



Brexit and Environmental Law

UKELA's Scottish Working Party response to the consultation paper published by the Scottish Government: *Consultation on environmental principles and governance in Scotland*

May 2019

The UK Environmental Law Association (UKELA) aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Northern Ireland, Scotland and Wales.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection, UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and that there is full and open consultation on options for change. UKELA's position on Brexit can be found at: www.ukela.org/ukelaposition.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force comprises members of UKELA's specialist Working Parties (including those for Scotland, Wales and Northern Ireland).

The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. In collaboration with its specialist Working Parties, the Task Force aims to inform the debate on the effect of withdrawal from the EU, and to draw attention to potential problems which may arise.

The UKELA Brexit Briefing Papers were produced under the guidance and approval of UKELA's Brexit Task Force and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members. For a list of reports available, see *Annex A*.

This paper has been prepared by UKELA's Scottish Working Party (at the request of the UKELA Brexit Task Force).

UKELA's Scottish Working Party response to the Scottish environmental principles and governance consultation

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1. INTRODUCTION

1. The UK Environmental Law Association (UKELA) Scottish Working Party (UKELA Scotland) welcomes the consultation paper published by the Scottish Government in February 2019 entitled: *Consultation on environmental principles and governance in Scotland* (EPGS Consultation). UKELA Scotland regards the matters discussed as being critical to UK environmental law both in Scotland and the UK, including EU-derived law, post-Brexit. It is crucial to be clear at the earliest possible stage how environmental law and governance fit and support the Scottish Government's long term aspirations for environmental protection.
2. UKELA has been exploring what Brexit might mean for the UK's environmental policies and laws for some time through events, papers, and responses to inquiries and consultations across the UK.
3. UKELA has prepared this response following extensive internal discussions with, and submissions from, its members, including its specialist Working Parties and the wider UKELA Brexit Task Force. The response does not necessarily, and is not intended to, represent the views and opinions of all UKELA members in Scotland.

2. EU (WITHDRAWAL) ACT 2018 & THE EU (LEGAL CONTINUITY) SCOTLAND BILL

4. Section 16 of the European Union (Withdrawal) Act 2018 (EU (Withdrawal) Act 2018) entitled *Maintenance of environmental principles, etc*, entered into force on 26 June 2019 and clauses 13B and 26A of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill are likely to inform the Scottish Government's own actions on the consultation.

5. Also relevant is the future relationship with the EU. On 12 July 2018, the Department for Exiting the European Union published a White Paper on the future UK-EU relationship, setting out more detail on the UK government's vision of the future economic partnership and security partnership with the EU, and on cross-cutting areas¹. This confirms the UK government's commitment to maintaining high standards, in part by a non-regression clause, and to international commitments in areas including the environment and climate change after Brexit. It also includes the desire to establish cooperation arrangements between UK regulators and EU regulators, and to participate in key EU agencies such as the European Chemicals Agency. UKELA generally welcomes this approach to maintaining high environmental standards supported by non-regression of standards and cooperation with EU regulators and agencies.

6. One further matter is whether the provisions in the proposed “Backstop” in the Withdrawal Agreement between the UK and the EU may constrain the Scottish Government to act in a particular way. This could be e.g. by requiring functions of the European Commission (EC) being passed to a body with defined scope and purpose. It may also be that a backstop or similar future agreement with the EU provides for certain environmental arrangements to be required, albeit these may be interim.

3. RESPONSES TO CONSULTATION QUESTIONS

7. UKELA Scotland's responses to the EPGS Consultation questions below are in the order as published while recognising that there may be some overlap in the answers.

¹ HM Government: *The future relationship between the United Kingdom and the European Union* (Cm 9593) (Crown Copyright, July 2018).

SECTION 1: ENVIRONMENTAL PRINCIPLES (Q1-Q4)

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?

8. UKELA Scotland considers that the environmental principles set out in §18 of the EPGS Consultation are a good starting point and notes the outline definitions that follow each principle. It does not disagree or object to the definitions. It recognises that these are outline definitions and that it is likely to be for the environmental policy statement to provide more detailed definitions of the principles. UKELA Scotland notes, however, that there is merit in providing an overriding commitment to maintain high environmental standards and a high level of environmental protection. This would set a clear purpose in line with the Minister's commitments in the Consultation Foreword. A clear commitment in this regard is likely to help to cover any gaps that may emerge when applying the specific principles.

