

Developments in environmental justice in Scotland

A consultation

March 2016

Ministerial foreword



The Scottish Government is a strong supporter of environmental justice. We have undertaken a significant programme of reform to the justice system and are improving environmental regulation. We are also working with others to tackle environmental crime in our criminal justice system.

The court system in Scotland is currently undergoing a period of comprehensive change. Over the last few years we have undertaken a significant programme of reform, the combined effect of which will reinvigorate the whole justice system in Scotland. The key argument for court reform has always been to ensure that the system deals with cases proportionately. The level of the judicial officer, court, and the time and money expended in resolving a case should be proportionate.

Much has been achieved already but there is more to come. Implementation of the Courts Reform (Scotland) Act 2014 will continue in 2016. Ultimately we should expect a system where, through the appropriate streaming of cases and appeals to the right courts, cases are dealt with swiftly and efficiently, and delays minimised. In making such significant changes to modernise the system, our aim is to create a more accessible, affordable and equitable justice system for Scotland. In any environmental matters before our courts, case management will minimise the potential for delay which could impact on the viability of projects.

On the criminal side, the Scottish Government continues to bear down on wildlife crime and on illegal raptor persecution in particular. There have been significant changes and strengthened protection following the Wildlife and Natural Environment Act (Scotland) 2011. Each of Police Scotland's regional divisions has a Wildlife Crime Liaison Officer and the Crown Office and Procurator Fiscal service has created a specialist prosecution unit.

There is more to come. The Scottish Sentencing Council has been established. The Council has the objectives to promote consistency and transparency in sentencing practice, assist in developing sentencing policy and encourage better understanding of sentences across Scotland. In future this has the potential to include the sentencing of environmental offences.

A handwritten signature in black ink, appearing to read 'Paul Wheelhouse'.

PAUL WHEELHOUSE
Minister for Community Safety and Legal Affairs

Abbreviations and acronyms

ACCC	Aarhus Convention Compliance Committee
Courts Reform Act	Courts Reform (Scotland) Act 2014
COPFS	Crown Office and Procurator Fiscal Service
EU	European Union
FoES	Friends of the Earth Scotland
PAW Scotland	Partnership for Action Against Wildlife Crime Scotland
PEO	Protective expenses order
Regulatory Reform Act	Regulatory Reform (Scotland) Act 2014
SCJC	Scottish Civil Justice Council
SCTS	Scottish Courts and Tribunals Service
SEPA	Scottish Environment Protection Agency
SLAB	Scottish Legal Aid Board
UKSC	United Kingdom Supreme Court
WCLO	Wildlife Crime Liaison Officer
WECU	Wildlife and Environmental Crime Unit

About the consultation

The objective of this paper is to offer an opportunity for views to be aired on the options for environmental justice in Scotland.

Duration of consultation

We are inviting responses to this consultation by **Friday 10 June 2016**.

Responding to this consultation

Please respond to this consultation using the online platform Citizen Space: <https://consult.scotland.gov.uk/>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date. If you are unable to respond using Citizen Space, please send your views and comments on the proposals set out in this document to: environmentalcourtoptionpaperresponses@gov.scot

If you are unable to respond using Citizen Space or by email, please complete the Respondent Information Form (See “Handling your response” below) and send to:

Civil Law and Legal System Division
Scottish Government
Area GW-15 St Andrew’s House
Regent Road
Edinburgh
EH1 3DG

Responses should reach us by **Friday 10 June 2016**. Earlier responses would be welcome.

Handling your Response

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, please complete and return the **Respondent Information Form** attached to the end of this document. This will ensure that we treat your response appropriately.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

CHAPTER 1: INTRODUCTION

Purpose of this paper

1. In the SNP 2011 manifesto, the party committed to producing a paper, saying:

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

2. In this paper we set out the recent, major changes to the court system in Scotland. In doing so, we provide an overview of the justice landscape as it is relevant to environmental cases. What constitutes an “environmental” case may to a certain extent be subjective. There is no single definition and the Civil Justice Statistics in Scotland are not broken down for “environmental” cases¹. However, Appendices to this report provide statistics relating to wildlife and environmental crime.

3. The first section of this paper describes the unprecedented change that the Scottish legal system is experiencing and sets out the recent action that the Scottish Government has taken in relation to both our civil and criminal courts.

4. We also provide details of both environmental and wildlife crime and the ongoing work across the justice sector to tackle criminal activity with a significant impact on the environment, the economy, and society as a whole.

