Law Society of Scotland

Stage 1 Briefing

UK Withdrawal from the European Union (Continuity) (Scotland) Bill

October 2020

Introduction

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

The UK Withdrawal from the European Union (Continuity) (Scotland) Bill[1] was introduced by the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP, on 18 June 2020. The Finance and Constitution Committee was designated as the lead committee and conducted an inquiry on the Bill to which we submitted evidence[2]. The Environment, Climate Change and Land Reform Committee also conducted an inquiry to which we submitted evidence[3]. The Stage 1 Report of the Finance and Constitution Committee was published on 7 October 2020[4]. The Stage 1 Report of Environment Climate Change and Land Reform (ECCLR) Committee was published on 22 September 2020[5]. The Delegated Powers and Law Reform (DPLR) Committee also considered the Bill at Stage 1 and its stage 1 report was published on 25 September 2020[6].

If you would like to discuss this paper or would like more information on the points raised, please contact us via the details at the end of the paper.

[1] https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/uk-withdrawal-from-the-european-union-continuity-scotland-bill-2020/introduced/bill-as-introduced-uk-withdrawal-from-the-european-union-continuity-scotland-bill.pdf
[2] https://www.lawscot.org.uk/media/369232/07082020-lss-stage1-evidence-to-financeplusconstitution-cmt-on-the-uk-withdrawal-from-the-eu-continuity-scoltand-bill.pdf
[3] https://www.lawscot.org.uk/media/369257/20-06-22-uk-withdrawal-continuity-scotland-bill-written-evidence-ecclr-002.pdf
[4] https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2020/10/7/Stage-1-Report-on-the-UK-Withdrawal-from-the-European-Union--Continuity---Scotland--Bill/FCC.S5.20.10.pdf
[5] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf
[6] https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/9/25/UK-Withdrawal-from-the-European-Union--Continuity---Scotland--Bill--Stage-1/DPLRS052020R55.pdf

General remarks

Withdrawal from the European Union

The UK joined the European Economic Community (since 1993 the EU) in 1973. The European Communities Act 1972 is the Act of Parliament which gave domestic effect to EU law and obliges the UK Government, the Scottish Government and the other devolved administrations to implement EU law.

After the EU Referendum in 2016, the Prime Minister notified the European Council of the intention to withdraw from the EU under Article 50 of the Treaty on European Union by the European Union (Notification of Withdrawal) Act 2017. The EU (Withdrawal) Act 2018 established the system for the retention of EU law within the UK through 'retained EU law'.

The Withdrawal Act was followed by the European Union (Withdrawal Agreement) Act 2020 (EUWAA) which ratified the Withdrawal Agreement (WA) between the UK and EU in October 2019. 31 January 2020 was designated exit day when the UK left the EU.

The WA contained a transition or implementation period, during which most EU law applies in the UK as if it were a Member State. The transition or implementation period is due to expire on 31 December 2020. The EUWAA retained the ECA in order to continue EU law during the transition or implementation.

The EUWAA ensures that retained EU law comes into effect at the end of the transition or implementation period. Retained EU law will apply in Scotland until such time as new domestic laws are made to change it.

The Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in February 2018. This Bill was designed to ensure that devolved laws could be prepared for the effects of UK withdrawal even if it was not possible to rely on the EUWA to which the Scottish Parliament did not consent and which was not law when the Legal Continuity Bill was introduced. Section 13 of the 2018 Continuity Bill provided a power for the Scottish Government to make provision that would correspond to or implement provision in EU law after UK withdrawal.

When the Bill completed its parliamentary passage in March 2018, the Advocate General for Scotland and Attorney General made a reference to the United Kingdom Supreme Court arguing that the Bill was outside the legislative competence of the Scottish Parliament. The Supreme Court found that aspects of the Bill were outside the Scottish Parliament's legislative competence but also confirmed the Scottish Parliament's power, within its competence, to prepare the statute book for the UK's withdrawal.

In 2019 Scottish Ministers confirmed their intention to bring forward legislation to ensure Scots law can continue to align with EU law, where appropriate and to strengthen environmental protection – the principal components of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

Environmental principles and governance

We previously responded to the Scottish Government's consultation *Environmental Principles and Governance in Scotland*[7]. At that time, we noted the proposals previously set out in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. We highlighted that it is important that the wider context within which environmental principles sit is considered – for example, Scotland's National Performance Framework and other 'restrictions' in environmental matters such as climate change. We welcome the work undertaken by the Roundtable on Environment and Climate Change. The report of the Roundtable[8] considered a variety of options for environmental governance following the UK's withdrawal from the EU.

We note the terms of the UK Environment Bill[9] and have provided briefing and evidence on the Bill[10]. 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 environmental principles are applied will be of benefit in ensuring that international environmental obligations are met and avoiding 'environmental regulatory tourism'. The extent to which consistency will be sought across the jurisdictions is a political matter and we have no comment to make on this.

