ability of the citizen to challenge planning decisions. Five policy areas were considered where there was no right of appeal against the principle that:

“...unless there are compelling reasons to the contrary, citizens should have the right to appeal against administrative decisions, and the onus should be on government to rebut that right where it considers that it is not in the public interest to assert it.”¹⁴⁶

The report recommended that a national tribunal be set up as part of the Scottish Tribunals Service to hear appeals from ‘routine’ decisions by planning authorities.

141. M Grant, ‘Environmental Court Project: Final Report’ (DETR, 2000) at page 7.

142. Greening Justice, page 33. Report available at <http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf>

143. See Additional Support Needs Tribunal Eighth Annual Report for financial year 2012/2013 at page 9. In 2006 there were between 40 to 50 referrals, and in 2012/13 there was just over 40. The highest number of referrals appears to be around 75 in 2011/12.

144. See for example H Genn and A Paterson, ‘Paths to justice Scotland: what people in Scotland think and do about going to law’, (Hart, 2001), which suggested a lower level of ability or willingness to use formal legal remedies in Scotland.

145. Administrative Justice and Tribunals Council Scottish Committee, ‘Right to Appeal: A review of decisions made by Scottish public bodies where there is no right of appeal or where the appeal procedure is inaccessible or inappropriate’, (Administrative Justice & Tribunals Council Scottish Committee, 2012) at paragraph 21.

146. Ibid, at paragraph 3. The five policy areas were community care, tuition fees/assessment of student financial support, housing decisions, legal aid and planning.

A further area of some sensitivity is the speed of decision-making. Many developers, if faced with an increase in the number of challenges to their projects, would be particularly anxious around the speed that the court was able to settle the challenges. Complaints on delay may often more on the administrative stages (including consultation) rather than the court or tribunal stage.¹⁴⁷ However, relaxed standing rules increase the need for speedy disposal of claims:

*“The more specialised and efficient the appellate forum, the more relaxed a jurisdiction can afford to be about introducing third-party merits appeals, because of the court’s greater ability to deal summarily with unmeritorious applications and to avoid delay in their handling.”*¹⁴⁸

It is submitted that, to provide a solution for the problems with Aarhus compliance in Scotland, any Environmental Tribunal would need to include judicial review.

Structure and place of an environmental tribunal

If a separate environmental court or tribunal was to be set up, a number of issues arise. Firstly consideration could be given to providing an existing court or tribunal with an additional specialist function. Using this model, a ‘new’ tribunal could be set up, or an existing (or to be created) model would be given an additional

statutory function. Depending on how it was done, this could be an extension from the concept of specialisation that might be seen as simply a restriction on the judge who can hear a case, rather than a new court with its own ethos. However, there are grey areas between these two models, and the specialisation of judges gives opportunities for a certain ethos and ‘feel’ of a court to be created. The second option is for a separate tribunal to be created, with a number of options thereafter as to where appeals would lie from the tribunal.

Using existing courts

The most logical candidates for the extension of existing jurisdiction are either the Sheriff Court (or Sheriff Appeal Court) or the Lands Tribunal.

Sheriff Court

The Sheriff Court already has an established jurisdiction of hearing administrative law appeals in areas such as licensing. It also hears certain appeals with an environmental character such as statutory appeals regarding decisions of access authorities under Part I of the Land Reform (Scotland) Act 2003.¹⁴⁹ The Scottish Civil Courts Review’s suggestion of a specialist personal injury Sheriff Court with a Scotland-wide jurisdiction is being implemented,¹⁵⁰ and a similar structure could be created for environmental and planning appeals.

147. Research was carried out in 2009 by Maastricht University on the comparative speed of administrative decision-making in Germany, the UK, France and the Netherlands; see Chris W Backes and Sander Jansen in *Environmental Law Network Review* Vol 1 2010, page 23.

148. *Ibid*

149. See sections 14 and 28 of the Land (Reform) Scotland Act 2003.

150. See footnotes 83 and 84.

The jurisdiction would be created by statute, detailing specific areas where appeals would be heard in the specialist Sheriff Court rather than in the Court of Session or elsewhere. Rules could include strong case management provisions.

The advantages of this model would be that the cost would be relatively insignificant given that no new court would require to be created. There would be flexibility as to the appointment of Sheriffs to hear cases in the environmental court. The existing clerking arrangements would be utilised, allowing for cost-effective set-up costs. The Sheriffs appointed could still be available for other Sheriff Court business when not required, allowing for efficient use of judicial time. This model would also have an advantage if it were desirable to have a criminal function, although if the third tier District Judge is to be created then this may not be such a relevant consideration. Appeals would be to the new Sheriff Appeal Court if created, or to the Inner House of the Court of Session. Leave to appeal requirements could be considered.

It might be argued that this model is a form of judicial specialisation, albeit in a court which has not had a significant environmental caseload before. Whether

a Sheriff environmental court creates its own working practices and jurisprudence depends on the caseload of the court, the ability of a number of judges to specialise and the flexibility of the court within its own practices to make its own rules. This model might only be desirable if there was to be clear docketing of these cases within the Sheriff Court, to the extent that effectively 'new' appointments of Sheriffs were made to those with the expertise to deal with such cases (bearing in mind that administrative appeals are a small proportion of the caseload of the Sheriff Court), and the ability to devote judicial time to them. In practice, there may be difficulties given the fears of an increased workload in the Sheriff Court from implementation of the Scottish Civil Courts Review,¹⁵¹ and there appears to be a reluctance to rely on part-time Sheriffs to fill the gaps.¹⁵²

Another option would be the Sheriff Appeal Court. At the present time, each Sheriff Principal hears appeals for his/her own Sherifffdom, in addition to having certain administrative and management functions. The Sheriff Appeal Court was proposed by the Scottish Civil Courts Review,¹⁵³ which noted the increasing burden on the Court of Session in hearing appeals, and considered it was more proportionate that such cases were heard at a lower level,

151. See for example Eric McQueen (Chief Executive of the Scottish Courts Service) responding to such fears at <http://www.journalonline.co.uk/News/1012658.aspx#.UkAm4Rz-1DQ>.

152. It is unclear if this is for financial reasons – see <http://news.stv.tv/north/230110-aberdeen-trials-delayed-as-court-service-fails-to-provide-temporary-sheriff/> or is due to the influence of the Scottish Civil Courts Review which recommended a reduction in the reliance on part-time Sheriffs.

153. See paragraph 79 of the Scottish Civil Courts Review.

with strict leave provisions to appeal further.¹⁵⁴ However the Scottish Civil Courts Review did not seem to consider any jurisdiction for the Sheriff Appeal Court outwith its appellate function from the lower court.

Whilst there may be no immediate consensus or desire to move the work of the DPEA to a specialist court, it might be wise to consider that as a possibility. Although it might be seen to be difficult to merge the current practice of planning inquiries into the Sheriff Court, (perhaps more difficult than creating a new tribunal), it should be borne in mind that the Sheriff Court already deals with a wide range of appeals, including some appeals with an environmental character. These are “basically administrative appeals, which deal with the merits of the matter, and these forums are empowered to substitute their decision for that of the original decision maker”.¹⁵⁵ As such, there may be the ability within the Sheriff Court, through a specialist division to create appropriate and cost effective procedures.

Using the Scottish Land Court?

A more obvious existing court to consider is the Scottish Land Court. The Scottish Land Court (referred to as ‘the Land Court’) has a statutory jurisdiction in various crofting and agricultural disputes.¹⁵⁶ It is closely related to the Lands Tribunal for Scotland (referred to as ‘the Lands Tribunal’), which has jurisdiction in various areas of property law and title conditions. The Land Court and Lands Tribunal share office premises and the President of the Lands Tribunal is the Chair of the Land Court.

The Scottish Land Court already has existing administrative law functions of an environmental nature. Under section 34 of the Nature Conservation (Scotland) Act 2004, it hears certain appeals in relation to land management orders made in respect of Sites of Special Scientific Interest. It hears appeals against notices made by the Scottish Ministers regarding nitrate vulnerable zones, regarding orders against landowners to undertake certain action plans and remedial action.¹⁵⁷ It also

154. See page 21, paragraph 33 of the Scottish Civil Courts Review which noted around a third of civil appeals to the Inner House came from the Sheriff Court, with few raising points of law or complexity that required to be considered by the Inner House. The Gill Review proposed the Sheriff Appeal Court should deal with civil appeals from the Sheriff Court and the (new) district judge, but that it would also have a criminal jurisdiction to deal with appeals.