5. In short, since 2011 we have:

- made significant structural changes to the court system in Scotland;
- made major procedural changes to civil court procedure;
- created a new tribunal structure;
- merged our courts and tribunals services;
- codified changes about who is entitled to bring a case to court;
- created procedures to enable specialisation within our court system;
- maintained the scope of legal aid;
- worked with the Lord President to introduce rules of court to allow certain litigants to apply for costs protection (protective expenses orders);

¹ For the most recent statistics, see: <http://www.gov.scot/Publications/2015/07/9805>

- consulted on recommendations from Sheriff Principal Taylor’s Review of Expenses and Funding of Civil Litigation in Scotland;
- established the Scottish Sentencing Council to promote consistency in sentencing practice, and ensure policy and practice are transparent;
- continued to pursue a policy of bearing down on wildlife crime;
- established the Environmental Crime Taskforce;
- continued to monitor wildlife offences and available data on wildlife crime; and
- submitted three annual reports on wildlife crime in Scotland to the Scottish Parliament².

This activity and its impact is further discussed in this paper.

6. We have also taken into account the representations of Friends of the Earth Scotland (FoES) in the reports: “Tipping the Scales” and “Litigation over the environment”³. This paper addresses the changes that have since taken place, for example in relation to who can take a case to court (“standing”) and the introduction of protective expenses orders (PEOs).

7. This paper does not consider our systems of first instance environmental decision making or administrative appeals where these are outside the court system. Environmental consents and appeals determined by the Scottish Ministers, planning authorities and key agencies are excluded from the scope of this paper.

8. In 2015 Ministers appointed an independent panel to carry out a wide-ranging review of Scotland’s planning system. The review is focusing on six key topics: development planning; housing; infrastructure; development management; leadership, skills and resources; and community engagement. The independent panel is expected to report in May 2016, and thereafter the Scottish Government will respond to the panel’s recommendations and take forward a programme of further improvements to the planning system⁴.

² The most recent report was submitted to the Scottish Parliament on 30 September 2015 <http://www.gov.scot/Resource/0048/00486449.pdf>

³ “Tipping the Scales. Complying with the Aarhus Convention on Access to Environmental Justice”: <http://www.foe-scotland.org.uk/tippingthescales> and “Litigation over the environment: an opportunity for change”: <http://www.foe-scotland.org.uk/litigationovertheenvironment>

⁴ <http://www.gov.scot/Topics/Built-Environment/planning/Review-of-Planning>

CHAPTER 2 – SCOTLAND’S CIVIL JUSTICE SYSTEM

Introduction

1. The Scottish Government recognises the importance of an efficient justice system – both as a mechanism for economic growth and for the effective protection of rights. An efficient civil justice system is vital to Scotland’s economy in helping to make Scotland an attractive place to do business. An understandable and accessible system is vital in giving litigants confidence that their problems will be resolved in an efficient and timely manner.

2. We are living in a period of comprehensive change, at the heart of which is the desire to ensure that the court system deals with cases proportionately.

3. We have created a new framework for the civil courts in the Courts Reform (Scotland) Act 2014 (“the Courts Reform Act”), which began to be implemented throughout 2015. That implementation will continue in 2016. This Act is part of our programme of significant reform to address the problems identified in Lord Gill’s Scottish Civil Courts Review⁵. Our aim is to ensure our civil justice system remains accessible and cost effective by ensuring that the right cases are heard by the right court, at the right cost.

4. Major changes to civil court structures and procedures will reinvigorate the whole justice system in Scotland. We want to improve access to justice at every level. The courts should help parties focus on the issues and facts in dispute and facilitate settlement. There should not be endless opportunity for technical arguments about procedures which prevent cases being dealt with expeditiously.

5. This is where reformed procedures and clear court rules can have a huge beneficial impact. Recent changes will support our judiciary in adopting more active judicial case management. Ultimately we expect a system where, through the appropriate streaming of cases and appeals to the right courts, cases are dealt with swiftly and efficiently.

6. In the next sections we explain in more detail the changes which have taken place and which provide the context for considering environmental cases as they are dealt with in our justice system.

Sheriff courts and the Sheriff Appeal Court

7. Scotland’s sheriff courts deal with certain environmental matters that arise in summary applications, for example in licensing. The sheriff court also hears certain statutory appeals which might relate to the environment, for example in relation to decisions about local access disputes. However, discussions at the National Access

⁵ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

Forum suggest that particularly difficult access disputes remain unresolved because access authorities (local authorities and National Park Authorities) are reluctant to take cases to the sheriff court because of the time taken to resolve a dispute, the costs involved and the risk of an appeal to a higher court.

8. Civil appeals from the sheriff court were previously made to the sheriff principal or directly to the Inner House of the Court of Session. The Courts Reform Act has created the Sheriff Appeal Court⁶ which will hear the majority of appeals from the sheriff courts.