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*[11] and published in September 2020 a further document: *Frameworks Analysis 2020*[12]. The most revised analysis has 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[13]. We note that that seven frameworks are expected be developed, agreed and implemented by the end of December 2020 and interim measures will be in place for a further twenty-five provisional frameworks within that time frame before being finalised in 2021[14].

[7] https://www.lawscot.org.uk/media/362627/19-05-11-env-consultation-sg-environmental-principles-and-governance.pdf
[8] http://www.gov.scot/Resource/0053/00536067.pdf
[9] https://services.parliament.uk/bills/2019-21/environment.html
[10] https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-201920/environment-bill-2019-21/
[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf
[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf
[13] The European Union (Withdrawal) Act and Common Frameworks Reports can be accessed here: https://www.gov.uk/search/policy-papers-and-consultations?parent=%2Ftransition&topic=d6c2de5d-ef90-45d1-82d4-5f2438369eea
[14] SP OR ECCLR 11 August 2020, col 8&9.

We also note that the Scottish Government has consented to regulations on a variety of environmental matters which have been, or are due to be, laid in Parliament in preparation for the UK's EU exit[15]. 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

Part 1: Alignment with EU Law

Alignment with EU Law

(a) Power to make provision corresponding to EU law

Section 1 (1) (a) entitled 'Power to make provision corresponding to EU law 'states:

> (1) The Scottish Ministers may by regulations—
>
> (a) make provision—
>
> (i) corresponding to an EU regulation, EU tertiary legislation or an EU decision,
> (ii) for the enforcement of provision made under sub-paragraph (i) or otherwise 15 to make it effective,
> (iii) to implement an EU directive, or
> (iv) modifying any provision of retained EU law relating to the enforcement or implementation of an EU regulation, EU tertiary legislation, an EU decision or an EU directive, so far as the EU regulation, EU tertiary legislation, EU decision or EU directive has effect in EU law after IP completion day […]'.

These powers will allow Scottish Ministers to make regulations corresponding to EU regulations, tertiary legislation or decisions. The regulations will also be able to enforce these laws, implement directives or modify any retained EU law relating to implementation or enforcement. Furthermore Section 1(6) provides that 'Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

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

The Scottish Government's justifications for the powers in section 1 is contained in paragraphs 26 and 27 of the Policy Memorandum. The first justification is that -

> "26… In order to ensure the effective operation of Scots law, to provide for the most flexible approach to regulation, and to reflect Scotland's desire to remain a European nation closely aligned to the EU (so far as within devolved competence), upon the ending of the implementation period, the Scottish Government considers it necessary to give Scottish Ministers the power to make secondary legislation to ensure that Scotland's laws may keep pace with changes to EU law, where appropriate and practicable…
>
> 27… If there is no other power to regulate in an area, the alternative could be considerable primary legislation, so it is pragmatic to legislate for a power to keep pace with post-withdrawal developments in EU law and ensure, as appropriate, continuity of law in certain devolved areas after the implementation period ends."

It is a political or policy question as to whether it is necessary to keep pace with future EU law as to which the Law Society has no view but it is a separate question as to whether, even if it is, it is necessary to give Scottish Ministers the power to make the regulations under section 1.

Section 1 of the Bill is modelled upon section 2(2) of the European Communities Act 1972 which empowers regulations to be made to implement EU law but in the case of the Bill there is no legal necessity to implement EU law within a particular period of time. It is simply a policy requirement to keep pace with EU law.

It is appreciated that it would be impractical to require all changes in EU law to be given effect to by primary legislation in the Scottish Parliament because this would hold up the normal legislative programme.

However, some future changes in EU law could involve substantial policy considerations which would not have been subject, within the UK, to the usual EU consultation. This means that neither the UK nor Scottish Governments and stakeholders would have had the opportunity to influence those proposals or even to become familiar with them (see the Answer to Question 3).

Section 5 and 6 of the Bill make provision for Scottish Ministers, when laying a SSI, or a draft of it, to make a statement explaining, among other things, the instrument or the draft and why Scottish Ministers consider that there are good reasons for making it. In the case of proposals which involve substantial policy considerations it is not thought that such a statement, by itself and without extensive scrutiny, would make up for the absence of proper consultation and consideration. **In these circumstances, it is suggested that the power to make regulations under section 1 should be restricted to where the changes in EU law do not involve substantial policy considerations unless they are subject to super affirmative procedure as described below.**

The second justification put forward by the Scottish Government attempts to give a legal justification for the power in section 1. Paragraph 26 of the Policy Memorandum states that, in the event of the UK and EU

reaching a trade agreement, there may be a requirement for a form of “dynamic alignment” with EU law and it is therefore prudent to legislate for a power to make regulations to achieve this alignment.