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

9. UKELA Scotland submits that a relevant preliminary point is that it is important to clarify that "policy" should include strategies, programmes etc. to ensure that labeling is not used as a means to limit the scope of the duty: see e.g. s.4 of the Environmental Assessment (Scotland) Act 2005, which expressly includes "strategies" among "plans and programmes".
10. In terms of extending the duty to have regard to environmental principles in policy formation to other functions of Scottish Ministers and public authorities, UKELA Scotland's members have different views. Some submit that any duty should extend to all functions exercised by Scottish Ministers, and all public bodies in Scotland. Others consider that there should be caution to avoid placing ever more duties on public authorities.
11. UKELA notes that the term "have regard to" could result in the purpose of the

principles being avoided. For the biodiversity duty the phrase is “to further the conservation of biodiversity so far as is consistent with the proper exercise of [their] functions”: Nature Conservation (Scotland) Act 2004, s.1, although a recent Scottish Parliament inquiry found that this was not effective. Other phrases used include acting “with the objective of contributing to the achievement of sustainable development” (Town and Country Planning (Scotland) Act 1997, s.3E); acting “in the way best calculated to contribute to the achievement of sustainable development” (so far as consistent with other functions and duties) (Water Environment and Water Services (Scotland) Act 2003, s.2) (similar phrasing for delivery of climate change targets – Climate Change (Scotland) Act 2009, s.44); the Ministers must give Scottish Water directions “requiring it to promote water conservation and water-use efficiency” (Water Industry (Scotland) Act 2002, s.56). UKELA submits that, without more, there is room for ambiguity and avoidance of action.

12. Moreover, it is suggested that there would be value in a general review of the duties on public authorities with a view to potentially rationalising or simplifying (but not necessarily reducing) the public authority duties. Any new duties here would add to existing duties on biodiversity, climate change, sustainability and those relating to the countryside, as well as those that may be regarded as being outside the direct environmental scope, e.g. equality and best value, but that may nevertheless have an indirect effect on environmental matters.
13. In any event, UKELA submits that there should be greater clarity on the extent to which the courts can pay heed to the principles. It is likely to be quite complex with principles and concepts sometimes being carried over as part of retained EU law.

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?

14. As a preliminary point UKELA Scotland considers that a new duty should cover all the environmental principles which are adopted by the Scottish Government as principles and which apply to Scottish environmental law. However, seeking to limit this to only the four EU principles would unduly and unnecessarily limit

the opportunity for pursuing the environmental goals and ambitions of Scotland.

15. It is also important that there is consistency in approach and in that regard UKELA Scotland considers that in order to finalise an appropriate final list of principles, it is essential that these are consistent with and complement any principles provided for in any legal continuity legislation and with any comparable principles provided for in other devolved jurisdictions and legislation and international obligations (noting that many international environmental norms and concepts are framed as being the minimum standards necessary and the opportunity to go beyond the international provisions to provide greater environmental protection). UKELA also recognises that “complement” does not mean mirror.
16. UKELA Scotland notes that §21 of the EPGS Consultation refers to a non-exhaustive list of environmental principles that influence environmental policy, including e.g. principles of sustainable development, integration, an ecosystem system and also the rights conferred by the Aarhus Convention 1998 of public access to environmental information, public participation in environmental decision making and access to justice in relation to environmental matters.
17. UKELA Scotland notes that some of its members suggest that the Aarhus Convention information, participation and access to justice provisions should more properly be described as rights, rather than principles. UKELA’s view is that they are, without doubt, rights conferred upon all citizens in the UK (and those within all the states that have ratified the Aarhus Convention). The Scottish Government should make this distinction.
18. The environmental principles in the EPGS Consultation represent a continuation of the current position under EU, Scottish and UK law and policy. In UKELA Scotland’s view, they underpin existing UK environmental law and will play a key role in achieving the outcomes of environmental protection and conservation in Scotland post-Brexit.
19. The principle of non-regression is supported by UKELA Scotland.²

² See also §5 of UKELA’s submissions to the Environment, Food and Rural Affairs (EFRA) Committee and Environmental Audit Committee (EAC) inquiries (31.1.19) which noted that, as a minimum, a principle of

20. UKELA Scotland submits that the Integration principle which is within Art 11 of Treaty of the Function of the European Union (TFEU) should be included. This would be in line with the Scottish Government's commitments and the whole tenor of the consultation which, perhaps in contrast to the Defra consultation, links up with wider Scottish Government objectives and structures.