9. The Sheriff Appeal Court may establish precedents on points of law which will be binding on sheriffs throughout Scotland. Using the Sheriff Appeal Court rather than the Court of Session is likely to result in lower costs to litigants. Court fees will be lower and the instruction of counsel, which is compulsory in the Court of Session, may not be necessary. As appeals from sheriff courts may include environmental appeals, the Sheriff Appeal Court is an important part of the landscape for these appeals.

Court of Session

10. As a consequence of the Courts Reform Act, the Court of Session now hears cases where the combined value of orders sought is £100,000 or more. This has been raised from £5,000. The limit for the Court of Session was increased in order to permit the Court of Session to return to its proper role of dealing with the most complex and important cases and developing Scots law⁷.

11. The Court of Session has exclusive competence to hear judicial reviews and appeals under statute. In each case, the Court considers whether a decision-maker acted lawfully in making a decision.

Judicial review

12. In judicial review, the Court of Session supervises the decision-making of both private and public bodies. The Court looks at whether the decision was wrong in law, and whether the body making the decision had the power to make it.

13. A decision may be judicially reviewed on the basis that it is not rational, or that it was made following an unfair or biased procedure. Judicial review may also be used where a decision is considered to breach the Human Rights Act, European Union law, or equality duties.

⁶ The Sheriff Appeal Court (Criminal) opened on 22 September 2015 and the Sheriff Appeal Court (Civil) on 1 January 2016.

⁷ Policy memorandum to the Courts Reform Act:
[http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20\(Scotland\)%20Bill/b46s4-intro-
pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-intro-
pm.pdf)

14. One example of an “environmental” judicial review could be *Sustainable Shetland v Scottish Ministers*⁸, which concerned a decision to grant consent for the construction and operation of a wind farm.

15. Judicial review is only available when there are no other ways of challenging a decision. If internal complaints procedures, or appeals under statute (see below) are available, these mechanisms should be used first.

16. As part of a broader programme of civil court review, the Courts Reform Act has introduced a 3 month time limit within which an application for judicial review must be made. However, the Court has discretion to allow a longer period where it considers it equitable so to do. The Act also introduces a permission to proceed stage. This is intended to filter out cases with no real prospect of success or where the applicant has insufficient interest in the subject matter of the application.

17. These reforms, coupled with improved case management by the Scottish Courts and Tribunals Service (SCTS), are intended to speed up and reduce the costs of judicial review.

Appeals under statute

18. Where an Act of Parliament sets out a right of appeal, this is usually heard by the Inner House of the Court of Session. In this type of challenge, known as a statutory appeal, the court exercises a similar function to that in a judicial review. The question is whether the decision-maker acted lawfully in making its decision.

19. Examples of statutory appeal can be found in sections 238 and 239 of the Town and Country Planning (Scotland) Act 1997, Schedule 2 to the Roads (Scotland) Act 1984, and sections 63A and 63B of the Marine (Scotland) Act 2010.

20. For example, a decision made by a planning authority to adopt a strategic or local development plan can be challenged by way of a statutory appeal, as was the case in *Uprichard v Scottish Ministers*⁹.

Judicial specialisation

21. The Lord President of the Court of Session may determine categories of sheriff court case for the purposes of judicial specialisation under section 34 of the Courts Reform Act. This is a discretionary matter for the Lord President.

22. The sheriff principal in any sheriffdom may, in turn, designate sheriffs and summary sheriffs, under section 35 of the Courts Reform Act, as specialists in a particular category of case. Again this is at the discretion of the sheriff principal.

⁸ [2013] CSOH 158
⁹ [2013] UKSC 21

23. Section 36 of the Courts Reform Act places a duty on both the Lord President and the sheriff principal of a sheriffdom, when allocating business within a sheriffdom, to have regard to the desirability of ensuring that cases which fall within specialist categories are dealt with by judges who are designated as specialists in those categories.

24. The effect of sections 34, 35, and 36 of the Courts Reform Act is that, if the case is made, it is possible that environmental cases could be heard by specialist environmental judges provided that the Lord President designates such cases as a category that is suited to be dealt with by specialist sheriffs or summary sheriffs, and sheriffs principal designate one or more of these judicial office holders as specialists in environmental cases. This option is not a matter for the Scottish Ministers.

Court specialisation

25. In January 2015, Lord Gill, the then Lord President, announced his intention to carry out a feasibility study¹⁰ into the creation of a new Energy and Natural Resources Court in the Court of Session.

26. The creation of this court would not require primary legislation. The creation of a specialist court within the Court of Session is a matter for the Lord President and the SCTS and not for the Scottish Ministers.