However, it is uncertain whether there will ever be such a trade agreement which requires alignment with EU law and, even if there was, the implementing UK legislation would make provision for any necessary powers to achieve that alignment.

(b) Scrutiny

Section 4 of the Bill provides that some regulations under section 1 are to be subject to affirmative procedure and all other regulations are subject to negative procedure.

Affirmative procedure will be used where the subordinate instrument:

1. abolishes any function of an EU entity or public authority in a Member State without providing for an equivalent function to be exerciseable by any person or provides for any function of an EU entity or public authority to be exerciseable instead by a Scottish public authority,
2. Imposes fee or charges in respect of the function exerciseable by a public authority,
3. Creates, or widens the scope of, a criminal offence; or
4. Creates or amends a power to legislate.

The Policy Memorandum confirms that where the provision in regulations made under section 1 of the Bill “does not fall under the category as noted above, negative procedure will apply subject to a discretionary decision by the Scottish Ministers to apply affirmative procedure”(paragraph 35).

The Bill also requires Scottish Ministers to produce an explanatory statement to accompany each instrument proposed under the keeping pace power.

The explanatory statements which Scottish Ministers must produce to accompany each instrument proposed under the keeping pace power and the expiry of the subordinate powers at 10 years with the possibility of two further five year extensions may provide some safeguards but these are procedural mechanisms rather than provisions for adequate scrutiny (see further discussion below).

Accordingly, the presumption must be that wide secondary legislative powers such as section 1 of the Bill are inappropriate unless justified by some overriding justification and even then, with enhanced scrutiny. It is a policy question as to whether it is necessary to keep pace with EU law but, even if it is, it is suggested that the normal rule must be that its exercise is subject to affirmative procedure or even super affirmative procedure except in minor cases (see paragraph 8 below).

We note that the powers in Section 1 are only one of the ways in which keeping pace could be achieved. The Government should set out the circumstances in which it would use Primary legislation to achieve that policy aim.

Section 4 of the Bill provides that certain regulations under section 1(1) are subject to the affirmative procedure.

Affirmative procedure therefore applies to regulations which (i) abolish a function of an EU entity or a public authority in a member State without providing for an equivalent function to be exercisable by any person, (ii) provide for a function mentioned in section 1(3) or (4) to be exercisable by a Scottish public authority, or by a different Scottish public authority, or by any person whom the Scottish public authority delegates functions on its behalf, (iii) fall within section 1(5), regarding the charging of fees or other charges in connection with the exercise of a function by a Scottish public authority, except for inflationary increases, (iv) create, or widen the scope of, a criminal offence, (v) create or amend a power to legislate.

Such regulations as these are important due to their subject matter and the serious powers they confer.

Whilst affirmative regulations provide more scrutiny than negative regulations there is no provision in the Bill for super affirmative procedure or for consultation on the draft regulations. We believe that the most significant regulations should attract the most significant scrutiny and that the Bill should be amended to provide for such scrutiny in connection with the regulations contained in section 4(2). There should also be provision for adequate pre-legislative consultation.

Section 4(3) provides “Any other regulations under section 1(1) are (if they have not been subject to the affirmative procedure) subject to the negative procedure”.

The Bill therefore only offers a choice between affirmative and negative resolution procedures.

There is no discussion in the Policy Memorandum of super affirmative procedure such as was contained in section 14 (5) to (9) of the UK Withdrawal from the EU (Legal Continuity) Bill.

We suggest that the power to make regulations under section 1 should be subject to super affirmative procedure in the cases where the changes in EU law involve substantial policy considerations.

We therefore agree with the recommendation contained in paragraph 68 of the Finance and Constitution Committee Stage 1 Report regarding endorsement of the DPLR Committee’s views regarding the use of Primary Legislation and super-affirmative procedure.

Constraints on using the keeping pace power

(a) International treaties

The Scottish Parliament and Scottish Government do not play a formal role in negotiating treaties but are bound to observe and implement those international obligations undertaken by the UK Government. The Scotland Act 1998 Schedule 5, paragraph 7 provides that:

“1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.”

In *Processes for making free trade agreements after the United Kingdom has left the European Union* (CM 63) published in February 2019 the UK Government set out its proposals for the approval of free trade agreements within the Parliamentary and devolved structures.

The UK Government confirmed its commitment to “working closely with the devolved administrations to deliver a future trade policy that works for the whole of the UK…” within the current constitutional make-up of the UK and acknowledging that the devolved governments have a strong and legitimate interest where the trade agreements intersect with areas of devolved competence.

We expect the Review of Intergovernmental Relations Report will contain further information on this topic. In the meantime, the Command Paper highlights the engagement on trade policy between the UK Government and the devolved administrations which include regular Senior Officials ’Groups and monthly round-tables on technical policy areas.