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?

21. UKELA Scotland agrees that there should be an associated requirement for a policy statement to guide the interpretation and application of any duty to have regard to principles. This should include a statement of policy on the principles themselves. However, there needs to be greater clarity, perhaps in statutory guidance, as to how far the courts can make use of the principles.
22. Under, s.6 of the European Union (Withdrawal) Act 2019 the courts can still have regard to future Court of Justice of the European Union (CJEU) case law, but are not bound to follow what it says. The courts will therefore have an option of following CJEU case law as it develops. If guidance were to indicate that future case law should be taken into account, that should not conflict with provisions of e.g. parliamentary sovereignty post-Brexit. Guidance does not impose a legal requirement and it would not be asking the courts to do anything other than something they are already permitted to do.
23. It may be the case that the proposals at present are unduly complicating matters e.g. by seeking to link the environmental principles directly to EU principles. This link or association can be provided for in guidance, but the Scottish Government should have the confidence and independence to progress its own principles. These should as a minimum reflect EU principles and ensure that the handling of transboundary environmental matters is consistent and also allows the opportunity to develop increasingly robust

non-regression should be included within the proposed Environment Act relating to England and that existing and prospective environmental law should be interpreted to give effect to the environmental principles. Moreover UKELA proposed that a procedure to add new principles, subject to consultation, should be included in its response to the EFRA Committee and EAC inquiries. UKELA understands that this is built in to proposed backstop provisions.

environmental protection and enhancement measures.

24. UKELA Scotland proposes the following further principles for consideration, including:

- 1) Principle of maintaining and increasing natural capital;
- 3) Principle of improving public health and well-being; and
- 4) Principle of consistency.

1) Principle of maintaining and increasing natural capital

25. UKELA Scotland recommends that the principle of maintaining and increasing natural capital should be considered by the Scottish Government for inclusion as a key environmental principle. This is consistent with the Scottish Government's commitments on natural capital as a key national performance indicator³. UKELA Scotland considers that the principle of a natural capital approach should encompass the notion of the conservation of biological diversity and ecological integrity and should be framed to complement the principle of sustainable development. This needs to be integrated with the work already being done on this by the Scottish Government.

2) Principle of non-regression

26. UKELA Scotland recommends that the principle of non-regression should be considered by the Scottish Government for inclusion as a key environmental principle. This follows on from the principle of improving and enhancing natural capital and is consistent with a commitment to maintain and improve the environment for the next generation. The United Nations explains that:

“... the principle of non-regression prohibits any recession of environmental law or existing levels of environmental protection, and comprises its protective norms in the category of non-revocable and intangible legal rules, in the common interest of humanity.”⁴

³ <https://nationalperformance.gov.scot/measuring-progress/national-indicator-performance>

⁴ based on M. Prieur 'Le principe de non régression en droit de l'environnement, condition du développement durable', RADE, 2013).

27. Its inclusion is consistent with the UK Government's White Paper, which recognises that a non-regression clause should form part of any trading partnership with the EU. It is a common requirement of trade deals. This is also likely to be provided for in any backstop agreement.

3) Principle of improving public health and well-being

28. UKELA Scotland suggests that public health and environmental protection are interdependent. In order to benefit from all the socio-economic gains that flow from having a healthy public, it is essential that a principle of improving public health and well-being is at the heart of environmental law, policy and governance. Therefore, it should be considered for inclusion as a key environmental principle. A principle of public health and well-being may be defined as:

Placing environmental protection at the heart of all legislation, policy and governance to ensure that the primary, secondary and tertiary socio-economic consequences of environmental pollution and degradation of nature are avoided in order to optimise the acute and chronic health benefits of living in harmony with nature.

