



Law Society  
of Scotland

## Written evidence

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

Evidence to the Scottish Parliament's Environment,  
Climate Change & Land Reform Committee

July 2020



## Introduction

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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.

We welcome the opportunity to consider and provide written evidence to the Scottish Parliament's Environment, Climate Change and Land Reform Committee<sup>1</sup> on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill<sup>2</sup> and have the following comments to put forward for consideration.

## General remarks

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We previously responded to the Scottish Government's consultation *Environmental Principles and Governance in Scotland*<sup>3</sup>. 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<sup>4</sup> 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<sup>5</sup> and have provided briefing and evidence on the Bill<sup>6</sup>. 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

<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115449.aspx>

<sup>2</sup> <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>

<sup>3</sup> <https://www.lawscot.org.uk/media/362627/19-05-11-env-consultation-sg-environmental-principles-and-governance.pdf>

<sup>4</sup> <http://www.gov.scot/Resource/0053/00536067.pdf>

<sup>5</sup> <https://services.parliament.uk/bills/2019-21/environment.html>

<sup>6</sup> <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-201920/environment-bill-2019-21/>

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). 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: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*<sup>7</sup>. This revised analysis has reduced the number of policy areas where legislative common frameworks may be required to 21, and includes a number of matters relating to the environment. The detailed arrangements for the common frameworks are not yet known, however, we continue to monitor the reported progress<sup>8</sup>.

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<sup>9</sup>. 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

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### Part 1: Alignment with EU Law

The implications of the 'keeping pace power' in the Bill potentially leading to substantial policy divergence with the rest of the UK depends on how the keeping pace power is used, to what EU policy areas the Scottish Government decide to apply the legislation and what the UK and other devolved administrations decide to do in relation to EU legal and policy developments. If the power is used in relation to environmental matters which fall within devolved legislative or executive competence and which apply

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf)

<sup>8</sup> 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>

<sup>9</sup> Further information about the Scottish Parliament's consideration of these instruments can be found here: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/109366.aspx>

within Scotland only, the implications for the rest of the United Kingdom will be few. If the power is used in relation to issues which touch on intra-UK trade, the implications could be greater.

It is important to recognise that some policy divergence already exists within the UK in respect of environmental matters. There may be opportunities and challenges associated with policy divergence but in some matters, this has created opportunities for Scotland, for example in relation to renewables.

In relation to common frameworks, we note that 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”. The development of common frameworks, future trade deals and other international agreements, and arrangements for the functioning of a UK internal market will have *de facto* impacts on how these powers can be exercised.

We note that section 3 introduces a limitation by providing for the expiry of the legislation 10 years after it has been implemented with the possibility of extending the period at its expiry for a further period of 10 years in five year increments. It therefore appears that legislation from the EU which has been passed in 2020 could continue to apply in Scotland until 2040. Scottish Ministers in 2040 would be limited by the terms of this Bill at that point although they could seek to amend the Act.

## **Part 2 Environment: Chapter 1 - Environmental 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 Bill includes the integration principle as set out in section 16(5).

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 duty on Ministers of the Crown in developing policies (including proposals for legislation) “so far as extending to Scotland”. 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. While we recognise the underlying reasons for this, we note that there appears to be a disconnect between discussion about the importance of a green economy, and in particular green recovery from the impacts of Covid-19 and the blanket exclusion of finance and budget matters. Subsection (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 do not consider it appropriate that such regulations are subject to the negative 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 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 Parliamentary approval of the guidance. We consider it appropriate that there is consultation with public and stakeholders on the guidance. It is important that the process by which the guidance is formulated is transparent and accountable.

## 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.”

### 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. Provision is made in paragraph 2(3) 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) 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)).

### 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<sup>10</sup> 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 note that matters where UK Ministers act in a devolved area with the consent of the Scottish Ministers 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 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<sup>11</sup>.

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 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 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.

<sup>10</sup> Environment Bill section 43.

<sup>11</sup> <https://www.lawscot.org.uk/media/368403/20-02-05-environment-bill-second-reading-briefing-final.pdf>

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 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))."<sup>12</sup> 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 individual regulatory decisions or where a systematic failure has already been identified in an improvement report.

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.

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.

<sup>12</sup> Explanatory Notes, paragraph 113.

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). 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<sup>13</sup> 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 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". 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)).

## **General**

We have no further general remarks to make.

<sup>13</sup> provided for in section 27A(1) of the Court of Session Act 1988 (as amended)



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