Accordingly, until the detail of any revisals to the MoU are made public we will not know the detail of how Scottish Ministers (and the other devolved administrations) will be able to influence the UK Government in their negotiations. The Command Paper confirms that UK Government will continue to “work with the devolved administrations to secure legislative consent” for UK-wide legislation where appropriate.

However, Scottish Ministers and the Scottish Parliament will continue to be responsible for observing and implementing international obligations in areas of devolved competence and the provisions of any FTA will restrain any Scottish Government proposed keeping pace legislation if it does not comply with the provisions of that FTA.

The Command Paper covers FTAs only, but we expect that the UK Government’s policy regarding involvement of the Scottish Ministers and Parliament will also apply to other types of International Agreement.

(b) Statutory and non-statutory common frameworks

In October 2017, the UK and devolved governments agreed a set of principles “that common frameworks will be established where they are necessary in order to: enable the functioning while acknowledging policy divergence”.

There are no domestic legal constraints on the powers of the UK Parliament or UK Government concerning common frameworks. Transforming the common frameworks principles into functional structures has been largely achieved through inter-governmental negotiations. There are a “wide variety of approaches, levels of detail and progression” among the framework structures.

Inter-governmental negotiations on resolving these issues have taken two tracks.

Discussions around the Common Frameworks analysis: The number of policy areas within the analysis is 160 and over the course of the past 3 years there has been change in the number of policy areas in each category, including a reduction from 24 to 18 in the category where new primary legislation may be required in whole or in part. The number of areas non-legislative arrangements are being considered is 22. The number of areas where no further action is required to create a common framework is now 115.

There are now four policy areas that the UK Government believes are reserved but remain subject to ongoing discussion with the devolved administrations.

Common frameworks are therefore in place either because of non-legislative agreements or because legislation provides a statutory arrangement for regulating the points of intersection between Devolved Matters and EU law.

Accordingly, the Scottish Ministers will be bound to such common frameworks either because they have agreed to them or because they are bound by law. Either result will constrain the ability to keep pace in those areas covered by such common frameworks.

(c) The functioning of the UK internal market

The UK Internal Market Bill (UKIMB) was introduced into the House of Commons on 9 September and had its Second Reading on 14 September. The Second Reading in the House of Lords concluded on 20 October with significant support for a Motion of Regret. The UKIMB seeks to implement the policy detailed in the Internal Market White Paper which was published in July.

The UK Government maintain that the UKIMB would maintain the continued functioning of the UK Internal Market by avoiding the creation of new barriers for manufacturers, producers and service providers trading within the UK in a way that respects the devolution settlement and ensures that the devolved administrations receive powers over policy areas formerly held by the EU, whilst ensuring that all intra-UK trade remains frictionless.

The Scottish and Welsh Governments disagree with this view and oppose the Bill arguing that it undermines devolution. Instead, the Scottish Government would prefer to deal with any future barriers to trade through the system of Common Frameworks in specific policy areas.

<u>UK Internal Trade issues: goods</u>

To achieve its policy objectives the Bill provides for two legal principles which are derived from EU law (Arts 34-36 TFEU):

- the principle of mutual recognition
- the principle of non-discrimination

Mutual recognition means that the rules governing the production and sale of goods and services in one part of the UK are recognised in the other parts of the UK and should present no barrier to the flow of goods and services between different regulatory systems.

Non-discrimination means that it is not possible for one regulatory regime to introduce rules that discriminate specifically against goods and services from another.

UK Internal Trade issues: services

The Bill introduces a system for the recognition of professional qualifications across the UK. The EU Single Market Regulated Professions Database lists 550 professions covering many occupations: https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions

Part 2 of the Bill allows professionals qualified in one Part of the UK to access the same profession in another part without requalification in much the same way as the EU provisions for Mutual Recognition of Qualifications applies at present. These clauses ensure a service provider authorised in one part of the UK will be able to provide services in the other parts unless they provide services (such as legal services) which are excluded under clause 17 and schedule 2 from the scope of the Mutual Recognition Principle in clause 18. The Non-Discrimination Principle (clauses 19 and 20) applies to regulators.

Professional qualifications and regulation (recognition) are covered by Part 3 clauses 22-27 and Schedule 2. These clauses apply the principle of equal treatment of UK residents practising a profession in another part of the UK meaning that any professional qualification in one part of the UK is automatically recognised in the rest of the UK. Exceptions to these provisions include any law which limits the ability to practice the legal profession, meaning in Scotland the provision of advocate, solicitor, notary, conveyancing practitioner or executry practitioner (clause 25).