27. The commercial court within the Court of Session is an example of a specialist court established by the Lord President. The procedures appropriate to an Energy and Natural Resources Court could be put in place in the same way, including case management powers similar to those of the commercial court.

28. The aim of the Courts Reform Act is to reform the civil courts in order to allow the right cases to be heard in the right courts. This in turn will afford the Court of Session the opportunity to adapt, diversify, and attract high quality work.

29. An Energy and Natural Resources Court in the Court of Session could provide a specialist forum to resolve disputes in the oil and gas industry and in the newer renewable energies, wind and wave power sectors.

30. As far as the sheriff court is concerned, section 41 of the Courts Reform Act allows the Scottish Ministers, with the consent of the Lord President, to provide for “all-Scotland” sheriff courts for specified types of civil proceedings if a case is made for doing so. This would enable an all-Scotland environmental court to be created to deal with civil environmental matters. However, this is only likely if the volume of cases to be heard by the court can justify its existence. An example of an all-Scotland sheriff court is the Sheriff Personal Injury Court.

¹⁰ <http://www.scotland-judiciary.org.uk/Upload/Documents/LPHolyroodDigitalJusticeConferencespeech28January2015.pdf>

Standing

31. In order to function efficiently and effectively, every judicial system requires clear procedural rules: for example about who can bring an action, what kind of action they can bring; and the remedies available to them, if successful.

32. The procedural rules on who can bring a case to court in Scotland have recently been changed. The long-standing concept of “title and interest”, requiring litigants to have a private interest in their litigation, has been replaced by a less restrictive test of “standing”.

33. The rights of representative organisations to litigate in the public interest were clarified in the Supreme Court case of *AXA General Insurance v HM Advocate*¹¹. These rules were then affirmed in *Walton v Scottish Ministers*¹², where it was held that “a person aggrieved” could include someone taking a public interest challenge. In *Walton*, Lord Hope stated that environmental law proceeds on the basis that “the quality of the natural environment is of legitimate concern to everyone” although this was not to be seen as an “invitation to the busybody”¹³.

34. The Courts Reform Act codified these changes for judicial review¹⁴. Someone wishing to challenge a decision of a public authority requires to demonstrate “sufficient interest” in that decision. The result is a clear, broader entitlement to take a case to court. We expect that this change will benefit those with an interest in public interest litigation and who seek to bring cases in the future.

Legal aid

35. Making legal aid available to those who need it is a key part of access to justice. Legal aid helps people to pursue their rights if they can’t afford to do so otherwise. The Scottish Government seeks to make the system more effective by reducing unnecessary costs and making sure support is targeted at those who need it most¹⁵.

36. Unlike in other jurisdictions, we have not approached the challenge of a gap between budget and the true cost of legal aid by proposing major changes to the scope. We consider that reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.

¹¹ [2011] UKSC 46

¹² [2012] UKSC 44

¹³ [2012] UKSC 44 at para. 152-153.

¹⁴ Section 89 of the Courts Reform Act introduced sections 27A-D into the Court of Session Act 1988

¹⁵ Scottish Government policy strategy: “A Sustainable Future for Legal Aid”, October 2011

37. As Scotland's public interest litigation culture develops, there have been calls for changes to be made to some aspects of legal aid. For example, FoES¹⁶ call for the repeal of a regulation which FoES considers makes many environmental cases ineligible for legal aid: Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

38. Regulation 15 applies not only to environmental cases but to all civil legal aid cases. Where more than one person has a legal interest in a case, the Scottish Legal Aid Board (SLAB) is required to consider whether, in those circumstances, legal aid should be granted.

39. The purpose of this rule is to ensure that taxpayers' money is used only where it is appropriate to do so and where there are no other means of funding a court action. In cases where many individuals have an interest in the outcome, it is not always reasonable to expect public funds to meet the costs of those individuals if some of those involved could meet those costs themselves.

40. SLAB does not believe that Regulation 15 has an "overbearing influence" on the ability of applicants to receive legal aid in cases with an environmental impact. SLAB notes that between April 2011 and March 2015, Regulation 15 was given as part of the reason for refusal in only 4 of 23 applications for legal aid¹⁷.

41. The Scottish Government believes that Regulation 15 strikes the right balance by ensuring that legal aid is targeted at those who need assistance and cannot reasonably get funding from another source. However, as Scotland's public interest litigation culture continues to develop, we will keep matters under review.

Protective Expenses Orders

42. The general rule of litigation is that expenses follow success: the losing party pays the legal expenses of the other party. In order to limit the potential expense of certain cases and broaden access to justice, it is possible to apply in advance for an order which effectively acts as a guard against any expense being payable beyond a limit set out in the order. This is known as a protective expenses order (PEO). As with legal aid, only those who need a PEO should be eligible to receive one.

