



Law Society
of Scotland

Environment Bill

Law Society of Scotland briefing for Second Reading
in the House of Lords

June 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and comment on the Environment Bill¹. If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General remarks

Various parts of the Bill extend and apply to different parts of the UK and therefore our comments in this briefing are restricted to those parts which extend and apply to Scotland.

Matters relevant to devolution

We note the work undertaken in Scotland by the Roundtable on Environment and Climate Change. The report of the Roundtable² *Environmental governance in Scotland after Brexit* considers a variety of options for environmental governance following the UK's withdrawal from the EU. The Group's work involved a preliminary study of the possible issues relating to future environmental governance in Scotland post-Brexit. Further to this report, the Scottish Government consulted on environmental principles and governance in Spring 2019³. The Scottish Government published the Environment Strategy for Scotland⁴ in February 2020 which contains details of the Government's approach to environmental policy. Following this, the UK Withdrawal from the European Union (Continuity) (Scotland) Bill was introduced in 2020 and was given Royal Assent in early this year - European Union (Continuity) (Scotland) Act 2021 (Scottish Act).

Environmental principles

We note that the provisions in the Bill concerning environmental principles (clauses 16 – 18) extend to England and Wales and apply to England only.

¹ <https://bills.parliament.uk/bills/2593>

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

³ <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

⁴ <https://www.gov.scot/publications/environment-strategy-scotland-vision-outcomes/>

Section 13 of the Scottish Act sets out the following guiding principles on the environment:

- “(a) the principle that protecting the environment should be integrated into the making of policies,
- (b) the precautionary principle as it relates to the environment,
- (c) the principle that preventative action should be taken to avert environmental damage,
- (d) the principle that environmental damage should as a priority be rectified at source,
- (e) the principle that the polluter should pay.”

We note that these are in line with the principles proposed set out in clause 16 , although it is significant that the Scottish Act requires reference to the principles themselves (see duties in sections 14-17), taking account of their interpretation by the Court of Justice of the European Union, whereas under the Environment Bill, the reference point is the policy statement to be made by the Secretary of State.

While the extent to which consistency is sought is a political matter, we consider that coherence in the manner in which principles are understood and applied may be of benefit in ensuring that international environmental obligations are met and avoiding disparities that might encourage 'environmental regulatory tourism'. While differentiation is a natural consequence of devolution, we consider that strong collaboration between the UK Government and devolved administrations in relation to environmental governance is essential. This is particularly significant given the transboundary effects of environmental impacts and the duties imposed on UK Ministers under the Scottish Act. Some coherence may also be of assistance in relation to UK-wide discussions and forums, for example, in relation to the Joint Nature Conservation Committee (JNCC), the REACH regime, and agreement of the Joint Fisheries Statement (under the Fisheries Act 2020).

Office of Environmental Protection

In relation to the Office of Environmental Protection (OEP), we consider that it is important that the OEP works closely alongside environmental governance bodies in the devolved administrations. We would welcome clarification in relation to the reserved functions of UK Ministers relating to Scotland that will be subject to oversight by the OEP.

Clause 42(1) provides for a restriction on the OEP in relation to disclosure of information. We note that clause 42(2)(f) provides for an exception for a disclosure “made to a devolved environmental governance body for purposes connected with the exercise of a devolved environmental governance function”. We welcome this exclusion but consider that the Bill should provide for either a wider power to or an obligation on the OEP to share information with and work with relevant bodies in devolved administrations where necessary. This might include provisions for joint investigations to be undertaken between the OEP and one or more environmental governance bodies in the devolved administrations where appropriate. It is also crucial that individuals and businesses have a clear understanding of the scope and remit of the OEP and any bodies in the devolved administrations. We suggest that provision be included within the Bill for any complaints passed to an ‘incorrect’ body to be passed directly to the relevant body.