The Bill has attracted considerable attention because of clauses 42-47 in respect of those provisions which will be inconsistent or incompatible with international or other domestic law. The bill should, as a matter of principle, comply with public international law and the rule of international law as provided for in the Vienna Convention on the Law of Treaties Art 26, *pacta sunt servanda* (agreements are to be kept) should be honoured. Article 26 states “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Adherence to the rule of law such as that expressed in Article 26 underpins our democracy, confidence in our constitutional arrangements and our society. It should not be knowingly put to one side. In our second reading briefing for the House of Lords we expressed the view that the Government should amend or remove clauses 44, 45 and 47 from the Bill.

Other constraints on using the keeping pace power

The bill contains limits on the powers of the Ministers to act under section 1(2).

The bill contains limits on the powers of the Ministers to act under section 2(1) in as much as Regulations under section 1(1) may not—

(a) impose or increase taxation,
(b) make retrospective provision,
(c) create a relevant criminal offence,
(d) provide for the establishment of a Scottish public authority,
(e) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),
(f) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,
(g) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),
(h) modify the Scotland Act 1998, or
(i) modify the Equality Act 2006 or the Equality Act 2010.

Section 3 also introduces a limitation by providing for the expiry of the legislation 10 years after it has been implemented with the possibility of extending that period for a further total period of 10 years in five-year increments. Scottish Ministers in 2040 Would be limited by the terms of the legislation at that point although they could seek to amend the Act.

The Government should explain why the sunset provisions in the Bill differ so much from the provisions in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill sections 13 (7),(8) and (8A) which provided that:

> '(7) No regulations may be made under subsection (1) after the end of the period of 3 years beginning with exit day.
>
> (8) The Scottish Ministers may by regulations—
>
> (a) extend the period mentioned in subsection (7) by a period of up to one year,
>
> (b) extend any period of extension provided by regulations under this subsection by a further period of up to one year.
>
> (8A) The period during which regulations under subsection (1) may be made may not be 10 extended by regulations under subsection (8) so as to last for more than 5 years in total'.

Part 2 Environment: Chapter 1 - Environmental principles

Principles

Section 9 sets out the "guiding principles on the environment". We are supportive of the Bill focusing on the four EU environmental principles – precautionary principle, prevention principle, rectification at source principle and polluter pays principle. The principles are currently integral to Scots environmental law as they are relevant to the interpretation of any law that implements EU environmental law and have played a major role in shaping environmental law to date. As referred to in section 9(2) of the Bill, these four principles are enshrined in Article 191(2) of the Treaty on the Functioning of the European Union.

These principles will continue to have relevance following the UK's withdrawal from the EU due to the incorporation of EU law into domestic law. We consider it important that an approach is taken which safeguards these 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. We note that the UK Environment Bill includes the integration principle as set out in clause 16(5) and note the recommendations of the ECCLR Committee in this regard as well as in relation to other principles which might be included in the Bill[16].

This Bill provides that in preparing guidance relating to the interpretation and application of the principles, the Scottish Ministers must have regard to the interpretation of the equivalent principles by the European Court (section 9(3)). We consider it appropriate that the Bill provides powers to modify the guiding principles by regulations (section 9(4)) given the possibility of changes to the four principles by the EU at some time after the UK's withdrawal from the EU. If there was a change to the principles at EU level, it would be appropriate for the Scottish Parliament to have a role in considering whether to adopt changes to the principles. Given the potential significance of a decision to amend the principles, it is appropriate that any such regulations are subject to consultation and to the affirmative procedure.

We support the approach not to include the rights 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 (the Aarhus Convention 1998) as principles. We consider it important that these continue to be recognised as rights rather than principles as this may have the effect of devaluing them.

Duties in relation to the principles

Section 10(1) sets out a duty for Scottish Ministers to "have regard to the guiding principles on the environment" in developing policies (which is defined as including proposals for legislation). We welcome the scope of the duty in terms of having regard to the principles rather than as the UK Environment Bill provides for England, to have regard to a statement about the principles. Section 10(2) provides a similar

[16] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraphs 80 -87.

duty on Ministers of the Crown in developing policies (including proposals for legislation) "so far as extending to Scotland". We note that there may be one than one view on the competence of this provision. We welcome the fact that a single set of principles is to apply to both Scottish and UK Ministers.

Section 10(3) sets out circumstances where the duties do not apply, including in relation to finance or budgets. We note that Scottish Government officials provided clarity as to the intentions of this exclusion to the ECCLR Committee: it "is not to exclude from consideration the wider issues of how much resource should be applied to environmental issues or goals; it is about the specific processes for budgets and finance, which we see as not being within the purview of the new duty to have regard to the principles"[17].

Section 10(4) provides powers to Scottish Ministers to make further provisions about or circumstances to which the duties do not apply. Given the potential far reaching impacts of any changes which could be made under regulations, **we consider it appropriate that such regulations be subject to the affirmative procedure.**

Section 11 provides that a responsible authority must have regard to the guiding principles in doing anything in respect of which a requirement for an environmental assessment applies. We welcome the extension of the duty beyond Ministers only and consider it appropriate that an existing definition of "responsible authority" is used in order to assist clarity across the statute book.