43. While PEOs were already available at common law, in 2013 the Rules of the Court of Session were changed to set out an express PEO procedure for certain environmental statutory appeals and judicial review¹⁸. Since then, PEOs have been

¹⁶ "Litigation over the environment: an opportunity for change", a report for Friends of the Earth Scotland by Frances McCartney, at p.46: <http://www.foe-scotland.org.uk/litigationovertheenvironment>

¹⁷ Letter to the Equal Opportunities Committee of the Scottish Parliament: [http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_\(pdf\).pdf](http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_(pdf).pdf)

¹⁸ Chapter 58A of the Rules of the Court of Session: <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=6>

applied for in a number of cases including *Carroll v Scottish Borders Council*¹⁹ where a homeowner appealed against the grant of planning permission for wind turbines. More recently, in *Gibson v Scottish Ministers*²⁰, the decision not to award a PEO was successfully appealed.

44. In 2015, amendments were made to the rules of court which provide for PEOs²¹. While the PEO rules continue to apply to statutory appeals and judicial review, the rules now refer to the Aarhus Convention itself.

45. In order to ensure broad access to justice and assistance for those who need it, in determining PEO applications judges must consider both the resources of the applicant and the likely expense of the litigation (i.e. the subjective and objective elements of the application²²). As the rules make clear, the overall purpose is to ensure that proceedings are not prohibitively expensive for the applicant.

46. The PEO rules, together with the rules about who might bring a case (see the section on standing above), are part of ensuring access to justice in environmental decision-making.

International obligations – the Aarhus Convention

47. The United Kingdom and the EU are parties to the United Nations Economic Council for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention”).

48. The Aarhus Convention is an international treaty concerned with environmental protection and the rights of individuals in relation to environmental decision-making. It is based on three “pillars”:

- the right of **access to information** about the environment;
- **public participation** in decision-making about the environment; and
- **access to justice** in relation to environmental matters.

49. The rights of access to environmental information and to public participation in environmental decision-making have been incorporated into EU law²³ and domestic

¹⁹ [2014] CSOH 30

²⁰ [2016] CSIH 10

²¹ See the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015: <http://www.legislation.gov.uk/ssi/2015/408/made>

²² See *Gibson v Scottish Ministers* [2016] CSIH 10

²³ Directive 2011/92/EU (as amended by Directive 2014/52/EU) on the assessment of the effect of projects on the environment; and Directive 2010/75/EU (which replaced Directive 2008/1/EC) on industrial emissions.

legislation²⁴. The third pillar, access to justice, has not been the subject of EU incorporating legislation.

50. This paper sets out how the Scottish system affords access to justice, as distinguished from the right to public participation in decision-making. We set out the comprehensive changes which have affected the landscape in the last 5 years, many of which are fundamental reforms. The changes to standing, the introduction of PEOs, and the increased possibility for judicial specialisation are some of the main differences.

51. In setting Scotland's scene, we note that there is inevitably scope for comparison with other legal cultures and traditions. This is particularly the case given the international nature of the treaty arrangements²⁵. Different countries with different legal systems give effect to the Aarhus Convention in their own ways. Compliance may therefore take a number of forms.

52. The Aarhus Convention itself required the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention". To meet this obligation, the Aarhus Convention Compliance Committee (ACCC) was established. The Scottish Government contributes to the UK's annual reports to the ACCC²⁶ and has informed the ACCC of updates to PEO rules and to judicial review.

53. The Scottish Government has undertaken a significant programme of reform to the justice system. We aim to make the court system in Scotland more efficient and more accessible. By codifying the changes to "standing" for judicial review and introducing PEOs for certain environmental cases, our civil courts reform programme has contributed to Scotland's ongoing compliance with international obligations under the Aarhus Convention.

²⁴ The Environmental Information (Scotland) Regulations 2004.

²⁵ As of 5 February 2016, there were 47 Parties to the Aarhus Convention
<http://www.unece.org/env/pp/ratification.html>

²⁶ <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html>

CHAPTER 3 – SCOTLAND’S CRIMINAL JUSTICE SYSTEM

1. Scotland has a wide range of environmental laws aimed at protecting and enhancing our wildlife and the environment. A breach of many of these laws may be a criminal offence. The prosecution of crime is a matter for the Lord Advocate and the Crown Office and Procurator Fiscal Service (COPFS) which acts on his behalf.

2. As part of a programme of unprecedented court reform, certain aspects of criminal procedure have changed. From September 2015 summary appeals (including in relation to breaches of wildlife or environmental crime) are heard by the Sheriff Appeal Court, where they are dealt with by Appeal Sheriffs familiar with summary procedure.