155. Law Society of Scotland’s response to the Regulatory Reform (Scotland) Bill.

156. The Lands Tribunal’s main jurisdiction arises out of the Lands Tribunal Act 1949. It has jurisdiction under matters arising from the Title Conditions (Scotland) Act 2003, the Housing (Scotland) Act 1987, and various appeals regarding compensation to property under statutes include the Land Compensation (Scotland) Act 1963, the Land Compensation (Scotland) Act 1973, the Coal Mining (Subsidence) Act 1957, together with valuation and rating disputes and registration of titles.

157. Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2003.

has an appellate function for decisions made by Ministers in relation to agricultural subsidies. Additionally, the Land Court is the Scottish Government's preferred route for appeals under the Regulatory Reform (Scotland) Act 2014.¹⁵⁸

Both courts appear to recognise a value to alternative dispute resolution methods. The Land Court has non-legal members who often sit alone to determine disputes, noted on the Land Court's website where it states that, "they may be regarded, in a sense, as highly skilled arbiters".¹⁵⁹ The Lands Tribunal can act as an arbiter in disputes. It has an existing model of using non-legal expertise to determine cases, and might be better suited to have a range of different skilled non-legal judges to hear cases – including Reporters in the DPEA – with a flexible procedure to best dispose of the case. It also may present an alternative cost effective way of hearing statutory appeals in environmental cases.¹⁶⁰

The Land Court's jurisdiction could be extended, or alternatively a new tribunal set up to work alongside the Land Court, in a similar way that the Land Court and the

Lands Tribunal currently do. Again this would allow for the sensible allocation of judicial resources depending on demand, and allow functions to be increased over time.

A new tribunal

There are strong arguments for a wholesale creation of a new tribunal. In March 2012, the Scottish Ministers consulted on their proposals for a new tribunal structure in Scotland and two years later the Tribunals (Scotland) Bill received Royal Assent.¹⁶¹ The Act establishes a first tier of tribunals divided into Chambers, to provide flexibility with changing caseloads and new jurisdictions. It also introduces an Upper Tribunal to hear appeals, in which all of the Senators of the Court of Session, serving Sheriffs and Sheriff Principals would sit (although it is not envisaged that all serving judges would routinely or usually sit in the Upper Tribunal). Appointments of tribunal members would be on the basis of recommendation from the Judicial Appointments Board, suggesting that "in this respect, tribunals will be no different from courts" and that the Judicial Appointments Board for Scotland would have a role in supervising arrangements.¹⁶² The Judicial Appointments Board for Scotland

158. <http://www.scotland.gov.uk/Publications/2014/07/6322/7>

159. See <http://www.scottish-land-court.org.uk/about.html>

160. In this respect it is noted that one of the recommendations of the Macrory Report was to transfer contaminated land remediation notice appeals to the Lands Tribunal (p 6). The report divided the appeals into 2 categories: (1) appeals against the refusal of a licence/permit (or against conditions imposed in a licence/permit) required under environmental legislation and (2) appeals against some form of notice served under environmental legislation requiring remedial action or the cessation of activities (p 10), described as 'regulatory appeals' in part to distinguish them from judicial review applications.

161. Scottish Government, 'Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service', (Scottish Government, 27th June 2013), and Tribunal (Scotland) Bill introduced to the Scottish Parliament on 8th May 2013 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62938.aspx>.

162. Scottish Government, 'Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service' (Scottish Government, 27th June 2013), at page 21.

currently has no remit for tribunal appointments.¹⁶³ Reserved tribunals have their appointments made by the Judicial Appointments Commission giving a high degree of independence and transparency, although there can be complaints about the length of time appointments take. By contrast, appointments for Scottish tribunals have tended in the past to be made by an ad hoc interview panel, which can comprise of civil servants, and a member to represent the Public Appointments Commissioner. The appointment of a President of Scottish Tribunals is likely to strengthen independence in tribunal appointments.

The consultation document proposed that ‘internal’ arrangements were made as to the ability of a tribunal judge from one chamber to sit in a different tribunal chamber (referred to as ‘cross-ticketing’). Chamber Presidents and Deputy Chamber Presidents would be appointed to “add a further layer of protection to the

distinctive and specialist operations of different tribunal jurisdictions.”¹⁶⁴ Judicial independence and leadership would be provided by the Lord President as the head of the tribunal service, and the creation of a President of Scottish Tribunals. The Scottish Tribunals Service is to provide all administrative support. The advisory function on rules for tribunals will fall under the jurisdiction of the Scottish Civil Justice Council (set up to replace the Sheriff Court Rules Council and the Court of Session Rules Council).

The consultation paper and resulting Act clearly shows the Scottish Ministers’ commitment to tribunals as an integral part of the judicial landscape, and as part of the solution to the problems identified by the Scottish Civil Courts Review. Whilst the distinction of roles between courts and tribunals can blur (and might do when considering the role of a new District Court judge), the consultation document makes it clear that it is expected

163. The Administrative Justice and Tribunals Council recommended that the Judicial Appointments Board for Scotland should appoint tribunal members, noting that, “All appointments to tribunals in Scotland should be judicial appointments, made on merit and in accordance with procedures that are independent, open and transparent. The Judicial Appointments Board Scotland (JABS), with amendment to its current statutory functions, would be an appropriate body to undertake the recruitment of tribunal members. If JABS does not undertake the recruitment itself, the appointment procedures used must, at the very least, be approved by JABS. All tribunal members should be appointed by Scottish Ministers on the recommendation of the recruitment body and using appropriate procedures. Although unlikely to impact directly on tribunal users, a move to judicial appointments is appropriate because tribunal members fulfil an adjudicative function. Such a move will create coherence, provide security of tenure across the board and a guarantee of judicial independence. It need not impact on the titles used by tribunal members.”, The Administrative Justice and Tribunals Council Scottish Committee, ‘Tribunal Reform in Scotland: A Vision for the Future’ (The Administrative Justice and Tribunals Council Scottish Committee, 2011), paragraph 4.13.

164. Scottish Government, ‘Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service’, (Scottish Government, 27th June 2013), p18, paragraph 4.8.

that the tribunals under the unified structure would have an inquisitorial role, which would be designed to cope with an unrepresented party as a normal part of its functions.

If the proposals outlined in the consultation paper are implemented, it will lessen any concerns regarding the volume of cases that an environmental tribunal might have, in respect that existing tribunal judges could be 'ticketed' to deal with environmental appeals alongside other judicial functions.¹⁶⁵ The Lands Tribunal for Scotland is to be part of the new first tier tribunal.¹⁶⁶

There was no discussion as to the position of planning appeals and the DPEA in the consultation paper. Inclusion of the functions of the DPEA would have implications for the large volume of work before the tribunal.

However, a tribunal should be ideally placed to deal with such functions – the consultation paper notes the need to ensure flexibility in the future, whether between the relationships and functions between courts and tribunals, or as to further developments on tribunals.¹⁶⁷ It also noted the need to ensure working procedures fitted with the requirements of the cases before it.

There are also significant changes to the structure, appointments system and administration of English, Welsh and reserved tribunals operating in Scotland by the Tribunals, Courts and Enforcement Act 2007. The 2007 Act created a new structure for English, Welsh and reserved tribunals, and enables certain judicial review cases to be transferred from the Court of Session to an Upper Tier chamber of the Tribunals Service. Cases can be transferred at the discretion of the court. However,

165. The other tribunals listed in the consultation paper are Mental Health Tribunal for Scotland, Private Rented Housing Panel; Additional Support Needs Tribunal for Scotland and Scottish Charities Appeal Panel (although the Scottish Charities Appeals Panel is proposed to be abolished by the Scottish Government; the consultation paper suggests it would not be a separate chamber in its own right). Other tribunals considered by the consultation paper included the Parole Board for Scotland, the Plant Varieties and Seeds Tribunal, Children's Hearings, various local government tribunals (such as education appeals) and NHS tribunals (such as NHS charges). The Bill proposes the Additional Support Needs Tribunal, a Scottish Charity Appeals Panel, The Crofting Commission, An Education Appeal Committee, In relation to certain Housing and other Acts— (a) a private rented housing committee, (b) a homeowner housing committee, the Lands Tribunal for Scotland, the Mental Health Tribunal for Scotland and in relation to the National Health Service— (a) the NHS National Appeal Panel, (b) the NHS Tribunal, A Parking Adjudicator, A Police Appeals Tribunal, A Valuation Appeal Committee.