29. This links to elements of the Scottish National Outcomes: see e.g. <https://nationalperformance.gov.scot/national-outcomes>.

4) Principle of consistency

30. This principle is set out in Article 7 of the TFEU which provides that:

“The Union shall ensure consistency between its policies and activities, taking all of its objectives into account in accordance with the principle of conferral of powers.”

31. Consistency and transparency are core principles in proper enforcement, for example, by the Scottish Environment Protection Agency (SEPA) under its Enforcement Policy and associated guidance (June 2016) and should be considered as important in the creation of policy.

Further comment on environmental principles

32. As environmental impacts (both beneficial and harmful) are often

transboundary by their nature, UKELA Scotland urges the Scottish Government to achieve agreement or close cooperation with the other devolved administrations and Westminster to ensure that common environmental principles are adopted and that the environmental principles are applied in a comparable or complementary way across the UK. This will help ensure consistent commitment to international environmental obligations. It will also present a common position on environmental protection to trading partners and third countries generally and set standards for international co-operation and collaboration. UKELA welcomes the approach of partnership and cooperation between UK and EU regulators proposed in the White Paper.

33. The fact that the list of principles in the EU (Withdrawal) Act 2018 is different to that in the Legal Continuity Bill adds complexity. UKELA Scotland underlines the need for a draft Statement of Policy before a final position can be taken on what principles are appropriate.

SECTION 2: ENVIRONMENTAL GOVERNANCE ARRANGEMENTS

PART 1: MONITORING, MEASURING AND REPORTING ACTIVITIES

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

34. UKELA Scotland considers that there will be the loss of the governance functions of the EC, the European Parliament (EP), the CJEU and the European Environment Agency. Each of these bodies have some form of monitoring, measuring and reporting role notwithstanding that they each have other roles in relation to environmental law and policy such as scrutiny and enforcement. The review of performance (as opposed to simply publication of data) in particular is an important function which will be lost.
35. The gap in environmental law and regulation through the absence of these bodies has been ameliorated in England to some extent by the enactment of s.16(1) of the EU (Withdrawal) Act 2018 and the proposal for the Office for Environmental Protection (OEP), whose functions include monitoring,

measuring and reporting. While Scotland's route is likely to be different from those taken elsewhere in the UK, UKELA Scotland submits that these functions need to be covered and achieved in a robust, independent manner. The nature and scope of these governance functions should be wide and should ensure that (as with the remit of the EC) they cover all emanations of the state (public bodies). It will be important that these key governance functions contribute to effective environmental governance mechanisms in Scotland and beyond post-Brexit.

36. UKELA Scotland suggests options for these governance functions alongside others below.
37. UKELA Scotland submits that if Scotland loses access to data gathered by the EU it could have a particularly disproportionate effect on governance because of the constraints on regulators' resources and the relatively small size of the regulated business community. There are a number of risks associated with this:
 - Smaller data sets, or data sets with significant gaps in them, can skew results. Policy developed on such results may be erroneous and have unintended consequences. For example, a result that appears significant within the number of data points gathered in Scotland may not be when considered within a larger data set.
 - Individual government departments, both at local and national level, hold significant quantities of data, but the way it is stored is highly fragmented and complex. A lack of engagement on this issue could mean losing out on solutions to this problem.
 - Evaluation of how valid, reliable and relevant information sources are may also become more difficult.
 - The EU has a commitment to "open science" via the Horizon 2020 programme. Open science includes citizen science, which is envisioned as "linked with outreach activities, science education or various forms of public engagement with science as a way to promote Responsible Research and Innovation." In line with Horizon 2020, monitoring and reporting of

environmental data must adopt a transdisciplinary and multi-stakeholder approach, involving citizens, end-users, the public sector and industry (the “quadruple helix”). Scotland may be able to continue participating in such projects as a third country but its researchers will not be eligible for the grants available and as a result, its ability to collaborate in and influence such research will be significantly diminished.