Environmental crime

3. In November 2011, the Scottish Government established the Environmental Crime Taskforce, which brings together experts to support delivery of our commitment to tackling environmental crime. We created the taskforce to recognise that criminal activity has a significant impact on the environment, the economy, and society.

Wildlife crime

4. The Scottish Government recognises that the law relating to wildlife crime has become increasingly complex over recent years with a series of amendments to the Wildlife and Countryside Act 1981. The impact of crimes which harm wildlife on ecosystems as well as on rural businesses and communities is often complex and not immediately apparent. It is arguable that wildlife crimes could benefit from being heard by a court with sheriffs with specialist knowledge of the subject. However, it is recognised that the number of prosecutions are not high compared to those in other specialist courts such as those hearing drugs or domestic violence cases. This could mean that cases were subject to delays until the court had sufficient business to sit, and it could also mean that the accused and witnesses were required to travel greater distances.

5. Since 2011, the Scottish Government has continued to pursue a policy of bearing down on wildlife crime and on illegal raptor persecution in particular. Significant changes to the law in this area have included the introduction of vicarious liability, making landowners and land managers responsible for specified offences involving wild birds committed by their employees or contractors. The Wildlife and Natural Environment Act (Scotland) 2011 also strengthened protection for certain bird and mammal species; reformed the law on poaching; created new training and registration requirements for snare operators; and created a new regime for control of non-native species.

6. The Scottish Government continues to work with others in the Partnership for Action Against Wildlife Crime Scotland (PAW Scotland), which represents organisations concerned with the prevention and tackling of crimes against wildlife. PAW Scotland includes representatives from law enforcement, land managers as well as wildlife conservation and welfare organisations. PAW Scotland has worked on a range of measures to reduce wildlife crime that are outside the criminal justice system, including confidence and trust-building initiatives and a pesticide disposal scheme.

7. The Scottish Government published a review into the available penalties for wildlife crime in November 2015²⁷. The Minister for Environment, Climate Change & Land Reform responded to the recommendations on 24 February 2016²⁸.

8. Following the creation of Police Scotland in 2013, Scotland's single police force is at present made up of 13 regional divisions. Each division has a Wildlife Crime Liaison Officer (WCLO) who may be contacted by members of the public. Details are available online²⁹.

9. A breakdown of proceedings in the Scottish courts for wildlife and environmental crime between 2004 and 2014 is available at Appendix 1. For more information, please see our annual report on wildlife crime, which is submitted to the Scottish Parliament³⁰.

Crown Office and Procurator Fiscal Service

10. COPFS has also created a specialist prosecution unit to tackle wildlife and environmental crime. As part of wider changes to the environmental protection framework in Scotland, the appointment of specialist prosecutors and the creation of COPFS' Wildlife and Environmental Crime Unit (WECU) has led to significant improvements in tackling wildlife and environmental crime, building on work already undertaken by COPFS in these areas.

11. WECU began operating in August 2011 and its specialism model involves a team of full time, dedicated prosecutors investigating and managing the prosecution of all cases involving crimes against wildlife and the environment in Scotland, as well as more complex cases of animal cruelty.

12. The Unit's close working relationship with the police and other specialist reporting agencies has permitted a collaborative building of expertise, and its specialism model has delivered a range of significant benefits, including:

- promoting a consistency of response from prosecutors in Scotland;

²⁷ <http://www.gov.scot/Publications/2015/11/2196>

²⁸ <http://www.gov.scot/Resource/0049/00494565.pdf>

²⁹ <http://www.gov.scot/Topics/Environment/Wildlife-Habitats/paw-scotland/what-you-can-do/report-a-wildlife-crime>

³⁰ <http://www.gov.scot/Resource/0048/00486449.pdf>

- early intervention in complex or higher level cases;
- improving the quality of reporting of wildlife or environmental crime to COPFS; and
- allowing the quality of prosecutions to continuously improve.

Environmental enforcement

13. The Regulatory Reform (Scotland) Act 2014 (“the Regulatory Reform Act”), and the wider Better Environmental Regulation Programme it supports, are designed to provide a simpler legislative framework so that the Scottish Environment Protection Agency (SEPA) can be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions. This will ensure more effective and efficient protection of the environment and reduce the regulatory burden on business.

14. Once fully implemented, the Regulatory Reform Act will deliver a range of improvements to the framework of environmental regulation and protection in Scotland, making a significant contribution to environmental justice.

SEPA’s enforcement measures

15. The Regulatory Reform Act enables the creation of a range of new civil enforcement measures for SEPA, including:

- fixed and variable monetary penalties;
- enforcement undertakings; and
- non-compliance penalties.