166. The Lands Tribunal has opposed its inclusion within the First Tier Tribunal, and its opposition has been supported by the Lord President; the Justice Committee report urge the Scottish Ministers to review its position; Scottish Parliament Justice Committee Stage 1 Report on the Tribunals (Scotland) Bill published 14th October 2013. However, the Lands Tribunal is one of the Tribunals listed in Part 1 of Schedule 1 to the Tribunals (Scotland) Act 2014 as forming part of the Tribunals system.

167. Scottish Government, 'Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service', (Scottish Government, 27th June 2013), paragraph 5.15.

under section 20(1) of the 2007 Act, a case must be transferred if it covers certain reserved areas, to be specified by Act of Sederunt.¹⁶⁸

The 2007 Act also limits the situations in which an appeal can be taken from Upper Tier tribunals to the Court of Appeal in England and Wales. The 2007 Act is silent in relation to the Court of Session.¹⁶⁹ However, the same restrictions to the Court of Session's discretion to hear an appeal have since been introduced by an Act of Sederunt¹⁷⁰ which amends Court of Session rules to limit

the discretion the Court of Session had previously enjoyed in deciding whether it should hear an appeal.¹⁷¹ Concern has been expressed about the implications of these changes for administrative law in Scotland.¹⁷²

Whilst none of these changes would directly affect a devolved tribunal, as has been noted, the relationship between devolved and reserved tribunals remains unclear.¹⁷³ It is important to recognise that through time, the Upper Tier may become the principal court for administrative appeals to be resolved.¹⁷⁴

168. The Act of Sederunt (Rules of the Court of Session Amendment) (Transfer of Functions of the Asylum and Immigration Tribunal Order 2010) 2010 makes amendments to the rules of the Court of Session, transferring functions to the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007

169. The issue was considered by the UKSC in *Eba (Respondent) v Advocate General for Scotland (Appellant)* (Scotland) 2011 UKSC 29, where the UKSC (hearing the case with a similar English case) rejected the notion that judicial review in Scotland is without limit and should not be circumscribed; the UKSC considered that the correct test as to the availability for judicial review should be based on "some important point of principle or practice" and "some other compelling reason", "Underlying the first of these concepts is the idea that the issue would require to be one of general importance, not one confined to the petitioner's own facts and circumstances. The second would include circumstances where it was clear that the decision was perverse or plainly wrong or where, due to some procedural irregularity, the petitioner had not had a fair hearing at all", Lord Hope at paragraph 48.

170. Act of Sederunt (Rules of the Court of Session No.5) (Miscellaneous) 2008 (SSI 2008/349).

171. Permission must be sought for an appeal against a decision of the Upper Tribunal, which will only be granted if the proposed appeal raises an important point of principle or practice, or if there is some other compelling reason for the court to hear an appeal; see Act of Sederunt (Rules of the Court of Session No.5) (Miscellaneous) 2008 (SSI 2008/349)

172. J. Mitchell, 'Proposal to remove judicial review from Scottish courts' (2008), available at: <http://www.jonathanmitchell.info/2008/10/29/proposal-to-remove-judicial-review-from-scottish-court/> See also Lord Clyde, 'Public service – edited version of Lord Clyde's address to the Murray Stable conference on public law in Scotland' (2008) *Journal of the Law Society of Scotland*. Available at: <http://www.journalonline.co.uk/Magazine/53-12/1005983.aspx>. These issues were considered by the Supreme Court in the Scottish case of *Eba* and the English case of *Cart*.

173. See Faculty of Advocates consultation response at <http://www.advocates.org.uk/downloads/news/responses/foaresponse-newtribunalsystem.pdf>.

174. These reforms were proposed by Leggatt, who favoured that the tribunals be split into themed divisions, with a clear route of appeal to an Upper tier tribunal and then to the Court of Appeal or Court of Session, although it would be possible for complex cases to be heard at first instance by an Upper Tier Tribunal. See Leggatt, A. (2001) *Tribunals for users: one system, one service*. London: Department for Constitutional Affairs. Available at: <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>.

Conclusion

At present, the hearing of administrative appeals and planning and environmental matters is separated over a number of courts and tribunals in Scotland. The Sheriff Court has jurisdiction as diverse as appeals in relation to the Coal Mining Subsidence Act 1991, access to land under the Land Reform (Scotland) Act 2003, the Animal Health Act 1981 and the Animal Health and Welfare (Scotland) Act 2006, appeals on abatement notices in respect of statutory nuisance claims, appeals in respect of contaminated land, and private water supplies and certain appeals under the Pollution Prevention and Control (Scotland) Regulations 2000.¹⁷⁵ The Scottish Land Court has jurisdiction in environmental matters on nature conservation, notices concerning nitrate vulnerable zones and agricultural subsidies. The Department of Planning and Environmental Appeals has jurisdiction in a wide range of planning appeals, including reviews of minerals permissions, hazardous substances consents and some environmental appeals (these appeals go to the Scottish Ministers but are dealt with by the DPEA) in a range of issues, including pollution prevention and control and water supplies.

The expansion of the various jurisdictions appears to have been done on a case-by-case basis, and without an

overall strategy in mind. It is not clear why the jurisdictions have necessarily been assigned to each body. The creation of an Environmental Tribunal within a unified Scottish tribunals structure gives the opportunity for a low cost, inquisitorial system to deal with the types of administrative appeals against notices or decisions of public bodies listed above.

Of more difficulty is whether an Environmental Tribunal should have a jurisdiction to deal with judicial review and statutory appeals functions, and functions currently dealt with by the DPEA. It is submitted that if an accessible and cost effective model of challenging public bodies' decisions is to be found, such a jurisdiction would need to be an integrated part of the tribunal's functions, with arrangements for members with appropriate planning expertise to be appointed for DPEA functions. It would be expected that the legal members would already have sufficient knowledge to deal with the judicial review functions, which could provide for a swifter outcome and a lowering of the costs involved. Appeals from such decisions – and appeals generally – could be made to an Upper Tribunal, and perhaps most appropriately to the Senators within the Upper Tribunal with an interest and expertise in such areas. For that reason, a ticketing system might be considered appropriate for an Upper Tribunal.

175. The Contaminated Land (Scotland) Regulations 2000 brought into effect Part II of the Environmental Protection Act 1990 and provides a right of appeal to the Sheriff Court by way of summary application where the notice has been served where there is 'significant harm'. Private water supplies come before the Sheriff Court via the Private Water Supplies (Scotland) Regulations 2006 which gives a right of appeal from decisions of a local authority regarding the supplies or the management or control of such supplies.

The final point that has not yet been considered is the basis on which an Environmental Tribunal would operate, particular in its DPEA functions. The DPEA already considers the 'merits' of a proposal. It is not bound by the narrower considerations of a judicial review type function. Arguably this function gives the opportunity for checks and balances of the environmental implications of a decision to be debated. The inclusion of the jurisdiction of the DPEA with an Environmental Tribunal gives a real opportunity to consider if the role of the courts should move away from the narrower judicial

review function which primarily considers the narrow legality of the procedure, towards a more holistic merits based approach of the underpinning principles of environmental law. Whilst this would have implications which would need to be carefully considered, and may, for example, require an Environmental Court or Tribunal to have a mix of legal and other members, the Scottish Government may wish to consider the Aarhus Compliance Committee's comments in the Port of Tyne case and make changes which offer a method of considering the substantive legality of a decision.

Chapter 4: Adapting the current system

*“We are not persuaded that the special features listed by Macrory and Woods, or indeed the combination of features, is unique to environmental law – it could be argued that these features could be attributed equally to other areas of law such as health, Health & Safety and employment none of which have specialist courts/jurisdiction (tribunals are not taken to be “courts” in the context of the definition of an environmental court given in the introduction to this section).”*¹⁷⁶

In the absence of agreement as to a wide jurisdiction being provided to an environmental tribunal in Scotland, this final chapter considers the changes required to adapt current Scottish practice for resolving environmental disputes.

Although cost is likely to be a major consideration in the creation of an environmental court (or the increase in jurisdiction to an existing court or tribunal), the changes required to comply with the Aarhus Convention will involve costs somewhere within the system. These costs include increased court time, through grants of legal aid

(particularly regarding Counsel’s fees if cases remain in the Court of Session) and through the costs incurred by public bodies in defending such claims. Where a protective expenses order is granted to a petitioner, a public body will recover little, if any, of the costs of defending such claims. Whilst that might also be the case in a tribunal setting, the cost to a public body in litigating in the Court of Session will be higher than elsewhere. There are also likely to be increased costs to the public purse assuming that legal aid will be granted for public interest environmental issues. This last chapter considers what modifications, but not radical structural change, would be required to achieve Aarhus implementation.