Other matters

The Cabinet Office published in late 2017 a list of 111 points where EU law intersects with devolved matters in relation to Scotland (160 points overall where EU law intersects with devolved powers across the UK). This has been supplemented by the publication of the *UK Government's Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* on 9 March 2018. 24 of the policy areas in question were identified as being subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. The Cabinet Office published in April 2019 a *Revised Frameworks Analysis*⁵ and published in September 2020 a further document: *Frameworks Analysis 2020*⁶. The latest revised analysis reduced the number of policy areas where new primary legislation may be required (or has been put in place) in whole or in part, to implement the common rules and ways of working to 18, and includes a number of matters relating to the environment. The detailed arrangements for many of the common frameworks are not yet known, however, we continue to monitor the reported progress and a selection of published and provisional frameworks have been published⁷.

We also note that the Scottish Government consented to regulations on a variety of environmental matters which were laid in Parliament in preparation for the UK's EU exit⁸. These regulations cover a range of matters including: ionising radiation; emissions trading; health and safety in connection with genetically modified organisms, control of major accident hazards; water environment and environmental policy; persistent organic pollutants; control of mercury; animal health; nuclear reactors; fluorinated greenhouse gasses and ozone-depleting substances; waste management; Nagoya Protocol; air quality carbon capture and storage; marine environment; import and trade of animals and animal products; registration, evaluation, authorisation and restriction of chemicals (REACH); genetically modified organisms; and animals and food.

Comments on the Bill

Statements about Bills containing new environmental law – clause 19

This clause introduces a requirement on a Minister of the Crown to make a statement on any new Bill which contains provision that would constitute environmental law if enacted, to the effect that in the Minister's view the Bill contains provision which, if enacted, would be environmental law, and either, in the Minister's view the Bill will not have the effect of reducing the level of environmental protection provided for by existing environmental law or the Minister is unable to make such a statement but the Government nevertheless wishes to proceed with the Bill.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf

⁷ The European Union (Withdrawal) Act and Common Frameworks Reports can be accessed here: <https://www.gov.uk/government/collections/uk-common-frameworks>

⁸ Further information about the Scottish Parliament's consideration of these instruments can be found here: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/109366.aspx>

This provision provides for scrutiny of the Government in relation to environmental law, for example if there was a weakening of environmental protection or lowering of environmental standards. However, this protection is limited as there is no recourse provided if these circumstances were to arise. We consider that there is the potential for this to be challenged. It is likely to be difficult for the correctness of any such statement to be evidenced or tested.

Office of Environmental Protection - Clauses 21 – 46 and Schedule 1

Clause 21 of the Bill provides for the establishment of an Office of Environment Protection (OEP), with much of the detail provided in Schedule 1. It is important that the new OEP is able to hold Ministers of the Crown and public bodies 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 note concerns regarding the extent of discretion given to the Secretary of State in Paragraphs 1 - 3 of Schedule 1 to the Bill in relation to constitution of the OEP and appointment of members. The wide scope of these powers may impact upon the OEP's independence from Government.

Provision is made in paragraph 5 of Schedule 1 about terms of appointment of an OEP member. We are supportive of the requirement for non-executive members to be appointed for a fixed term. We suggest that the relevant term is set out in the Bill to reinforce the independence and impartiality of the OEP so that the duration of service could not be subject to Ministerial discretion. While the OEP will cover UK functions, we suggest that the Secretary of State should nevertheless consider the devolved administrations as having a stake in the appointment process, or be subject to a duty to have regard to the need for consistency and coordination with the approach in devolved administrations, due to the potential effects upon devolved matters.

We note the provisions of paragraph 5(6) which provides for a non-executive member to be removed from office in certain circumstances. We suggest this provision be subject to a requirement for the Secretary of State to consult with the Chair. We also propose that a definition of "unable or unfit to carry out the member's functions" is provided within the provisions and suggest the following wording for this purpose:

A person shall be considered unable or unfit if the Chair is satisfied as regards any of the following matters –

- (a) That the member becomes insolvent;*
- (b) That the member has been convicted of a criminal offence;*
- (c) That the member is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member."*

We note the terms of the Environment Act 1995, Schedules 1 and 6 which contain provisions on membership of the Environment Agency and the Scottish Environment Protection Agency respectively. We

consider there is scope for additional safeguards to be made in this Bill to ensure the independence of the OEP.