16. Where SEPA issues a variable monetary penalty, the Regulatory Reform Act also enables provision to be made for SEPA to require an offender to pay the costs it has incurred in investigating the offence. This provision will ensure that the offender, rather than the public purse, contributes to the costs associated with the investigation, in support of the “polluter pays” principle.

17. These measures will provide SEPA with a better range of interventions to tackle poor performance, non-compliance, and environmental crime and to help create a level playing field for business. They will also help SEPA to take a preventative approach; facilitating early engagement and intervention to prevent compliance issues from escalating and becoming prolonged or, through their deterrent effect, prevent such issues from happening in the first place.

18. The new measures will be supported by new enforcement guidance and a revised enforcement policy from SEPA. They will also be underpinned by guidelines from the Lord Advocate, which will ensure that the new enforcement measures are

applied consistently and proportionately as part of the whole range of sanctions that are available.

19. SEPA will continue to refer significant, persistent and deliberate offending to the COPFS for consideration of prosecution, and close working between SEPA and COPFS, building on the existing relationship, will be a key aspect to the successful operation of the new enforcement framework.

20. In response to stakeholder wishes for an appeals route independent of Scottish Ministers, appeals against the new measures will be heard by the Scottish Land Court. The Scottish Land Court is independent of Scottish Ministers, has sufficient and relevant expertise in hearing similar types of cases, and will provide immediate and affordable access to justice for appellants.

21. In the longer term, however, the suitability and appropriateness of alternative appeal routes will be kept under review.

SEPA's investigatory powers

22. In addition to providing new enforcement measures, the Regulatory Reform Act extends SEPA's investigatory powers under the Environment Act 1995, implementing recommendations from Scotland's Environmental Crime Taskforce. These extended powers include:

- the power for SEPA officers to enter premises and to seize and remove documents where SEPA has reasonable cause to believe certain offences have been committed, or where it may assist in determining actual or likely financial benefit arising from an offence;
- the ability to require a person to attend an interview and answer questions relating to an investigation; and
- removing the requirement for 7 days' notice for bringing heavy plant onto sites or entering residential property;

23. These powers are based on experience of major operations involving SEPA and the police, particularly dealing with serious organised crime involvement in waste activities and will expand the effectiveness of SEPA's regulatory toolkit and provide the agency with stronger powers to investigate and tackle environmental crime.

24. The Regulatory Reform Act also gives greater protection to SEPA officers by expanding the existing offence in the Environment Act 1995 relating to obstruction of SEPA officers to include assault and hindrance (including by non-physical means). The Act also increases the penalties for all such offences. These measures are based on the similar protections given to emergency workers under the Emergency Workers (Scotland) Act 2005.

Court powers and new offences

25. The Regulatory Reform Act provides courts with a range of tougher sanctions to use against those who blatantly disregard their responsibilities to protect Scotland's environment.

26. Section 40 of the Regulatory Reform Act creates a new offence relating to significant environment harm which provides that:

It is an offence for a person to—

- (a) act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or
- (b) fail to act, or permit another person not to act, in a way such that (in either case) the failure to act causes or is likely to cause significant environmental harm.

27. Environmental harm is 'significant' if it has serious adverse effects whether locally, nationally or on a wider scale, or it is caused to an area designated by an order made by the Scottish Ministers.

28. A person convicted on indictment of this offence is liable to an unlimited fine, imprisonment for up to 5 years, or both. A person summarily convicted of this offence is liable to a fine of up to £40,000, 12 months' imprisonment, or both.

29. In addition to, or instead of any other sentence, the court may make an order (a "remediation order") requiring a person convicted of the significant environmental harm offence to take such steps as may be specified in the order to remedy or mitigate the harm caused, and the period within which these steps are to be taken. Failure to comply with a remediation order constitutes an offence.

30. The Regulatory Reform Act also gives courts additional sentencing options such as the power to require an offender to pay compensation of up to £50,000 to a person to reduce or remediate the effects of any harm, loss or other adverse impacts arising from an environmental offence.

31. In reaching decisions on sentencing, the Regulatory Reform Act requires courts to take into account any financial benefit which has accrued as a result of the offence.

32. Where a person is convicted of a relevant offence, the court may make an order (a "publicity order") requiring that person to publicise the fact that the person has been convicted of the offence, details of the offence committed and the particulars of any sentence passed by the court. A publicity order may be made in addition to any other sentence. Failure to comply with a publicity order constitutes an offence.

33. The Regulatory Reform Act makes provision for corporate offending in relation to a range of offences under the Act, including in relation to the significant environmental harm offence, failure to comply with a publicity order and failure to comply with a remediation order. This means that an organisation (for example a company or other body), as well as the responsible official, can be held liable for offences where it can be demonstrated that the offence involved the organisation's connivance, consent, or neglect.