- It will be necessary to consider the impact of the FAIR data principles – findable, accessible, interoperable and re-usable. These put specific emphasis on machine learning to automatically find and use data, in addition to supporting its reuse by individuals. It is likely that aspects of this are already covered by the university sector, but government and government agencies also need to be aware.
- The Innovation Principle was proposed by the European Risk Forum (ERF), a Brussels-based non-profit think-tank, in 2013 to ensure that “whenever legislation is under consideration its impact on innovation should be assessed and addressed.” The Innovation Principle is a direct challenge to the Precautionary Principle and its advocates are pushing for innovation benefits to be given equal weight, or precedence, over potential risks when developing policy and legislation. The Horizon 2020 work programme includes requests for proposals to “take stock of the implementation of PP since 2000 in various contexts and analyse the effects of the PP and propose several scenarios for the future of PP and IP” as well as “develop new tools or approaches to PP or IP”. Although the Innovation Principle is not enshrined in EU law yet, its adoption within the Horizon programme and the continued lobbying of groups such as the ERF could set a precedent that sees the principle become part of EU law and may result in EU regulations that are counter to the standards the Scottish Government wishes to set. Loss of engagement also means loss of the ability to influence changes to rules and regulations that channel innovation in ways that are socially and environmentally useful.

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

38. UKELA Scotland considers that any review of reporting and monitoring requirements should be regular, frequent and meaningful such that the state of the environment and measures to tackle loss and degradation, preserve, improve and enhance can be effective.
39. UKELA Scotland strongly welcomes the proposed review and urges that it includes looking at consistency and comparability over time and space, and means for ensuring a sharing of data with relevant bodies elsewhere in UK and beyond who may be carrying on the same or comparable functions.
40. It will be important to establish baselines; agreeing what is being measured against.
41. The provisions should encourage voluntary disclosure, monitoring and reporting.
42. The reporting and monitoring requirements should embrace digital innovation – increasing ease of gathering, storing and sharing data, but also increasing challenges around privacy, intellectual property, quality and reliability of science communication.
43. There should be inclusivity: environmental degradation has a disproportionate impact on poorer communities; therefore the monitoring and reporting requirements must also take into account socio-economic factors as well as other diversity and inclusion indicators such as gender equality.
44. There should also be co-operation and to find new ways to foster close collaboration between industry, government, the public and universities.
45. Environmental monitoring and reporting must be meaningful and not perceived as being a tick-box exercise. Data gathering must either be demonstrably contributing to wider targets (e.g. air or water quality) or monitored itself to measure impact and progress.
46. An example of the type of reporting/monitoring that UKELA Scotland considers

would go towards achieving the overarching goal would be the *Environmental Standard Setting Outside the EU* report⁵, specifically the case studies. Another example in relation to water is to ensure that there continues to be use of comparable data, using the same terminology, scales and parameters, see e.g. the current datasets on drinking water standards or the comparative data from river basin management plans.

PART II: SCRUTINY OF GOVERNMENT PERFORMANCE

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

47. Yes. UKELA Scotland agrees with the comments at §§64-65 of the EPGS Consultation and that there will be no oversight from the EC or its agencies and, as identified by the Roundtable on Environment and Climate Change, there will be a loss of capacity and expertise to undertake assessment and investigation as well as a loss of independent scrutiny.
48. There was concern expressed in UKELA Scotland about the proposal for the Scottish Parliament to scrutinise and hold the Scottish Government to account. This is particularly so when, unlike Westminster, with a bicameral system (i.e. the House of Lords) scrutiny on this basis would be difficult. Some UKELA Scotland members support the approach taken in England with the establishment of the OEP. However, other members do not consider this to be the right approach and consider that an alternative system could work well, with e.g. the governance more closely integrated into the existing governance structures, the reasoning being that the OEP seems a rather isolated solution for the separate environmental compartment within government, rather than something that reflects the pervasive nature of environmental issues.
49. The approach in Wales is under review, although there is different system of governance arrangements and institutions already in place.