We have previously highlighted 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 and shares around 90 staff with the Directorate General for Climate Action. There are various other European Directorates relevant to the environment - Energy, Maritime Affairs and Fisheries, and Health and Food Safety.

The body needs to be properly and independently funded. This will be key to the body's ability to effectively scrutinise the Government. Paragraph 12 of Schedule 1 provides that: "The Secretary of State must pay to the OEP such sums as the Secretary of State considers are reasonably sufficient to enable to OEP to carry out its functions." We are concerned that if the body is not funded with some independence from Government, there is the potential for funding to be reduced, thereby affecting the body's functions as an independent entity. We welcome the new duty on the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect the OEP's independence (Schedule 1, paragraph 17). However, we note that it is possible for regard to be had to a factor but little or no weight attached to it. In the circumstances, we suggest that the Bill include provisions for the OEP to consult upon and publish a five-year budget.

Clauses 22 and 23 set out requirements for the OEP's strategy. We note that clause 22(6) provides that the strategy must contain an enforcement policy and sets out certain matters which must be contained in that policy. Clause 22(6)(c) refers to respecting the "integrity of other statutory regimes". We suggest that this should include consideration of other intra-UK regimes so as not to encourage 'environmental regulatory tourism'.

We welcome the requirement for the strategy to be kept under review (clause 23(3)) and the requirement on the OEP to consult with such persons as it considers appropriate before preparing, revising or reviewing the strategy (clause 23(5)).

Clause 24 provides that the Secretary of State may issue guidance on the matters listed in clause 22(6) which concerns the OEP's enforcement policy. The OEP must have regard to the guidance in preparing its enforcement policy, and exercising its enforcement functions. There is a potential for any such guidance to be far reaching and the Bill contains no requirement for consultation to be undertaken when such guidance is being prepared. While the OEP must 'have regard' to the guidance, there is the potential for the OEP to 'have regard to' the guidance but choose to attach little or no weight to it.

Clause 25 provides that the OPE and the Committee on Climate Change must prepare a memorandum of understanding setting out how the bodies intend to cooperate and avoid overlap between the exercise of their respective functions. Given the need for good cooperation between the bodies, it seems appropriate that the requirement to prepare such a memorandum is put on a statutory footing.

We anticipate that the provisions of clause 26 relating to co-operation will assist the OEP in their enforcement actions. We welcome the requirement in clause 26(4) for the OEP to consult with a devolved environmental governance body where the OEP considers that a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function. As referred to above, we consider there is scope to strengthen the requirements for the OEP to work alongside environmental governance bodies in the devolved administrations.

The OEP's monitoring and reporting powers in clauses 27 and 28 will cover environmental law which is not devolved but may impact upon devolved administrations. As noted above, it is important that the OEP works alongside other relevant bodies, in particular, the Environment Agency and Scottish Environment Protection Agency (SEPA).

In relation to the OEP's advisory role (clause 29), we note the importance of the OEP being able to provide advice to a Minister of the Crown on proposed changes to the law or on other matters relating to the natural environment which may take place in one jurisdiction but which by virtue of the connectivity of our land, water and air, impact the environment in another geographical area.

The enforcement powers of the OEP are set out in clauses 30 to 40 of the Bill. It is important that a comprehensive system of enforcement is available.

We consider there is benefit in the OEP having powers to investigate complaints and to carry out an investigation without having received a complaint (clause 32(2)). We welcome the discretion which is given to the body in this regard. We note that one of the conditions for the OEP to carry out an investigation is that the failure to comply with environmental law "would be a serious failure" (clauses 32(1)(b) and (2)(b)). The meaning of this lacks clarity and would merit clarification, perhaps in the form of guidance.