34. Provision is also made for employers or principals to have vicarious criminal liability for relevant offences. This applies where a relevant offence is committed by an employee or agent acting on behalf of the employer, or where an activity is carried out by arrangement with another (for example, a subcontractor). This will help ensure that those who benefit from offending behaviour are held accountable for regulatory breaches. It is, however, a defence for the employer to show that they had no knowledge of the offence being committed or that all reasonable precautions were taken and all due diligence applied to prevent the offence being committed.

Scottish Sentencing Council

35. The Scottish Sentencing Council was launched on 19 October 2015 under the Criminal Justice and Licensing (Scotland) Act 2010. The objectives of the Council are to promote consistency and transparency in sentencing practice, assist in developing sentencing policy and encourage better understanding of sentences across Scotland.

36. Environmental offences may be suitable for sentencing guidelines and consideration may be given to requesting that the Scottish Sentencing Council prepare guidelines for courts on the use of the additional sentencing options under the Regulatory Reform Act in due course.

Summary

37. Taken as a whole, the new environmental enforcement framework created by the Regulatory Reform Act will enable more proportionate and flexible enforcement action that is focused on changing behaviours; targeting those who deliberately and wilfully damage Scotland's environment, harm our communities and undermine legitimate businesses, and ensuring they are punished accordingly.

Questions

1 What types of case, both civil and criminal, do you consider fall within the term “environmental”? Please give specific examples.

Which processes are currently used to deal with those cases you have identified? Do you consider those processes are sufficient?

Please provide reasons for your response.

2 This paper outlines the improvements to the justice system that this Government has delivered in relation to environmental justice.

Do you agree that these changes have improved how environmental cases, both civil and criminal, are dealt with in Scotland?

If you do not agree, please explain why.

3. Given the extensive changes that have already been delivered to the justice system (as outlined in this paper) and the need to ensure that any further changes are proportionate, cost-effective, and compatible with legal requirements, are there any additional ways in which the justice system should deal with both civil and criminal environmental cases? If so, please detail these.

In particular, do you consider that there should be a specialist forum to hear environmental cases? If so, what form should that take (e.g. a court or tribunal)?

Please provide reasons for your response.

APPENDIX 1

STATISTICS RELATING TO WILDLIFE AND ENVIRONMENTAL CRIME

Proceedings in the Scottish Courts for wildlife offences by main charge

Crime Group	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
Total prosecutions	63	65	69	92	77	32	57	71	77	81
Offences involving birds	11	8	15	14	10	7	6	15	19	10
Cruelty to wild animals	1	1	1	10	9	4	2	4	9	4
Deer offences	-	1	-	2	-	-	3	8	3	5
Hunting with dogs	3	24	17	15	8	10	9	5	11	9
Offences involving badgers	-	-	7	11	1	2	3	2	-	-
Poaching and game laws	5	5	3	6	3	4	8	8	1	-
Possession of salmon or trout as result of offence	7	-	-	-	-	-	-	-	-	-
Possession of salmon or trout unlawfully obtained	1	3	-	3	3	-	1	2	2	1
Salmon and freshwater fisheries offences	29	18	21	25	32	3	21	16	21	42
Other wildlife offences	6	5	5	6	11	2	4	11	11	10

Proceedings in the Scottish Courts for environmental offences by main charge

Crime group	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
Total	362	343	315	280	187	181	199	171	128	173
Agricultural offences	1	1	2	-	3	2	-	-	1	-
Clean air Acts	1	5	4	7	2	1	5	4	1	1
Contravention of s6(1) of the Environmental Protection Act 1990 by continuing to operate proscribed process	1	-	1	-	-	-	-	-	-	-
Control of pollution	235	255	208	154	105	102	80	62	72	58
Dog fouling	9	11	11	8	14	32	65	52	28	86
Fraud	-	-	-	-	1	-	-	1	-	-
Litter offences	43	39	56	93	47	25	27	21	13	17
Oil pollution in navigable waters	17	5	-	-	-	-	-	-	-	1
Refuse Disposal (Amenity) Act 1978	23	10	13	5	2	5	-	2	-	1
Sea fisheries offences	29	17	17	7	8	5	7	11	5	1
Smoking in public places	-	-	-	1	-	1	9	3	4	4
Water Acts	-	-	3	4	3	5	4	11	3	2
Other Environmental Protection Act 1990 offences	-	-	-	-	1	2	2	3	1	2
Other conservation offences	3	-	-	1	1	1	-	1	-	-

Source: Scottish Government Criminal Proceedings Database

Developments in environmental justice in Scotland



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response.

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (anonymous)
- Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No



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