



Law Society  
of Scotland

# Consultation Response

## Environmental Principles and Governance after EU Exit

August 2018



## Introduction

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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 Department for Environment, Food and Rural Affairs' (Defra) consultation: *Environmental Principles and Governance after EU Exit*.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General comments

We note that developments in this field since the publication of the consultation document have resulted in some degree of complication in the current landscape of environment principles and governance.

The principles referred to in Annex 1 of this consultation do not align with those set out in section 16(2) of the EU Withdrawal Act 2018 (the Act), which received Royal Assent on 26 June 2018. The Act requires the Secretary of State to publish, within the period of six months from the day on which the Act is passed, a draft Bill containing the set of environmental principles which are detailed within section 16(2).

Section 13B of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill contains a different set of principles to that found within this consultation and in the Act. This section requires the Scottish Ministers to have regard to the guiding principles on the environment and animal welfare when making certain regulations under the Bill: section 11 (deficiencies arising from UK withdrawal), section 12 (complying with international obligations), and section 13 (power to make provision corresponding to EU law after exit day). At the time of writing, this Bill has been referred to the UK Supreme Court under section 33 of the Scotland Act 1998 by the Attorney General and the Advocate General for Scotland. It is not yet clear whether further legislative action will be taken to ensure these principles have general application to the law.

<sup>1</sup> <https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>

We consider that strong collaboration between the UK Government and devolved administrations is of considerable importance. This is particularly significant given the transboundary effects of environmental impacts. Consistency in the manner in which principles are applied will be of benefit in ensuring that international environmental obligations are met and avoiding 'environmental regulatory tourism'.

We note and welcome the work undertaken in Scotland recently by the Roundtable on Environment and Climate Change. The report of the Roundtable<sup>2</sup> considers a variety of options for environmental governance following the UK's withdrawal from the EU.

## Consultation questions

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### **Question 1: Which environmental principles do you consider as the most important to underpin future policy-making?**

We consider that all principles set out in Annex 1 of the consultation are of importance. These principles represent continuity with those currently found in EU law and policy, and as implemented in the UK. We do not seek to rank the principles by importance. We are concerned that by doing so, this could have the result of devaluing some principles when compared to others. Environmental principles have not been graded by importance by the EU.

As referred to above, we note the differences between the principles referred to in the consultation and those contained within the Act. We note that the principles referred to in section 16(2)(g) – 16(2)(i) of the Act may be considered to be rights rather than principles. These rights are set out in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>3</sup> (the Aarhus Convention 1998). These rights are conferred on UK citizens and citizens within all states that have ratified the Convention. While we welcome the inclusion of these matters in the Act, we note that by referring to them as principles rather than recognising their status as rights, this may have the effect of devaluing them.

### **Question 2: Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?**

We note that this question has been superseded by the passage of the Act which requires, at section 16(1)(b) and (c), a policy statement to be produced in relation to the application and interpretation of the principles and requires Ministers of the Crown to have regard to the statement in certain circumstances.

<sup>2</sup> <http://www.gov.scot/Resource/0053/00536067.pdf>

<sup>3</sup> <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

We would welcome consultation on the draft policy statement referred to in section 16(1)(b) alongside consultation on the draft Bill required under section 16(1). It is of central importance to the rule of law that the law is clear and has specification. Therefore, the extent to which the courts are entitled to have regard to the principles must be made clear, while the policy statement itself should set out clear expectations as to the role and interpretation of the principles. Individuals and organisations must have effective guidance as to the necessary standards of conduct. Uncertainty, therefore, in relation to environmental principles makes it difficult for individuals and organisations to plan for the future.

### **Question 3: Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1) or should the principles only be set out in the policy statement (Option 2)?**

We refer to our answer to question 2 above, in particular reflecting that this question has been superseded by the passage of the Act.

We recognise the importance of environmental principles in guiding policy and in the interpretation of legislation. We note the need for appropriate checks and balances, in particular reflecting the need to balance environmental principles against other principles and priorities.

### **Question 4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?**

Yes. We consider that there will be missing environmental governance mechanisms as a result of leaving the EU. These will include loss of governance functions of the European Commission (EC), the Court of Justice of the European Union (CJEU) and the European Environment Agency (EEA). To some extent, this loss has been mitigated by the provisions of section 16(1)(d) of the Act which provides for a new environmental body.

It is important that the new body is able to hold Ministers of the Crown to account. This requires the body to be independent and able to apply sanctions that will have sufficient deterrent effect on the acts of Ministers. We consider that there would be merit in the body's remit being sufficiently wide in scope to *indirectly* deal with non-compliance by any public bodies.

An example of where the removal of EU governance could result in less UK Government action is in the context of air pollution, currently dealt with by the Directive on Ambient Air Quality and Cleaner Air for Europe<sup>4</sup>, and of noise, currently dealt with by the Environmental Noise Directive<sup>5</sup>. To ensure that the

<sup>4</sup> 2008/50/EC.

<sup>5</sup> 2002/49/EC.

necessary steps are taken to meet the standards in these Directives, effective enforcement mechanisms would be required to hold the government to account.