⁵ <https://www.ukela.org/content/doclib/329.pdf>

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

50. UKELA Scotland recognises that the governance systems throughout the UK are distinct and it agrees with the comments in §69 of the EPGS Consultation that the key features of the scrutiny and assessment functions must include: (a) access to specialist expertise and skills; (b) independence from government; and (c) adequate powers⁶. UKELA Scotland adds that a further key feature must be (d) adequate and guaranteed resources.
51. UKELA Scotland also agrees with the point identified by the Roundtable that the body should have its 'own initiative' powers in order to instigate inquiry and scrutiny in its own right and not simply have to rely upon others to refer matters to it.
52. Page 22 of the EPGS Consultation refers to examples of Commissioners in Scotland and there has been suggestion for a separate Commissioner as a way forward comparable to the Scottish Information Commissioner and the Children and Young Peoples' Commissioner Scotland. Provided that the key features noted above are met, this may be appropriate.
53. Alternatively, it may be the case that it is considered unnecessary that a new body be created at all and that the functions of EPG scrutiny can be passed to an existing body such as Audit Scotland. UKELA Scotland's view is that any expansion of an existing body's role would involve changes almost as significant as setting up a new body. While it is accepted that the number of bodies would not change and there may be some savings in terms of structural arrangements, the scale of the steps needed to ensure the capacity to handle a completely different sort of work should not be under-estimated. Moreover, there is a real concern that some aspects of the new body's role may be missed with an existing body seeking to evolve into a function that, until now had been carried on by the EC. There is a real concern that resources may not be adequately apportioned, and openness and transparency could appear to suffer.

⁶ UKELA supported the establishment of the OEP in England.

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

54. UKELA Scotland considers that a broad range of policy areas should be included within the scope of any scrutiny arrangement (specifically including those laws and policies that are brought into force at a future date).
55. UKELA Scotland welcomes the range of policy areas noted at §72 of the EPGS Consultation, acknowledging that the areas listed as falling within the scope of scrutiny are based upon the Roundtable's framework. The scope therefore appears to avoid many of the concerns identified with the narrower one in the paper accompanying the Westminster Draft Environment Bill. It should not necessarily be regarded as complete and exhaustive: other areas that should be covered for instance, include landscape, land use planning, light pollution, noise, nano-materials, pathogens and genetically modified organisms.
56. One approach would be to apply the wide scope of coverage of environmental matters that are covered by the Aarhus Convention 1998. Importantly, a purposive approach to scope should be taken, whereby if there is any doubt whether an area falls within the scope of scrutiny then it should be included as falling within rather than excluded. This is consistent with the current application of EU environmental law, see e.g. the application of the Environmental Impact Assessment Directive 2011/92/EU as amended.
57. UKELA Scotland suggests that there is a wider issue as to whether Scotland should aim for alignment with the EU or be open to its interpretation of law and policy. This is essentially a political decision and could depend upon whether Scotland considers itself as an environmental world-leader (as England and Defra do).

PART III: CONSIDERING COMPLAINTS

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

58. The loss of EU complaint mechanisms will be significant in terms of environmental law and policy. UKELA Scotland agrees with the estimate at §16 of the EPGS Consultation that around 80% of domestic environmental law in Scotland derives from EU law and policy. As such, the ability of the EC to consider complaints about breaches of environmental law is significant. The EU provides a critical enforcement and sanctioning role, by taking action and also serves a preventative role. Similarly the CJEU has a vital role in the complaint mechanism.

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

59. Yes. However, UKELA Scotland is concerned that any scrutiny body could be inundated with complaints relating to local matters unless it has discretion in whether it pursues specific complaints and how it filters those complaints. The overarching strategic focus of its powers should be paramount. The EU structures have been particularly good at filtering the complaints received and pursuing the strategic overarching issues, as opposed to becoming bogged down in more minor issues⁷. In essence, the new function to receive complaints should not entail an obligation to follow up all complaints.

60. UKELA Scotland notes that the question as to whether complaints should be considered raises a wider point about the key functions under the EPG provisions which may be regarded as scrutiny of current policy, future advisory role and dealing with complaints. These three aspects need not all sit with the

⁷ This is consistent with UKELA's views expressed in submissions to the Draft Environment (Principles and Governance) Bill in relation to the role of the OEP.

one body. For instance, asking the one body to fulfill an advisory role and one dealing with complaints/enforcement can create a potential conflict of interest – if the government has followed the body’s advice it is possible that the body may not be able to exercise independent judgement over whether what is being done is fully meeting legal requirements. In contrast with separate bodies there is a danger that work may be duplicated, that expertise is spread too thinly and that gaps in scrutiny may arise.