We welcome the provisions in relation to information notices (clause 34) and decision notices (clause 35), however, the extent to which the OEP will be able to compel compliance is unclear. The Bill does not provide for any further sanctions following an investigation, for example, fines. We recognise, however, the potentially circular nature of enforcement against public authorities by way of fines, which may result in reducing the budget available for compliance in the future.

It is appropriate that a review application may be made by the OEP and we note the bespoke procedure which is provided under clause 37 for an environmental review. An environmental review is only possible where a decision notice has been issued by the OEP to the public authority (clause 37(1)) and is not a process open to the public at large. We consider that provision should be made for the public to prompt a review to ensure swift action can be taken where necessary and to ensure access to justice on environmental matters. We note that the court is to apply 'judicial review principles' (clause 37(5)) which would appear to restrict the scope of the review.

In relation to judicial review, we note the limitations placed on the OEP's powers under clauses 38(1) and (2), in particular, the requirement for an 'urgency condition' to be met.

Waste and resource efficiency

Clauses 49 – 52 and Schedules 4 – 7

We welcome the provisions focussing on waste reduction and resource efficiency. The provisions relating to producer responsibility for disposal costs and resource efficiency information and requirements (schedules 4 – 7) are enabling provisions and much of the detail of these regimes is not yet clear. We consider it appropriate that regulations under schedules 4 - 7 are subject to the affirmative procedure and welcome the consultation requirements found in schedule 4, paragraphs 8 and 20; schedule 5, paragraphs 10 and 18; schedule 6, paragraphs 5 and 14; and schedule 7, paragraphs 5 and 14.

Electronic waste tracking (clause 57) and transfrontier shipments of waste (clause 61)

The provisions in these clauses are enabling provisions. We note the provisions detailing when the regulations under clause 57 will be subject to affirmative procedure. We consider, across these clauses, that it would be appropriate to require the relevant authority to consult with relevant persons before making the regulations.

Air quality – clauses 71 – 76

Clauses 73 - 76 relate to the environmental recall of motor vehicles. These are enabling provisions which are wide in scope, with much of the detail to be provided in regulations. We consider that such regulations should be subject to the affirmative procedure and be subject to consultation before being laid to ensure that there is an opportunity for scrutiny by relevant stakeholders.

Forest risk commodities – clause 109 and schedule 16

We have no comment at this stage.

REACH – clause 133 and schedule 20

Schedule 20, paragraph 1 gives the Secretary of State the power to amend the REACH Regulation (Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency). Paragraph 2 gives the Secretary of State the power to amend the REACH Enforcement Regulations 2008.

The powers conferred on the Secretary of State by this schedule are wide reaching, although certain provisions are deemed to be protected and not subject to regulation under the schedule. Regulations made

under the powers could reduce the level of protection from hazardous chemicals and therefore it is important that safeguards are in place.

We note that regulations under both paragraphs 1 and 2 are subject to the affirmative procedure. Schedule 20 provides that regulations can only be made if they are consistent with Article 1 of the REACH Regulation. Paragraph 1(6)(b) provides that the Secretary of State must, before beginning consultation on any amending regulations, publish an explanation of why they are consistent with Article 1.

The power of the Secretary of State to make regulations is subject to the consent requirement in Article 4A of the REACH Regulation which provides:

- “1. Where any provision of this Regulation states that a function is subject to the consent requirement in this Article, the function may be exercised in a particular instance only if the person exercising it has obtained the consent or consents (if any) required by paragraphs 2 to 4.
2. The consent of the Scottish Ministers is required if, or to the extent that, the exercise of the function is within devolved competence (within the meaning of section 54 of the Scotland Act 1998(10)), whether or not the exercise of the function also relates to a part of the United Kingdom other than Scotland.”

Consultation provisions are contained in paragraph 5. Given the wide scope of the powers and the potential impacts of any changes, we consider broad consultation to be necessary before the laying of any regulations.

For further information, please contact:

Alison McNab
Policy Team
Law Society of Scotland
DD: 0131 476 8109
AlisonMcNab@lawscot.org.uk