Arguments against a specialised court

There are many arguments against a specialist environmental court.¹⁷⁷ It can be argued that the creation of a separate court or tribunal could be detrimental to the status of environmental law. If environmental law issues are removed from mainstream courts, they can be perceived to be of secondary importance. The research

176. Scottish Executive Environment Group, ‘Strengthening and Streamlining The Way Forward for the Enforcement of Environmental Law in Scotland’ (Scottish Executive, 2006), at page 41.

177. G Pring and C Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative, 2009) give a number of reasons including that environmental law is not unique in its complexity and the arguments for an environmental law equally apply in other areas, marginalisation and fragmentation of environmental law, that a better way is to allow for informal direction of cases to a judge experienced or interested in a particular area of law, cost and uncertainty as to how to define an environmental issue

carried out by the Prings confirms this as the experience in some jurisdictions.¹⁷⁸

Particularly in a smaller jurisdiction such as Scotland, the demand for a tribunal is likely to be an issue. There would be a legitimate fear that even if the caseload met the Prings' calculations on the minimum volume of cases,¹⁷⁹ the numbers still do not provide a sufficient opportunity for a court or tribunal to build its own expertise, jurisprudence and efficiencies of working. It may also mean that the tribunal would not have the chance to build up the public profile that the Prings consider important in resolving wider access to justice issues.

It may be that expertise can be built up within the judiciary in an existing generalist court, even without a specialist 'branch'. The Prings note research within US Court of Appeals judges, whereby there can be

"specialisation" which "generalist" judges routinely engage in, referring to an informal assignment process.¹⁸⁰

An informal system of assigning cases to judges who have shown particular interest or expertise would be a straight-forward matter of judicial management. Arguably a formal branch within a general court system, with or without specialist rules can be a better use of resources. The time and resources required to set up an environmental tribunal may be better spent on reforming existing procedures, raising awareness of rights and training the judiciary.

McAuslan raises fears of that a tribunal model will encourage the "confrontationist mode of environmental decision-making which will inevitably occur if we go down the judicial road".¹⁸¹ However, this could be lessened by consideration of ADR within an active case management system.¹⁸²

178. Ibid at p17, although arguably much will depend on the structure and set up of a court or tribunal and the resources available to it. See for example the praise given to the Land Court of Scotland by the Gill Review at paragraph 219, "The reputation of the Court has grown under a succession of distinguished Chairmen in the last 40 years. The modern extensions of its jurisdiction reflect the confidence that the Court enjoys from litigants and practitioners" and at paragraph 220, "In consequence of its clearly delimited subject areas, the flexibility of its procedures and the fact that most of the lawyers who practise in it are experienced in agricultural law, the Land Court has become a model of a specialist court".

179. The Pring research considered that around 100 cases a year are required to justify a 'stand alone' tribunal or court. See *ibid* at p33.

180. See *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, p23.

181. McAuslan 'The Role of Courts and other Judicial Type Bodies in Environmental Management' *Journal of Environmental Law* Vol 3 No 2 at p205

182. To encourage the use of ADR, consideration should be given to the costs; G and C Pring report that, "the Netherlands ECT received a grant to pay the costs of private mediators; while the grant was in place over 50% of parties chose to mediate and 50% of those were successful in reaching an agreement without court intervention. However, when funding ran out and parties had the choice of paying for mediation or going straight to court, only 10% chose mediation and a majority of those did not reach a satisfactory agreement. Evaluation indicated that parties were unwilling to pay for mediation plus litigation if mediation was unsuccessful, when they could go straight to court and obtain a judicial order. In Vermont, cases appropriate for mediation are referred to private mediators in the community, who may charge up to \$1,500 a day, with parties splitting the costs, which many find cost-effective in lieu of a trial", in 'Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty' (2008), at p16. Available at <http://www.law.du.edu/documents/ect-study/intro-paper.pdf> (accessed 05/10/13).

Perhaps the most fundamental argument against the setting up of a separate tribunal is the issue of whether there is conclusive evidence that an environmental court or tribunal gives improved decision-making on the substantive issues. As the Prings note:

*“ECTs, once created, need to provide on-going evidence to the government and public that they are meeting the goals established for them. It is not enough to say generally that ECTs improve access to environmental justice, or that they process environmental cases faster, cheaper, and better. ECTs themselves will have to regularly provide evidence that this ECT improves access to environmental justice and meets the needs of its constituents. To date, no court or tribunal has developed or adopted an evaluation model to measure substantive outcomes, such as environmental protection, contribution to sustainability, or the protection of the interests of future generations.”*¹⁸³

The Prings also point to a number of arguments against environmental tribunals, noting:

“...other fields with legal and factual complexity, resistance to “fragmenting” the judicial system, reluctance to set environmental law apart (“in the closet”), preference for incremental reforms in the general judicial system,

*concerns about sufficient caseload to warrant a speciality court, added costs, susceptibility to “capture” by special interests, lack of judges with knowledge and training in the subject area, court bias, judges substituting their judgement for that of an administrative agency or conversely relying too heavily on agency/political positions, among others.”*¹⁸⁴

In a 2006 discussion paper on the enforcement of environmental law in Scotland, the Scottish Government considered that:

*“...the fragmenting of the judicial system to accommodate a myriad of specialist courts would seem to put in danger procedural and sentencing consistency – furthermore, there are counter-indications suggesting that incremental or procedural changes would address the issues without the creation of a specialist environmental court.”*¹⁸⁵

However, it cannot be assumed that this analysis answers the arguments on a tribunal for with civil jurisdiction. ‘Streamlining and Strengthening’ was largely concerned with criminal issues. It noted that:

“It cannot be assumed that the creation of a specialist environmental court would in itself guarantee higher

183. Greening Justice: Creating and Improving Environmental Courts and Tribunals, p89. However, an alternative measure of the success of an environmental court or tribunal is set out by NSW Land and Environment Court Chief Judge Brian Preston, relating to three access-to-justice principles – “equity, effectiveness and efficiency” – Australian law’s requirement of “just, quick, and cheap” (Preston, 2008, 396-397).

184. Pring HRs and ECTs, p 309 11 Or. Rev. Int’l L. 301 (2009) Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment; Pring, George; Pring, Catherine

185. Scottish Executive Environment Group, ‘Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland’ (Scottish Executive Environment Group, 2006), at page 41.

*prosecution rates or more punitive sentences and it could be argued equally that procedural changes could address such concerns just as effectively.”*¹⁸⁶

Tromans reminds us that arguments for environmental courts should not be overstated. Arguments as to the rationalisation or development of the law should be considered with caution, and expectations of the role of a tribunal in this area may be overstated, it being more appropriate to look to the Law Commission for reform of law.¹⁸⁷

Given the absence of a third party right of appeal to the Department of Planning and Environmental Appeals (‘DPEA’), judicial reviews or statutory appeals by community groups and NGOs – those parties most likely to rely on Aarhus in seeking access to justice – will still require to raise their cases in the Court of Session. Litigation in the Court of Session is likely to remain an area of difficulty given the costs involved. As an alternative to a specialist court, recommendations for lowering the cost of litigation in the Court of Session are considered in chapter four.

The current response

If no specialist court or tribunal is to be created, then changes are required to make the Scottish system Aarhus compliant. The current problem is centred mainly

around costs (in various fora), but there are also potential problems in relation to access to the court aligned with the forthcoming reform of the civil courts. There may also be an issue as to whether the scope of judicial review satisfies the requirements of the Convention. Each of these issues will be examined.

Costs – Protective Expenses Orders

The new rules on Protective Expenses Orders are insufficient on their own to achieve Aarhus compliance. The implementation of the rules has yet to take effect, and it is hoped that the rules will provide a straightforward mechanism to obtain costs protection at an early stage. However, at best the rules only cover a narrow section of environmental cases under the Public Participation Directive. There is therefore an urgent need to widen the scope of the rules to cover all environmental cases. The Inner House considered an appeal against the refusal of a protective expenses order in a case concerning a residents association challenging on flooding grounds.¹⁸⁸ In rejecting the appeal, the Inner House relied on the discretion that was given to the court under the Corner House criteria. The court noted that:

“...litigation is costly. The discretionary power of the court to award judicial expenses serves to mitigate the cost of vindicating rights. It also provides a means whereby the

186. Ibid.

187. Stephen Tromans, ‘Environment Court Project: Final Report’ (2001) 13 JEL 423, p424 – 425, reviewing the Grant report.

