

Submitted by online form

10 May 2019

Re: Scottish Government consultation on Environmental principles and governance after Brexit

Question 1: Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?

Yes.

We agree with the introduction of a duty on Scottish Ministers which has the effect of ensuring that Scottish policy and legislation upholds the environmental principles of precaution, prevention and rectifying pollution at source, as well as the 'polluter pays' principle.

Several of these principles are of critical importance to the continued protection of Scotland's historic environment. The polluter pays system underpins the model of developer funded archaeological investigation and mitigation in the planning process, and a precautionary principle enables archaeological investigation of land with high archaeological potential prior, providing safeguards against undiscovered sites being destroyed without opportunity to investigate.

If Scottish Government's intention is to "carry through not just the letter of EU environmental law but also the underlying principles" it should also be committed to replicating the same strength that EU Treaty confers on these principles. That is that all environmental policy 'shall be based on' these principles, and not simply 'have regard to' them. Anything less would constitute a weakening of the current provisions under EU treaty.

We recommend that this duty should sit with a new Scottish Environment Act, and that this act should be broad in scope, and that it should specifically recognise that Scotland's cultural heritage is a key part of our environment, whether in the physical heritage of past and present human interaction with the landscape (e.g. traditional farm buildings, villages, field boundaries, ancient monuments, woods, and parkland) or the cultural traditions associated with human interaction with the land. It should recognise that in Scotland's landscapes, it is virtually impossible to separate the cultural from the natural. The duty, enshrined in the act should also recognise that environmental legislation and policy is not the only legislation and policy which affects the environment and that all should be subject to and able to be scrutinised for its adherence to environmental principles. This vitally includes, but will not be limited to, planning legislation and policy.

Currently the consultation is also unclear by what mechanism Scottish Ministers will be held accountable. Scrutiny and monitoring will need to be provided from a preferably independent oversight committee or regulator.

Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?

As stated above, we believe that the duty, enshrined in an act should recognise that environmental legislation and policy is not the only legislation and policy which affects the environment and that all should be subject to and able to be scrutinised for its adherence to environmental principles. This vitally includes, but will not be limited to, planning legislation and policy.

The scope of current provisions for environmental principles in EU Treaty applies broadly to all policy. It should follow that a national government committed to upholding these principles should seek to ensure protection for them at all levels of decision making.

We have previously suggested to both Westminster and Devolved governments that environmental principles should be applied to all public and private bodies, including government departments, agencies, and courts, as well as private developers, infrastructure providers, and contractors. We see no reason why all actors who potentially impact upon the environment through their actions should not be held accountable to these environmental principles.

Question 3: Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?

Yes.

We support the creation of a duty to cover the four principles set out in the consultation document. However, we feel that there is scope to consider additional principles which should be included in any new duty, particularly where these already overlap with Scotland's National Performance Framework. For example, a requirement for policy to be based on the principle of sustainable development would be a valuable additional principle to include in the duty. This would secure future protections for work already being done in Scotland on sustainable development (e.g. Scotland's National Planning Framework, Land Use Strategy, Climate Change Plan and National Marine Plan).

Question 4: Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?

Yes. As stated above, we believe that the duty must be established in statute, and not simply in a policy statement. This strong legal base should ensure that the duty is comprehensive, binding, is subject to requirements for non-regression, and no net loss.

However, a policy statement to guide the interpretation of the duty and to set out an implementation plan will also be required. The development of a policy statement should be subject of full parliamentary and stakeholder consultation.

Question 5: What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

We recognise that the loss of engagement with the EU will compromise monitoring, measuring and reporting arrangements. We are supportive of the measures outlined by Scottish Environment LINK to mitigate negative impacts through, for example, the Scottish Government pressing the UK to join the European Environment Agency (EEA) as a non-EU member. Also we urge the Scottish Government to enable continued participation in existing networks (public sector, academic and NGO) that facilitate data and knowledge exchange, sharing best practice etc.

Question 6: What key issues would you wish a review of reporting and monitoring requirements to cover?

We recommend that any review of reporting and monitoring requirements should consider the opportunity that results from leaving the EU to expand the scope of monitoring beyond traditional EU competences.

Because the historic environment is not legislated for or regulated at an EU level, this has led to the exclusion of the historic environment. Reconsideration of this could provide useful additional information to monitoring processes. For example, maintenance or restoration of historic field boundaries as part of monitoring of habitat or landscape.

We also consider that public knowledge of, access to, and enjoyment of the environment would be valuable to consider.

We also support the suggestions made by Scottish Wildlife Link on wider environmental suggestions.

Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

Yes.

The most important issue is the potential loss of mechanisms by which it is possible to challenge in court actions which are inimical to environmental principles. It is therefore vital that a strong legal basis for the duty is enshrined and that there is oversight by an empowered regulator to hold government to account.

Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

As stated elsewhere in this consultation, we believe that a strong independent regulator will be required to provide scrutiny, and be empowered to hold government accountable to environmental principles, and that these principles and the duty should be enshrined in law and should ensure that the duty is comprehensive, binding, is subject to requirements for non-regression, and no net loss.

Question 9: Which policy areas should be included within the scope of any scrutiny arrangements?

As stated above, it is vital that scrutiny of environmental principles specifically applies to any and all policy areas which have the potential to affect the historic environment, and not simply environmental policies. For example, planning policies are the most influential applications of environmental principles that affect the historic environment are observed.

Question 10: What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?

See our answer to question 7. EU complaint mechanisms have been an important means of raising complaints relating to public authorities' implementation of environmental legislation by NGOs and citizens. It is important that similar mechanisms are explored and considered whether they could be fulfilled by an independent environmental regulator.

Question 11: Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?

Yes.

As above. It is important that a complaint mechanisms are explored and considered whether they could be fulfilled by an independent environmental regulator.

Question 12: What do you think the impact will be in Scotland of the loss of EU enforcement powers?

Enforcement powers provide important incentives to uphold environmental protections. Lack of effective enforcement mechanisms, as a general rule, increases the likelihood that standards will slip, preventing the widening of a gap between rhetoric and reality.

Question 13: What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?

As above, we would support the establishment of an independent environmental regulator to undertake this role.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Lennox', written in a cursive style.

Rob Lennox

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