We consider that such duties will help to ensure that environmental concerns are taken into account when policies are made and when action is planned. There is a well-established practice of requiring Ministers and public authorities to 'have regard' to various factors. However, there is the potential for Scottish Ministers, Ministers of the Crown or responsible authorities to 'have regard to' the principles but choose to attach little or no weight to them. In practical terms, this could result in little weight being attached to the principles when developing policies.

It is likely to be difficult to challenge a decision of a Minister or a responsible authority, for example by judicial review, to attach little or no weight to the principles unless it can be demonstrated that the principles have been given no consideration. The Bill does not require Ministers or responsible authorities to explain how principles have been given regard. Such measures would provide some further scrutiny and accountability of policy makers in their fulfilment of the duties in the Bill. We recognise that this would still allow for little weight to be given to the principles in particular cases. We note the recommendation made by the ECCLR Committee that "the Scottish Government brings forward amendments at Stage 2 to strengthen the wording in relation to the duty to have regard to the principles."[18]

Alternatively, the duty could be reframed as a duty to "act in accordance with". This would likely strengthen environmental protection, however, may be considered to be too restrictive and limit the flexibility sought for the application of the principles. Such a duty has the potential to give rise to challenge.

[17] Environment, Climate Change and Land Reform Committee, Official Report, 11 August 2020, col. 12.
[18] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraph 103

We have previously noted that it is essential that all the other relevant principles are also considered when policies are made. This will include EU principles which become retained EU law as at the date of the UK's withdrawal from the EU.

Guidance

Section 13 requires Scottish Ministers to publish guidance on the guiding principles and the duties set out in sections 10 and 11.

It is important that the law is as clear and has specification. Scottish Ministers, Ministers of the Crown (in relation to policies relating to Scotland) and other authorities need to be able to guide their behaviour by a clear understanding of the standards of conduct expected by the law. Any incorporation of environmental principles into the law must therefore have sufficient clarity as to the role and effect of the principles so that Ministers and responsible authorities remain clear as to the conduct required to adhere to the law. We consider that guidance will help to achieve this.

We consider that it is important to clarify what is meant by "policies" in the context of the duties in sections 10 and 11. There would be merit in clarification that the definition of policy includes documents such as strategies and programmes to prevent the scope of the duty being artificially limited by the labelling of a document.

The guiding principles are well established in EU law and are generally consistently applied. It is important that there remains consistency in their application as this will help to provide certainty and clarity of decision making for individuals and businesses. The guidance should set out the key context of the principles being taken into account, in particular, clear expectations as to the role and interpretation of the principles. The guidance provides an opportunity to give further clarity as to how the principles are to be applied in Scotland, for example, in relation to the precautionary principle. The guidance should clearly set out the significance and weight to be attached to the guiding principles as compared to other legal principles and statutory obligations in relation to climate change, sustainable development and biodiversity, and give direction on the interaction of the principles with substantive legal rules. The extent to which the courts are entitled to have regard to the principles must be made clear.

We welcome the requirements of section 14 in relation to consultation and the commitment made by the Cabinet Secretary for the Environment, Climate Change and Land Reform to consulting "extremely broadly" on the guidance[19]. **We consider it appropriate that there is consultation with public and stakeholders on the guidance.** We also welcome the requirement for Parliamentary approval of the guidance. It is important that the process by which the guidance is formulated is transparent and accountable.

[19] Environment, Climate Change and Land Reform Committee, Official Report, 1 September 2020, col. 16.

Part 2 Environment: Chapter 2 - Environmental governance

Section 15 of the Bill provides for the establishment of Environmental Standards Scotland (ESS), with much of the detail provided in Schedules 1 and 2.

It is important that the new body is able to hold Scottish Ministers 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 Scottish Ministers. In this regard, we welcome the clear statement at paragraph 1, Schedule 1 that subject to any contrary provision "in performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government." We consider that there are opportunities to strengthen the independence of ESS.

Membership
We note the discretion given to Scottish Ministers in relation to the appointment of members to ESS (paragraph 2 of Schedule 1), however, welcome the requirement for Scottish Parliament approval of proposed appointments for members of ESS. We consider that it is important that the Parliament plays a role in the appointment of interim members to the non-statutory ESS body.

Provision is made in paragraph 2(3) of Schedule 1 in relation to the term of appointment of an ESS member. We are supportive of the requirement for members to be appointed for a fixed term. **We suggest that the relevant term is either set out in the Bill (rather than the maximum term only) or that the Bill provides for Scottish Parliament approval of the proposed term at the time of approval of the membership.** This would help to reinforce the independence and impartiality of the ESS.

