



Law Society
of Scotland

Consultation Response

Environmental Governance Inquiry

June 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law sub-committee welcomes the opportunity to consider and respond to the Commons Select Committee's Environmental Governance Inquiry.¹ The sub-committee has the following comments to put forward for consideration.

Response

Do the proposals in the Government's consultation meet the ambition set out in the 25 Year Plan to consult on "a new, world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union"? If not, what more needs to be done?

We note that there is a particularly wide range of functions for the proposed body discussed in the consultation, ranging from advisory to enforcement. We consider that it may be difficult to have a single body covering all matters. We consider that this difficulty arises due to the potential for internal tensions between policy (generally non-specific principles and choosing ways of fulfilling them) and enforcement (specific rules to be followed). The general public are entitled to understand the rules by which to guide their conduct. If policy and enforcement are to be considered at two separate ends of a spectrum, putting too much of that spectrum under the responsibility of a single organisation is likely to prove difficult in practice.

Whatever the body will be, it will be important for there to be a settled core set of functions and careful consideration should be given to this.

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/environmental-governance-inquiry-launch-17-19/>

Will a Governance and Principles Bill make all of the legal changes necessary to achieve the ambition of improving the environment for future generations? Are other legal changes required to improve the environment and if so, what interaction will there be with the new governance and principles regime, and is it possible for them to be designed separately?

We have no comment to make on this question.

What are the risks of ongoing uncertainty about governance and principles while other major decisions are being made, e.g. on the Withdrawal Agreement and the Trade Bill?

We note that it is difficult to reach a clear view on the provisions required due to the uncertainty surrounding how far and for how long existing EU obligations and procedures are going to continue to apply.

It is of central importance to the rule of law that the law is clear and has specification. Individuals and organisations must have effective guidance as to the necessary standards of conduct. Uncertainty, therefore, in relation to governance and principles makes it difficult for individuals and organisations to plan for the future. Careful consideration will require to be given to the appropriate approach to be taken within the UK and by devolved administrations to environmental standards in relation to possible impacts upon trade agreements.

Are the proposals in the Government's consultation adequate to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union? Are there any aspects in which they offer stronger environmental protection than existing arrangements? If not, what more needs to be done and by when?

In view of the uncertainty over how far EU laws which require specific outcomes and targets to be achieved are to be maintained, there is a possibility that objective and justiciable targets may be converted into more contextual obligations (for example to do one's best). Such obligations are more suited to social pressure or political enforcement, rather than legal enforcement.

With regards to enforcement, the consultation paper concentrates on the options reliant on political processes rather than stronger legal ones. This is a weakening from the position where the Court of Justice of the European Union (CJEU) has power to make sure that Governments meet their legal commitments. It is important in terms of enforcement that clear and strong environmental targets are maintained.

Do the proposals in the Government’s consultation set the basis for an appropriate relationship between the proposed body and other statutory bodies (for example, the Environment Agency, Committee on Climate Change, National Audit Office, regulators like Ofwat etc), Parliament and the devolved institutions? If not, what needs to change?

We have no comment to make on this question.

Whether the proposals in the consultation on incorporating environmental principles into UK law are sufficient to replicate or provide a stronger level of environmental protection than the existing arrangements? If not, what needs to change?

We consider that the proposals are sufficient to replicate the levels of environmental protection found in existing arrangements, although we caution the manner in which this may be done. There is potential for the proposals to provide stronger levels of environmental protection.

It is important that the law is as clear and precise as possible. Individuals and organisations need to be able to guide their behaviour by a clear understanding of the standards of conduct expected by the law. It flows from this therefore that any incorporation of environmental principles into the law must have sufficient clarity as to the role and effect of the principles so that citizens remain clear as to the conduct required to adhere to the law.

We think that any attempt to incorporate these principles expressly into statute must be managed carefully. We do not consider that there is a place for principles to be directly enacted as ‘black letter’ law as a substitute to substantive legal rules. We do however consider that there is a place for environmental principles to be incorporated into a general duty upon Ministers and public bodies to ‘have regard to’ the issues covered by the principles.

The courts must be able to enforce the principles where they have been enacted in the law, so they should be provided with clear guidance as to how they are to be treated. The guidance should make clear how any discretionary nature of the principles is to be applied and how they are to be balanced with other factors that influence a decision.

As things stand, we anticipate that the environmental principles will continue to apply after the UK’s withdrawal from the EU due to their current place in international law and in EU provisions which will become retained EU law. Arrangements for enforcement of the principles will require to be addressed. We consider it important that an approach is taken which safeguards the well-settled environmental standards but also ensures that there remains a degree of consistency of approach among the UK jurisdictions. The extent to which consistency will be sought is a political matter and we have no comment to make on this.

When considering any particular course of action, it is likely that there will be a number of matters to be regarded by the decision maker, including domestic policy and EU principles, such as proportionality, fundamental rights, legal certainty, equality before the law and subsidiarity. There must be clear guidance available, perhaps by way of a policy document sitting alongside substantive law, as to the significance and

weight to be attached to the environmental principles as compared to other legal principles and giving direction on the interaction of the principles with substantive legal rules.

Is there sound logic behind the decision to exclude climate change from the remit of the new body? Does this risk leaving the enforcement of climate change law weaker than the rest of environmental law?

We have no comment to make on this question.

What would be the benefits and weaknesses of a UK-wide approach? Has there been sufficient collaboration between HMG and the devolved administrations on this matter, and are the right processes in place to agree the most environmentally rational settlement?

We are concerned about the limited level of UK-wide planning and discussion which has taken place. It is not clear that there has been a sufficient level of collaboration with devolved administrations or society across the UK to find the best way forward on this important issue. As highlighted above, the extent to which consistency will be sought across the jurisdictions is a political matter and we have no comment to make on this.

For further information, please contact:

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