### **Question 5: Do you agree with the proposed objectives for the establishment of the new environmental body?**

We are supportive of the proposed objectives for the establishment of the new body. That said, the objectives will have to be workable and be able to be measured to ensure success. It is crucial that the body is effective in holding the government to account. This is of particular significance as the EC is arguably 'above and outside' the government, whereas the suggested supervisory body will necessarily be a creation of the legislature. We suggest, therefore, that an objective aimed at effectively holding the government to account is added.

The body needs to be properly and independently funded. We consider that this will be key to the body's effectiveness. If the body is not funded independently either from the Parliament or via Defra, there is the potential for funding to be reduced, thereby affecting the body's functions as an independent entity.

In addition, we note that it is crucial that the new body is properly resourced and staffed. By way of comparison, we understand that the EU's Directorate General for the Environment has approximately 500 staff members. It shares a resources directorate of around 90 staff with the Directorate General for Climate Action. There are various other European Directorates relevant to the environment including Energy, Maritime Affairs and Fisheries, and Health and Food Safety.

### **Question 6: Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?**

We do consider that the new body should be able to scrutinise government in relation to extant environmental law. We consider that there is merit in the body having limited advisory powers.

It will be important for the primary function of the body to be clearly identified to allow focussed work to be undertaken. Resourcing of the body will also be a significant factor in the ability to carry out advisory and enforcement roles.

### **Question 7: Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?**

We refer to our answer to question 6 above. We consider that there would be merit in the body being able to scrutinise, advise and report on the delivery of key environmental policies, perhaps with a particular focus on areas of non-compliance, but recognise that it would not be appropriate for the body to play a part

in advising government on the formation of policies due to the potential for conflict of interests. Our comments above reflect our view that the primary focus for the body should be compliance and enforcement.

### **Question 8: Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?**

Yes. We consider there would be a benefit in the body having powers to respond to and investigate such complaints. However it should not be under a duty to do so, but should instead have discretion as to whether to investigate complaints. This would allow such complaints to act as a source of information for the body, which may give rise to awareness about possible breaches of environmental law. It will be important for this function and powers to be carefully defined to enable the body to have appropriate control of this aspect of work.

### **Question 9: Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?**

Yes. We consider that other mechanisms should be available to the body beyond advisory notices and that this can be achieved within our current constitutional structure. We note that the advisory notice procedure is similar to the provisions for a reasoned opinion to be issued by the European Commission. It should be noted that further enforcement action is frequently taken beyond the issuing of a reasoned opinion. We consider therefore that further mechanisms are required to ensure a comprehensive system of enforcement is available.

We are of the view that powers of intervention in legal proceedings (set out in paragraph 106) are the least that the body should be able to do. We also consider that there is merit in the provision for environmental undertakings (set out in paragraph 107). However, we do note that these are restricted to circumstances where a government authority accepts that it has failed to meet its responsibilities and so are limited in scope.

We consider that the body should have the powers to raise its own legal proceedings on judicial review grounds by referring the government authority to an independent court or tribunal, for that court or tribunal to determine whether the government authority has failed to comply with its legal obligations and the steps it must take to bring it into compliance.

**Question 10: The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?**

We consider that other authorities should be indirectly in the scope of the new body, via the government being accountable for compliance with environmental law by all public bodies. This is similar to the current role of the European Commission where action is taken against a Member State due to an alleged breach of environmental law and that Member State's government takes responsibility for the actions of the relevant public body. This would prevent government 'passing the buck' for breaches of environmental law as failures by other bodies would require to be addressed.

**Question 11: Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?**

Yes. This is consistent with the current powers of the European Commission. Other international environmental agreements generally set out means of dealing with alleged contraventions.

As referred to above, there is a need for the remit of the body to be carefully framed, and in this regard, the definition of "domestic environmental law" that will fall within the remit of the body will require consideration. The Aarhus Convention 1998 provides wording which is wide in scope and could be adopted. For instance, Article 9.3 of the Aarhus Convention 1998 describes "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* (our emphasis)".

**Question 12: Do you agree with our assessment of the nature of the body's role in the areas outlined above?**

We consider that the proposed scope of the body's role is limited. In relation to climate change, we note that it is difficult to extrapolate this from other environmental matters such as air quality. With regards to agriculture, we consider that the body should be able to deal with matters arising in the scope of agriculture which are relevant to environmental law and any breaches thereof. Similarly, we consider that the body should have scope to deal with the marine environment as relevant to environmental law, particularly given the inextricable link between the marine and land environments.

We suggest therefore, that any exclusions from the scope of the body require to be carefully framed, so as not to exclude consideration of relevant matters, but also recognise the potential for agreements between the new body and other relevant bodies as to areas of work – for example, the Committee on Climate Change (CCC) which has a statutory remit under the Climate Change Act 2008.

### **Question 13: Should the body be able to advise on planning policy?**

We are of the view that the body should have a limited role in advising on planning policy, insofar as it relates to the body's areas of environmental responsibility, in particular breaches of environmental law, to allow for consideration of relevant matters. We suggest that this includes environmental impact assessments, waste management, contaminated land, habitats and noise. This role should be limited however, as a wider remit is likely to give rise to considerable complication and duplication of work

### **Question 14: Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?**

We note the UK-wide nature of environmental issues and therefore highlight the need for strong collaboration between UK Government and the devolved administrations.

**For further information, please contact:**

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