188. The Newton Mearns Residents Flood Prevent Group for Cheviot Drive v East Renfrewshire Council and the Stewart Milne Group [2013] CSIH 70.

court can discipline litigants with a view to encouraging them to conduct their litigations efficiently.”¹⁸⁹

The court does not appear to have made reference to the UK’s obligations under the Aarhus Convention, and its discretion in refusing the application for a cap does not appear to have been aimed at promoting wide access to justice.

To comply with the Aarhus Convention, the current Court of Session rules would require to be amended to provide for the availability of such an order in all environmental cases, including statutory appeals and nuisance actions raised in the Court of Session. The cross-cap should be removed and the rule should provide for one-way cost shifting. The limits should be carefully considered; it does not appear that any detailed research has been carried out to justify the limits as objectively reasonable or affordable.

Similarly no provision has been made to date for the various environmental issues that could be litigated

in the Sheriff Court (e.g. a nuisance action), bearing in mind that Article 9 (4) of Aarhus provides safeguards for breaches of national environmental law.¹⁹⁰

Costs – court fees

In 2012, the Scottish Government consulted over proposed changes to court fees.¹⁹¹ As was noted by the Faculty of Advocates, the proposed increase could give rise to a breach of Article 6 of the European Convention of Human Rights if the ability to go to court was impeded.¹⁹² The proposed fees would mean that a hearing in the Inner House might be around £2,000 per day in court fees. Whilst the Scottish Government decided to introduce the increases over a three-year period, unless a litigant is in receipt of legal aid or has a very low income,¹⁹³ these courts fees will increase the financial burden and will place a further barrier to achieving Aarhus compliance.

An exemption from paying court fees should be automatically granted in all Aarhus cases, which could perhaps be triggered by the grant of a protective expenses order.

189. Ibid, para 24.

190. It should be remembered that “national environmental law” is not limited to environmental law of a European origin given that the Aarhus Convention is a UN regional treaty and not one originating from the European Union. In that context, the meaning of national environmental law is clear.

191. Scottish Government, ‘Review of Fees Charged by the Court of Session, Accountant of Court, Sheriff & Justice of the Peace Courts, High Court, Office of the Public Guardian: A Consultation Paper’ (Scottish Government, 2012).

192. At paragraph 3.6 of the Faculty of Advocates response to the Scottish Government consultation.

193. The exemptions on the basis of income include those on income support and some other benefits; see the Scottish Courts Service “Court Fees” available at <http://www.scotcourts.gov.uk/taking-action/court-fees>

Costs – legal aid

The legal aid system needs to be reformed in three respects in Scotland. Firstly, it needs to be altered so as to include the ability to obtain legal aid for public interest matters. At the present time the ability to obtain legal aid for a public interest matter is regulated by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which would appear to mean that many environmental cases – including those with a private interest – are ineligible for legal aid.¹⁹⁴ Regulation 15 requires to be repealed, at least insofar as environmental cases are concerned, in order to comply with the provisions of the Aarhus Convention.¹⁹⁵

In addition, it might be desirable (and more cost effective) for legal aid to be given to community groups, rather than individuals within community groups. In the Netherlands, NGOs have access to legal advice through government-funded programmes.¹⁹⁶ In England and Wales there are provisions that effectively allow for the

sharing of a legal aid certificate between members of groups, with contributions shared.¹⁹⁷ These might be valuable mechanisms in public interest cases to reflect the true benefit of bringing the case over a wider community, and to allow for all those who should be considered as clients to be involved in the running of the case. It may also be valuable where the Scottish Legal Aid Board can be properly satisfied that there is the potential for a community group to raise funds to contribute to the cost.¹⁹⁸

Standing – sufficient interest

Until the UK Supreme Court's decision in *AXA v the Lord Advocate*, in public law cases a petitioner had to show both title and interest.¹⁹⁹ Title meant:

*"...he must be a party (using the word in its widest sense) to some legal relationship which gives him some right which the person against whom he raises the action either infringes or denies."*²⁰⁰

194. See F McCartney, 'Public interest and legal aid' (2010) 32 Scots Law Times 201.

195. In its analysis to its consultation on increasing court fees to a full cost recovery basis, the Scottish Government noted that although "Concern was also raised about the availability of legal aid for environmental cases. Whilst it is possible for individuals to apply for legal aid in such cases, it is also important that there is a careful balancing of the overall cost to the public purse in funding public interest cases that could be funded in other ways. The Scottish Government has no current plans to amend legal aid regulations in this regard".

196. C Backes on Chapter on the Netherlands, in 'Access to Justice in Environmental Matters in the EU' edited by Jonas Ebbesson, at p391

197. For legal aid for nuisance claims, the relevant regulations are The Civil Legal Aid (Prescribed Types of Pollution of the Environment) Regulations 2012; for environmental judicial reviews a community contribution is usually expected to the cost of the action

198. Any contributions would need to be a modest amount, and certainly less than £5,000. It is suggested that a fixed sum would be the most cost effective method of dealing with matters.

199. *AXA General Insurance Limited and others v Lord Advocate & others* [2011] UKSC 46.

200. *Lord Dunedin in Nicol (D&J) v Trustees of the Harbour of Dundee* 1915 SC (HL) 7.

To show interest a party had to have “a material or sufficient interest.”²⁰¹ A pecuniary stake in the outcome of a case assisted in establishing interest.²⁰² Generally, title was shown if the tests for interest are met.²⁰³ However, both tests had to be satisfied. Title and interest were frequently unresolved until the full hearing of the petition; often the merits of the petition were used to resolve the question of whether title and interest exists.

St Clair and Davidson noted that, “it has been generally considered that Scots law adopts the narrow approach”.²⁰⁴ That narrow approach was taken in Rape Crisis Centre where Lord Clarke held that it was “a fallacy to suppose that because of the public interest in ministers acting lawfully and fairly that public interest by itself confers on every member of the public a right to challenge a Minister’s act or decision”.²⁰⁵ In practice it has presented difficulties for a number of environmental

litigants in judicial review proceedings.²⁰⁶ The Civil Courts Review recognised the difficulties of the current test of title and interest, quoting Lord Hope:

*“...an approach to standing which applies a private law test to issues of public law is at risk of being out of touch with the public interest in having matters of that kind, about which a section of the public has a genuine grievance, litigated in the courts.”*²⁰⁷

In its 2011 AXA decision, the UK Supreme Court considered the law on title and interest had, for too long, been focused on private rights rather than public wrongs.²⁰⁸ Lord Hope noted:

“As for the substantive law, I think that the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the

201. Air 2000 v Secretary of State for Transport (No 2) 1990 SLT 335.

202. J St Clair and N Davidson, Judicial Review in Scotland (Green and Son, 1986), page 65 quoting Lord Justice-Clerk in Strang v Steuart (1864) 2 M. 1015 at 1029. Such thoughts were repeated in Doherty v Norwich Union Fire Insurance Limited 1974 SC 213, as per Lord Robertson at 220.

203. Although exceptions are found; see Clyde and Edwards, op cit 93, at paragraph 10.19.

204. St Clair and Davidson op cit 93 at paragraph 5.06.

205. Rape Crisis Centre v Secretary of State for the Home Department 2001 SLT 389, at p394.

206. Forbes v Aberdeenshire Council & Anr [2010] CSOH 01 which was approved by the Inner House in AXA v Lord Advocate 2011 SLT 439; Skye Windfarm Action Group Ltd v Highland Council [2008] CSOH 19. The Respondents took issue with title and interest in the written pleadings but did not argue it on the day. The challenge was to certain matters in the EIA and was ultimately unsuccessful. However, title and interest was kept ‘hanging over’ the group and the Council reserved the right to raise it again at a later stage; see also William Smith vs the Scottish Ministers; the City of Glasgow Council; Scottish Enterprise; Peel Holdings plc; and Clydeport Operators Limited <http://www.scotcourts.gov.uk/opinions/XA119.html> where the Respondents indicated they intended to argue against title and interest to sue.

207. Lord Hope of Craighead, ‘Mike Tyson Comes to Glasgow – A Question of Standing’ (2001) Public Law 294, quoted at paragraph 18 Vol 2 of the Gill Review.