We note the provisions of paragraph 5(2) of Schedule 1 which provides for a member to be removed from office in certain circumstances, subject to the approval of the Scottish Parliament. **We suggest this provision also be subject to a requirement for Scottish Ministers to consult with the Chair of ESS. We also propose that a definition of "unsuitable to continue as a member" is provided within the provisions.**

Resources and funding
It is crucial that the new body is properly resourced and staffed. Independent funding is key to the body's ability to effectively scrutinise Scottish Ministers and public authorities. The Bill provides for payments to members and committee members, and the payment of expenses, which are subject to Ministerial approval (Schedule 1, paragraph 4). This may be considered to be somewhat conflicting with the statement that "in performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government" (Schedule 1, paragraph 1(1)).

We support the recommendations of the ECCLR Committee in relation to a minimum a five-year indicative budget for ESS which would be ring fenced, and that consideration is given to putting this on a statutory basis, perhaps in the Budget Bill[20].

Functions

Section 16 sets out the functions of ESS, in particular, to monitor, to investigate, and to take steps to secure compliance and improvement in relation to environmental law. We comment below in relation to the definition of environmental law under section 39. We consider it appropriate that ESS can investigate matters on its own initiative or in response to information from another person (section 16(1)(b)).

We note that the functions of ESS appear to cover all actions by Scottish Ministers and by public authorities (as defined by section 37; both Scottish and UK). We have previously highlighted that the OEP's remit covers only reserved matters[21] and that there is a potential lacuna in environmental governance. **It appears that action taken by the Scottish Ministers on matters of executive devolution (for example, in relation to energy consenting under The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 and the associated environmental assessment) may not be covered by ESS functions given the terms of the definition of "environmental law" under section 39, particularly the terms of subsection (3) which refers to matters being within the legislative competence of the Scottish Parliament.**

In addition, **we consider that there is a lack of clarity as to position where UK Ministers act in a devolved area with the consent of the Scottish Ministers and suggest that this merits further consideration.** Such scenarios appear to be excluded from the scope of both the OEP and ESS – the functions of Ministers of the Crown are not included within the definition of public authority in section 37 of the Bill – although UK public authorities are within scope. We note the comments made by the Cabinet Secretary for the Environment, Climate Change and Land Reform that "where the Scottish Ministers consent to actions or regulations by UK ministers in areas that are within the legislative competence of the Scottish Parliament, those matters nevertheless remain within the scope of ESS's governance role"[22].

We welcome the provision of section 16(2)(g) giving ESS power to collaborate with another environmental governance body in the UK, including the Office of Environmental Protection (OEP, which is expected to be established by the UK Environment Bill). In respect of the OEP, we have called for either a power to or an obligation on the OEP to share information with and work with relevant bodies in devolved administrations where necessary[23].

Section 17 provides powers for Scottish Ministers to modify ESS' functions "for the purpose of implementing an international obligation that arises or may arise under an agreement or arrangement between the United Kingdom and the EU following the withdrawal of the United Kingdom from the EU". We

[20] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraph 218.
[21] Environment Bill section 43.
[22] Environment, Climate Change and Land Reform Committee, Official Report, 1 September 2020, col. 20.
[23] https://www.lawscot.org.uk/media/368403/20-02-05-environment-bill-second-reading-briefing-final.pdf

consider it appropriate that any such regulations are subject to a consultation requirement and to the affirmative procedure.

Strategy

Section 18 set out requirements for the ESS' strategy, with the details provided in Schedule 2. Schedule 2, paragraph 1 requires the strategy to set out how ESS will exercise its functions in a way that respects and avoids any overlap with other bodies. **While we consider it appropriate that there is a requirement to consider the relationship with other bodies, we consider that not all relevant bodies have been listed such as Audit Scotland, Information Commissioner and the Committee on Climate Change.**

We welcome the requirements for consultation and Parliamentary scrutiny set out in paragraph 2 of Schedule 2. We note the requirement for the strategy to be reviewed (Schedule 2, paragraph 4) and **consider it appropriate that the consultation and publication requirements under paragraph 2 are to apply to any revised strategy, "unless the revision makes only minor modifications to the strategy."**

Powers

It is important that a comprehensive system of enforcement is available to ESS in order for it to be effective in its role as an environmental governance body.

We welcome the provisions in relation to information notices in the Bill (section 20). We consider that the power to report a public authority's failure to comply with an information notice to the Court of Session will assist ESS in compelling compliance, particularly given the powers of the Court to make an order for enforcement and/or deal with the matter as if it were a contempt of the Court.