PART IV: ENFORCING ACTION

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

61. UKELA Scotland makes a general comment that the impact of the loss of EU enforcement powers will be significant in terms of both the actual scrutiny and also the deterrent effect that may arise from the role and functions. The role of external, independent oversight in ensuring that government keeps to commitments and to robust environmental standards and protection, even when expensive and inconvenient, is essential.
62. Moreover, the nature of much of the current EU law (law which is to be retained) is that it imposes “outcome duties”, which require certain outcomes to be achieved. This is a form of obligation placed on government that may not be familiar in domestic law and is likely to create problems over who can enforce, at what stage and with what remedy being ordered by the courts. It is suggested by some UKELA Scotland members that the current tendency of Scottish courts is to be deferential to government’s balancing of conflicting interests, whereas the retained law will require absolute adherence to targets/standards/outcomes, unless the situation meets one of the limited derogations.
63. A further question arises as to how the ‘soft’ role of the EC can be replicated post-Brexit e.g. by taking part in negotiation, mediation and other alternative dispute resolution mechanisms. The EC’s “soft” role draws strength from three key areas. The first is its expertise, which can be replicated in Scotland and

forms part of the key features noted above. The second is in knowing what other Member States are doing, and thinking about how they may react to legal, policy and environmental changes. This can be achieved through a commitment to collaborate and cooperate with other bodies. The third is the current background role the EC plays where it has influence on a Member State that is not responding positively to gentler nudges and can achieve acceptable results through ADR mechanisms. This opportunity can be within the scope of any scrutiny body. However, unless that body is given real power, this element will disappear. At the very least the new scrutiny mechanism must earn respect and be taken seriously – that requires demonstrable cross-party political commitment, supported by the resources, expertise and independence to be not just credible, but also trusted.

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?

64. To be effective and to meet the loss of EU enforcement powers, a body needs to be established that will impose a meaningful remedy on government. Some UKELA Scotland members consider that these enforcement powers should extend to public authorities in a similar fashion as the duty to have regard to environmental principles.
65. Some UKELA Scotland members also consider that the scrutiny body should have the power to impose fines for non-compliance with environmental law and, if need be, refer the matter to court.
66. However, other UKELA Scotland members are not persuaded that all public bodies should be subject to scrutiny and that it should be limited to government departments and also that fines should not be imposed. Any financial sanction powers need to be carefully considered, as they won't work if they simply take resource away from dealing with the environmental concerns at issue⁸.

⁸ For England, UKELA supported the approach for a new OEP that had monitoring, regulatory, enforcement and sanction powers, with the opportunity to secure sanctions from the court.

Other matters

67. UKELA Scotland wishes to emphasise the need for continued collaboration across the UK, EU and further afield. This includes the need to avoid barriers to sharing data etc. and the opportunity to introduce agreed common structures .

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UKELA Brexit Task Force Reports

The UKELA Brexit Task Force reports already available include:

- Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications (July 2017)
- Brexit and Environmental Law: Enforcement and Political Accountability Issues (July 2017)
- Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law (July 2017)
- Brexit and Environmental Law: the UK and International Environmental Law after Brexit (September 2017)
- Wales, Brexit and Environmental Law (October 2017)
- Brexit and Environmental Law: The UK and European Co-Operation Bodies (January 2018)
- Brexit and Environmental Law: Environmental Standard Setting outside the EU (February 2018)

These are available at: <https://www.ukela.org/brexitactivity>

Section 16 of the EU (Withdrawal) Act 2018

16 Maintenance of environmental principles etc.

(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of -

- (a) a set of environmental principles,
- (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,
- (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),
- (d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and
- (e) such other provisions as the Secretary of State considers appropriate.

(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of -

- (a) the precautionary principle so far as relating to the environment,
- (b) the principle of preventative action to avert environmental damage,
- (c) the principle that environmental damage should as a priority be rectified at source,
- (d) the polluter pays principle,
- (e) the principle of sustainable development,
- (f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,
- (g) public access to environmental information,
- (h) public participation in environmental decision-making, and
- (i) access to justice in relation to environmental matters.

<http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted> (26 June 2018)