208. AXA General Insurance Limited and others v Lord Advocate & others [2011] UKSC 46.

*court's supervisory jurisdiction that lie in the field of public law. The word "standing" provides a more appropriate indication of the approach that should be adopted... it cannot be based on the concept of rights, but it must be based on the concept of interests. It is worth noting that, as Friends of the Earth Scotland pointed out in their written intervention, in the 19th century Scots law was quite liberal in its approach to the question of standing in relation to what were said to be public wrongs."*²⁰⁹

The Supreme Court's decision in *AXA* came only days after the decision by Lord Brailsford in the Outer House in *McGinty v Scottish Ministers*,²¹⁰ where a birdwatcher was prevented from challenging the designation of a site within the National Planning Framework for Scotland on the basis that he did not have interest.²¹¹ However, even following *AXA*, the issue did not appear to be closed. The Inner House seemed to cast doubt as to whether the chair of a community opposition group could present a statutory challenge to a by-pass under the Roads (Scotland) Act 1984. The Inner House noted:

*"In pursuing the present reclaiming motion, therefore, the claimer does so as a private individual ... He does not aver, and did not seek to suggest to the court, through his counsel, that he himself would suffer any particular prejudice if the measures he seeks to have quashed were brought into effect. It should be noted also that the proceedings before this court are, in effect, a statutory appeal and not a petition for judicial review."*²¹²

The court also noted at paragraph 37:

"The claimer placed no material before the court to support the proposition that the schemes or orders or any provision therein substantially prejudice his interests or that they would affect his property. His residence is some significant distance from the leg of the proposal which was the particular target of his attack ... We, ourselves, would suggest that a person cannot claim to be a "person aggrieved" in relation to the relevant statutory provisions in this case simply because the decision to proceed with the AWPR (Aberdeen Western Peripheral Route) was

209. *AXA General Insurance Limited and others v Lord Advocate & others* [2011] UKSC 46, at paragraph 62.

210. [2011] CSOH 163.

211. In noting that the Petitioner had title, Lord Brailsford accepted "Putting the matter at its highest for the petitioner, he may, as an individual, be regarded as having a title to sue in order to "prevent a breach by a public body of a duty owed by that public body to the public" (per LJC (Ross) in *Wilson v IBA* 1979 SC 351)." However, in respect of interest the court thought the test was one of a 'real and practical interest to protect (following the Inner House's decision in *AXA*). Lord Brailsford considered, "He does not in my opinion have a "real and legitimate" or "real and practical" interest to bring proceedings. He does not reside adjacent to the site and is not therefore a neighbour. His use of the site is limited, intermittent and non-essential. The type of usage he exercises over the site could in fact be exercised over any area of land to which the public has access at any location in Scotland. He does not sue as a member or representative of a group or organisation with title or interest. If an interest of this sort were to constitute sufficient interest to sue in a public law question then any member of the public who, on occasion, used a piece of ground for recreational purposes would have a title and interest to challenge a public law decision which affected that ground. I specifically put that proposition to senior counsel for the petitioner who accepted that it was well founded. I do not consider that it is either desirable or, perhaps more pertinently, necessary for the discharge of public bodies to be subject to challenges by persons, no matter how well intentioned they may be, whose link with a site or subject are as remote as this".

212. *Walton v Scottish Ministers* [2012] CSIH 19 at paragraph 37.

against his opinions and views, however strongly held. It seems to us that, on the basis of the information before the court, the claimer has been an implacable opponent to the AWPR from its inception and by himself and previously also through the agency of an organisation with which he was closely connected, has sought to resist it at every opportunity and on whatever ground appeared to be open to be argued. But he is no more than that and in this respect is no different from, say, someone who lives many hundreds of miles from the proposed route but has, on occasions, to travel to Aberdeen.”

The Court of Session noted the Supreme Court’s decision in *AXA*, but did not consider that *AXA* was conclusive in Mr Walton’s favour. It thought that *AXA* may not be in point as the broadening of standing was confined to the supervisory jurisdiction within judicial review. In any event, the Inner House concluded if they had accepted Mr Walton’s arguments as to the lawfulness of the orders, it would still be inappropriate to quash the orders. They considered the interests of the wider public not represented in court, and in that vein, gave weight to the fact that the challenge only came from one person.²¹³ The Inner House’s judgment appeared to

question whether a narrow statutory appeal could encompass wider environmental challenges.

However, in line with English procedure, and as noted in the discussion within the Scottish Civil Courts Review, it might be that the courts should adopt a practice in considering standing where:

*“...if an arguable case of misuse of public power could be made out at the application for leave stage, the court’s only concern should be that it is not being made for an ill motive.”*²¹⁴

The Scottish Civil Courts Review noted the test of sufficient interest was regarded as a low one in England and Wales.

There is an extensive discussion on the role of public interest litigation within the chapter on judicial review within the Scottish Civil Courts Review.²¹⁵ Whilst it recommended a number of factors are taken into account in determining sufficient interest, including whether the petitioner had a material interest, it is submitted that what this was driving at was not the exclusion of public

213. “It would have been quite inappropriate, in our view, that the project, whose genesis came about some 30 years ago, and about which there has been a huge amount of public discussion and debate, should now be stopped from proceeding by an individual in the position of this claimer. As senior counsel for the respondents pointed out while there have been, in the past, a significant number of objectors at various stages of the proposal’s development, none of them has now sought to have the scheme and orders quashed. The interests of those members of the public who are in favour of the project, and have been waiting for its implementation for a very long time, clearly argue against the quashing of the schemes and orders”, *Walton v Scottish Ministers* [2012] CSIH 19, at paragraph 40

214. E Legere ‘Locus Standi and the Public Interest: A Hotchpotch of Legal Principles’ (2005) 10(2) *Judicial Review* 128, as quoted in the Scottish Civil Courts Review at Volume 2, chapter 12 paragraph 22.

215. The chapter is headed ‘Judicial Review and Public Interest Litigation’.

interest litigation, but rather the exclusion of sterile debates. Even so, the Scottish courts have allowed questions of an academic nature to be resolved where there is a wider general importance to the issue.²¹⁶

Ultimately, the UK Supreme Court determined that Mr Walton was a ‘person aggrieved’ for the purposes of the legislation. It noted that although the Inner House’s remarks on standing were strictly *obiter*, weight was likely to be placed on them.²¹⁷ Lord Hope considered that the Inner House had taken too narrow a view, noting that:

*“...environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone.”*²¹⁸

The Inner House more recently determined the petition of *McGinty v Scottish Ministers* where standing had also been challenged, and lost, in the Outer House.²¹⁹ The Inner House allowed his appeal on that point, noting:

*“We consider that there was force in Mr Moynihan’s observation that what is left unresolved in AXA and Walton is exactly how one should go about distinguishing between this person and the individual who has the genuine interest sufficient to be accorded standing to invoke the supervisory jurisdiction to challenge a decision with environmental consequences which do not impact on that individual’s private interest. All that can be said so far, it seems, is that the question is fact-sensitive and will depend on the circumstances of the challenge under consideration. We have yet to consider the specifics of the petitioner’s challenge but applying the approach now considered by the Supreme Court, it may not be permissible to dismiss it as that of a mere busybody ... Accordingly, at least at this stage of the examination of the question, it appears that it can be said that the petitioner has standing to bring these proceedings.”*²²⁰

Where does this leave the Court of Session for environmental third party challenges? The Courts Reform

216. See for example *British Medical Association v. Greater Glasgow Health Board* 1989 SC (HL) 65 per Lord Jauncey at 94, *Smith v. Scott* 2007 SC 345, *Beggs v. Scottish Ministers* [2007] 1 WLR 455, *Davidson v. Scottish Ministers* 2006 SC (HL) 42, *Napier v. Scottish Ministers* 2005 SC 307, IH and *Martin v N (A Child)* 2004 SC 358.

217. See Lord Reed’s remarks at paragraph 82, which noted the potential impact of the remarks for both statutory appeals and common law judicial review matters.

218. See Lord Hope at paragraph 152.

219. *McGinty v Scottish Ministers* [2013] CSIH 78.