Sections 22 – 26 concern improvement reports and plans. **We consider that there would be benefit in clearer reporting requirements as to how an improvement plan is being implemented to enable this to be monitored. We support the recommendation made by the ECCLR Committee that a maximum period be set for monitoring and follow up of improvement plans[24].** We note that ESS may only use this power if it is satisfied that the matter could not be addressed more effectively by issuing a compliance notice instead (section 22(3)).

Sections 27 – 33 set out procedures for a compliance notice to be issued by ESS to a public authority. We note that the Explanatory Notes to the Bill state: "The compliance notice process is designed to remedy failures by public authorities to comply with environmental law when exercising their regulatory functions (as defined by section 41(1))."[25] The notice requires the authority to take the steps set out in the notice to address its failure to comply with environmental law. There are certain conditions to be met, set out in section 27(1). Section 28 sets out restrictions on the issuing of a compliance notice. We consider the restrictions are appropriate so that compliance notices are not used as a mechanism by which to review

[24] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraph 140.
[25] Explanatory Notes, paragraph 113.

individual regulatory decisions or where a systematic failure has already been identified in an improvement report. We recognise, however, that this does not achieve equivalence with current EU arrangements.

Sections 29 – 31 set out arrangements concerning the issuing of compliance notices. Section 32 provides for an appeal against a compliance notice to a Sheriff. It is appropriate that a right of appeal is available. The Bill highlights the importance of environmental law and its underlying principles. At present, there is inconsistency and fragmentation in the appeal mechanisms for environmental matters. It is important that there is necessary expertise to deal with these matters, particularly appeals. **We would welcome action being taken to rationalise, in a consistent manner, how legal issues and appeals are determined across the regulatory frameworks affecting environmental issues and support the recommendations of the ECCLR Committee in this regard[26].** We note that there may be scope for considering these matters in the context of the Scottish Government's recent consultation concerning the Future of the Land Court and Lands Tribunal[27].

We welcome the terms of section 33 which concerns a failure to comply with a compliance notice. As referred to above in connection with a failure to comply with an information notice, we consider that the power for ESS to report a public authority's failure to comply with a compliance notice to the Court of Session will assist in compelling compliance.

In relation to section 34, we consider it is appropriate that ESS may make an application for judicial review and to intervene in legal proceedings relating to an alleged failure by a public authority to comply with environmental law. It is important to bear in mind that a judicial review is a review of the original decision by an authority. There is the potential for there to be a considerable delay between a decision being made by an authority and action taken and concluded. Powers to take interim measures have rarely been used. Nevertheless, environmental damage, which could be significant, may take place during the time taken for a case to reach conclusion.

We note the limitations placed on ESS' powers under subsections (1), (4) and (5) of section 34. We note that one of the conditions is that ESS considers that "the conduct constitutes a serious failure to comply with environmental law". The meaning of this lacks clarity and would merit clarification. We note that the Schedule 2, paragraph 1(2)(b) requires ESS' strategy to set out how ESS intends to "determine whether a failure to comply with environmental law is serious for the purposes of section 34(1)(a) and (4)(a)". We consider that the provisions are clear in relation to standing of ESS before the court.

We note that in some circumstances, it may be challenging for ESS to bring proceedings within the three-month time limit for judicial review[28] taking account of the time it may take for ESS to become aware of a matter and review alternative courses of action. However, we recognise that the Court may permit an application within "such longer period as the Court considers equitable having regard to all the

[26] https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraphs 199 - 203.
[27] https://consult.gov.scot/justice/land-court-and-the-lands-tribunal/
[28] provided for in section 27A(1) of the Court of Session Act 1988 (as amended)

circumstances" and it will be a matter for the Court to balance the considerations of equity for the relevant parties.

We also note that the definition of "court" provided in section 34(7) does not include the Supreme Court which means that ESS could not intervene in cases at the Supreme Court (unless they have done so at an earlier stage).

Disclosure of information/confidentiality of proceedings

Section 36(1) provides for restrictions on the disclosure of information by ESS. Subsection (2) provides for certain exceptions, including for a disclosure "made to the Office for Environmental Protection, or any other environmental governance body, for purposes connected with the exercise of an environmental governance function". We welcome this exclusion in the interests of cross-border working.

Interpretation

Section 39 defines "environmental law" and "effectiveness of environmental law", and section 40 defines "environmental protection", "environmental harm" and "the environment". **We note that there has been some uncertainty around these definitions during the course of the Parliament's consideration of the Bill to date, and we suggest that further consideration is given to these definitions as the Bill progresses[29].**

We note that certain matters are excluded under 39(2), including disclosure of, or access to, information; national defence or civil emergency; and finance or budgets. We note the exclusion of Parts 1 to 3 of the Climate Change (Scotland) Act 2009 from the definition of "environmental law" (section 39(4)) although the Bill does provide powers for this to be altered by Scottish Ministers (section 39(5) and (6)).

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[29] For example, see https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf at paragraphs 181-188.