220. At paragraph 48.

(Scotland) Bill introduces a codification of the standing test for judicial review, which appears to have been generally welcomed by commentators.²²¹ The UK Supreme Court has made it clear that the test for a person aggrieved or to have sufficient interest does not require the involvement of a personal or property right. There may be a need for a review of any other statutory tests to ensure that third parties wishing to challenge environmental decisions are able to do so, whether in the Sheriff Court or the Court of Session. Whilst the standing point does not seem to have been taken in more recent challenges considered by the courts, the courts will have to take into account the provisions of Aarhus to allow wide access to justice in any future fact finding exercise.²²²

Leave to raise the petition and time limits

At present in Scotland there is neither a formal leave requirement, nor is there a time limit in which petitions must be raised. Rather, a petition when lodged is subject to First Orders; that is a decision as to whether an interlocutor should be issued authorising the service of the petition. Often First Orders are granted without a hearing. There has been some debate as to the circumstances in which First Orders can be refused.²²³

Similarly, there is no formal time limit for judicial review petitions, but a delayed petition can be subject to a plea of mora, taciturnity and acquiescence.²²⁴ However, both a time limit for judicial review and a leave

221. In evidence to the Justice Committee on 1st April 2014, Jonathan Mitchell QC noted “There is a continuing undercurrent of people raising problems about standing; you are quite right about that. The difficulty is that we are talking about a difference of culture, not a legal problem. It is healthy that the Parliament should give what is in effect a rubber stamp of approval for the law as it has been declared by the Supreme Court, as it does in the bill” and that “...although the law is now in perfectly good shape and is perfectly clear, there seems to be a certain degree of uncomfortableness on the part of those who operate it, both in the courts and in Government, in recognising that...” Professor Tony Kelly, giving evidence on behalf of Justice Scotland noted that “Widening up the matter in the bill might deprive the courts of any gatekeeper role in relation to the question of standing. We are content with the terms of the bill.”

222. See for example *Sustainable Shetland v Scottish Ministers* [2013] CSOH 158, where standing does not appear to have been in issue.

223. See Inner House’s decision in *EY v Secretary of State for the Home Department* 2011 S.C. 388 where at paragraph 16 the court said: “as to what the correct test is, we agree with the submission of counsel for the respondent that the hurdle to be crossed is a low one. While a residual power is given to the judge, hearing such a motion, to refuse it, such a power must be exercised, in our opinion, only in what can be regarded as exceptional circumstances. These would include a petition that betrayed a clear lack of jurisdiction or incompetency that could not be explained away to any extent by the applicant’s representative at the time of the hearing. Petitions whose averments are incomprehensible or gibberish would also entitle the judge to refuse first orders”.

224. See *Sommerville v Scottish Ministers* 2007 SC 140 at paragraph 94 onwards for a discussion on the meaning of each part of the plea.

stage are to be introduced by way of the Courts Reform (Scotland) Bill.

The Scottish Civil Courts Review recommended that First Orders should be reformed to an adversarial hearing as to whether leave should be granted.²²⁵ Further, the Review recommended a 12 week time limit.²²⁶ Whilst the Scottish Government has accepted those recommendations,²²⁷ it is important that a leave stage deals with matters in a proportionate way, bearing in mind that the courts will wish to discourage satellite litigation.²²⁸ It is also worth noting that research suggests the permission stage in England and Wales may not be consistently applied.²²⁹

The discussion on leave in the Gill Review raises, in effect, a form of case management order in respect of the early timetabling of hearings. Preparation of the extensive documents within the timescales proposed under

the Scottish Civil Courts Review would be challenging for many petitioners, particularly under a twelve week deadline (or less) to raise the petition. Emergency legal aid procedures will need to be altered to recognise such changes. Case management is welcomed, so long as there are procedures in place to allow for the required resources for petitioners early in the case where the case is being funded by legal aid.

The introduction of a three-month time limit for the raising of petitions by way of the Courts Reform (Scotland) Bill means more petitions for judicial review will have to be raised under emergency legal aid provisions. This creates a further difficulty in respect of liability for expenses. Unless protective expenses orders are granted in all Aarhus cases as a matter of course (and not just limited to those under the Public Participation Directive), liability for expenses in this period might quickly mount up. There may be as many as three oral hearings

225. Scottish Civil Courts Review at chapter 12 paragraph 51.

226. Scottish Civil Courts Review at chapter 12 paragraph 39.

227. Scottish Government, 'Making Justice Work Courts Reform (Scotland) Bill – A Consultation Paper', (Scottish Government, 2013), chapter 5. In relation to a time limit for judicial review petitions, it was accepted that a test of 'promptly or in any event within 3 months' would be a breach of EU law (at paragraph 127).

228. The Scottish Civil Courts Review sets out its recommendations at paragraph 51 of chapter 11, with a time limit of serving the petition and any written evidence, time limits for the determination of the petition, copies of documents to be relied upon and a list of essential reading. The Review recommended the Respondents be given the opportunity to oppose leave, which would be determined at an oral hearing. If leave was refused, the petitioner could ask for a hearing before another Lord Ordinary within 7 days, and if still refused, the right to appeal to the Inner House within 7 days.

229. V Bondy and M Sunkin, 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing' (Public Law Project, 2009), which noted the drop in permission being granted in judicial review cases. No firm reason was found for this but "the greater use of the written process and the greater involvement of defendants at the permission stage, in particular, have made it more difficult for claimants to persuade judges that their claims are sufficiently arguable, and have enabled the judges to be more discriminating in their assessment of the quality of claims for permission. While there has been no formal change in the permission criteria, the consequence has been to heighten the de facto barrier facing claimants" (at page 68).

in a relatively short space of time before the issue of leave is finally determined. The provisions of the Legal Aid (Scotland) Act 1986 should be amended to permit a case funded by legal aid to be given protection from liability for expenses at the outset.

However, it should be noted that a number of statutory provisions have a six week deadline.²³⁰ This already places a burden on individual or group litigants, particularly in the absence of specific rules of court for protective expenses orders in such statutory appeals. There are likely to be doubts as to whether a six week time limit permits wide access to justice (as required by EU law) and is necessary and proportionate.²³¹

Case management

Closely aligned with the requirement for leave are the proposals for case management. The Scottish Civil Courts Review noted this was an area of high dissatisfaction, particularly in relation to obtaining answers

from the respondent shortly before the first hearing, and the late lodging of documents.²³² The Scottish Civil Courts Review recommended the timetabling of cases, with orders for answers, documents, authorities and notes of argument.²³³

Case management provisions could go further. One important part of case management is continuity of the judge, particularly if there are issues as to the keeping to the timetable or the adjournment of dates. These issues are closely related to the specialism of the judiciary.

The Gill Review recognised the benefits of specialism within the judiciary, although this was limited to the Sheriff Court in the areas of crime, general civil, personal injury, family and commercial law. It did not propose any specialisation within the appellate functions of the Court of Session, at least partly on the basis that the value of specialism was in case management at first instance.²³⁴ It did however, indicate that a docket system

230. See for example Roads (Scotland) Act 1984 and Planning (Scotland) Act 1997. Six weeks is also the time limit for certain challenges to Marine licensing under the recently enacted the Regulatory Reform (Scotland) Bill

231. See *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08) [2010] 2 CMLR 47 which considered the need for clarity in time limits for challenging procurement decisions under EU law; see also G Downie 'Calling time on mora' JLSS 2010 55 (5) 54-55 which considered the case in the context of judicial review in Scotland.

232. Scottish Civil Courts Review, chapter 12 paragraph 55.

233. Scottish Civil Courts Review, chapter 12 paragraph 58.

234. Volume 1, Paragraph 59 notes, "We have come to the conclusion that it would be undesirable to promote specialisation at the appellate level in the Court of Session. In our opinion, the real benefit of specialisation lies in the active judicial case management of actions at first instance. We considered whether there might be merit in creating a specialist appellate court that would have jurisdiction in appeals relating to planning, appeals from the Land Court and from the Lands Tribunal and those appeals currently within the jurisdiction of the Lands Valuation Appeal Court. Our findings suggest that, at present at least, these appeals would not constitute a volume of business sufficient to justify a separate appellate court."

might be appropriate.²³⁵ It might be that the value of case management will not be fully realised unless such a system also exists for planning and environmental cases.

A further part of case management is the avoidance of delay, and to that end, the Gill Review made a number of recommendations as to both the hearing of cases, and steps to ensure timely judgements, including outstanding judgements of more than three months being listed on the court website. Again such steps would assist with the obligations under Aarhus to provide a 'timely' mechanism to resolve environmental disputes.²³⁶

Sheriff court

Whilst the focus on this chapter has been alterations to the position of the Court of Session, there is a similar need to ensure any jurisdiction over environmental law areas in the Sheriff Court (and any other tribunal or judicial body) is also considered.

The Sheriff Court has jurisdiction in environmental matters in a number of environmental matters as explored above.

It is likely that the Sheriff Court will also become involved in nuisance actions by way of its common law and statutory jurisdiction to hear nuisance claims. In this respect it is likely to involve the determination of individual disputes and engage Aarhus rights.

Statutory nuisance claims can be brought by a local authority or by the individuals suffering the nuisance.²³⁷ The main statutory provisions are found in section 79(1) of the Environmental Protection Act 1990.²³⁸ The volume of statutory nuisance actions raised in Scotland either by individuals or local authorities is not thought to be high.²³⁹ However, a contributing factor to the relatively low levels of cases could be the absence of a cost-effective way of litigating. There are no rules in relation to the obtaining of a cap on liability for expenses

235. Generally speaking a docket system in this context would refer to a case being assigned to a judge when filed, and that judge will retain the case throughout. This already happens in Scotland with certain family actions and adoption cases. It also happens in larger Sheriff Courts where, e.g. a particular judge may deal with the majority of Adults with Incapacity applications.

236. What period of time for a court or tribunal to resolve the dispute is not stated in the Convention. The Aarhus Compliance Committee considered the issue in ACCC/C/2011/62 in a complaint concerning Armenia where at paragraph 38 it surprisingly expressed the opinion that a delay of a year may be acceptable.

237. Individuals can raise nuisance actions at common law and under statute.

238. Other relevant provisions on statutory nuisances are found in the Public Health (Scotland) Act 1897 and the Mines and Quarries Act 1965.

239. The number of reported nuisance actions in Scotland appears to be less than ten a year, although actions might not be reported, either on the Scottish Courts website or elsewhere. Actions are more likely raised in the Sheriff Court rather than the Court of Session which may mean there is less chance of the decision being reported.

in the Sheriff Court, and no current proposals to introduce such rules, which raises Aarhus compliance issues.

Actions such as nuisance actions are covered by Article 9(3) of the Aarhus Convention, as a breach of national environmental law.²⁴⁰ As such, there is an obligation to provide a procedure which provides, “adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”.²⁴¹ As such, a clear and proportionate procedure for obtaining a protective expenses order should be introduced in the Sheriff Court, with careful case management to ensure that such cases are dealt with quickly.

In addition to provision for a protective expenses order, many nuisances affect a number of persons. There is no provision for class actions in Scotland, although the Scottish Civil Courts Review recommended a multi-party procedure should be introduced, and the Taylor Review has made specific proposals.²⁴² The introduction of a multi-party procedure would likely assist with both cost effective litigation and use of court time.

A detailed analysis of the jurisdiction of the Sheriff Court is beyond the scope of this report. However, simply focusing attention on judicial reviews of permissions or orders in the Court of Session will not provide Aarhus compliance in Scotland. A more comprehensive overview is required. Other examples of jurisdictions that might require to be reviewed include the right of appeal against land management orders made by SNH to the Land Court. Under section 34(1) of the Nature Conservation (Scotland) Act 2004, the appeal is restricted to owners or occupiers. A conservation group or other interested party which consider that the land management order breaches the provisions of the Nature Conservation (Scotland) Act or another environmental provision would be restricted to a judicial review of SNH’s decision. There is no provision within the rules for such a group to appeal if they are not the owner or occupier, nor is there provision for a third party intervention in an existing appeal. In theory, the Court of Session could be asked to consider a judicial review whilst the Land Court considers an appeal by the owner or occupier of the land.

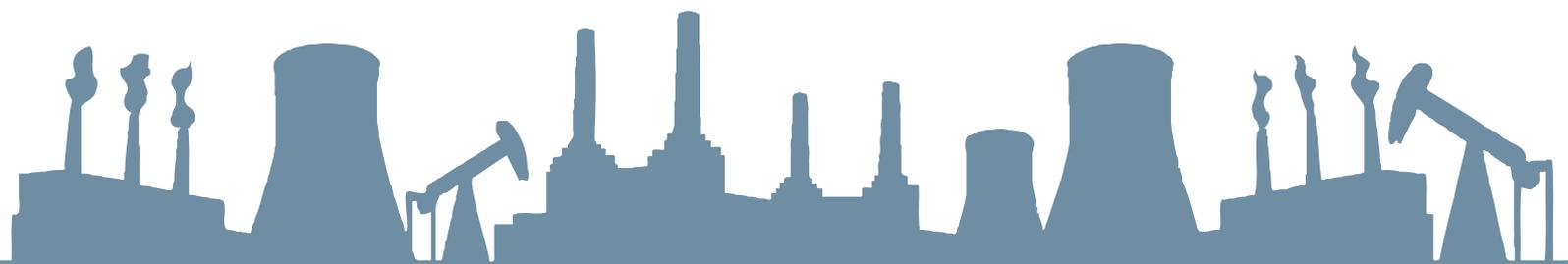
240. Article 9 (3) reads “In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

241. Article 9 (4) Aarhus Convention.

242. See Sheriff Principal Taylor, ‘Review of Expenses and Funding of Civil Litigation in Scotland’ (Taylor Review, 2013), which makes recommendations for multi-party actions at chapter 12.

This example is not given as an illustration of an issue that has caused problems to date. Rather it highlights firstly that leaving the system largely 'as is' may cause difficulties of jurisdictions overlapping in future, and secondly that minor changes made over a number of courts or procedures might not be more

cost-effective compared with more radical change. Leaving the system largely unchanged appears to be a missed opportunity to introduce a more comprehensive and integrated system, consistent with the principle of cost effective litigation as defined by the Civil Courts Review.



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Conclusion

*“...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”*²⁴³

*“...litigation is far too expensive, traumatic and inconvenient ever to become a popular pastime.”*²⁴⁴

This report has set out some of the options for Scotland to move towards compliance with the Aarhus Convention. Without action being taken, Scotland risks breaching its international obligations. More fundamentally, citizens will continue to face exposure to unreasonable levels of costs, and cases that should form part of the national debate on environmental protection in Scotland will not be litigated. Courts not only have a role to play in the democratic checks and balances of the exercise of authority by the state, but litigation can also lead to a debate, outwith the courts, of the issues raised in the case. Scotland’s public law culture is emerging: it is only relatively recently that decisions on protective expenses orders and standing have given opportunities for litigating issues of public interest. This gives an opportunity

to introduce a cost-effective and fair system to allow environmental issues to be proportionally litigated.

This does not necessarily mean a rapid increase in the number of cases being brought. As Lord Reed observed:

*“...the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted.”*²⁴⁵

Taking legal action will always have a cost – time, money and effort. Even with the risk of an adverse award of expenses removed, litigation is likely still to be a stressful and unpleasant process. Few groups or persons are likely to actively seek litigation, and even larger NGOs will have pressures of competing resources.²⁴⁶

Aarhus compliance should be seen as an opportunity and not a threat. Scotland has an incoherent system for determining environmental disputes. There is a chance to rethink how litigation is carried out for environmental

243. T Bingham, *The Rule of Law* (Penguin, 2011), p8.

244. A Roman, ‘Locus Standi: A Cure in Search of a Disease?’ in J Swaigen (ed.) *Environmental Rights in Canada* (Butterworths, 1981) p17.

245. *AXA v Lord Advocate and others*, 2011 UKSC 46, at paragraph 170.

246. As has been argued, “the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom” K Scott, ‘Standing in the Supreme Court – A Functional Analysis’, (1973) 86 *Harvard Law Rev.* 645 at page 674.

disputes with the principles of the efficiency and economy firmly within a system that also allows for proper environmental protection. Environmental judicial reviews should be seen as an integral part of the democratic process, and a tool for environmental protection. As Preston notes, most legal theorists:

"...see that there is a legitimate role for the courts in ensuring that public officials are held accountable to the public by way of disclosing information and reasons for decision to the public, by engaging in consultation with the public

*and by taking a hard look at the matters that the statutes of the common law require such officials to consider."*²⁴⁷

As such, and underpinned by Scotland's obligations under the Aarhus Convention, systematic consideration should be given to improving all mechanisms for environmental appeals in respect of costs, speed and fairness to third parties. This should be done not only to avoid a breach of international obligations, but also to strength the rule of law and the contribution that such challenges make to participatory democracy.

247. B Preston 'Public Enforcement of Environmental Laws in Australia' J. Env'tl Law and Litigation 1991 Vol 6 39 at p 45