



Scottish
Environment

LINK

CONSULTATION ON ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN SCOTLAND

A response to the Scottish Government's consultation by Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. LINK provides a forum for these organisations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for the environment. LINK works mainly through groups of members working together on topics of mutual interest, exploring issues and developing advocacy to promote sustainable development respecting environmental limits.

Scottish Environment LINK welcomed the publication of this consultation paper¹, it and its members have been pleased to participate in the Government's stakeholder discussions and is pleased to submit this formal response.

This response complements those responses submitted by individual member organisations and by individuals who are associated with LINK or its members. This submission is supported by the following Scottish Environment LINK members: -

- Amphibian & Reptile Conservation
- Association for the Protection of Rural Scotland
- Badenoch and Strathspey Conservation Group
- Bat Conservation Trust
- Buglife Scotland
- Butterfly Conservation Scotland
- Friends of the Earth Scotland
- Froglife
- Hebridean Whale and Dolphin Trust
- John Muir Trust
- Marine Conservation Society
- National Trust for Scotland
- North East Mountain Trust
- Nourish Scotland
- Planning Democracy
- Plantlife Scotland
- Ramblers Scotland
- RSPB Scotland
- Scottish Geodiversity Forum
- Scottish Geodiversity Forum
- Scottish Wild Beaver Group
- Scottish Wild Land Group
- Scottish Wildlife Trust
- The Royal Zoological Society of Scotland
- Trees for Life
- Whale and Dolphin Conservation
- Woodland Trust Scotland
- WWF Scotland

¹ <http://www.scotlink.org/public-documents/environmental-charities-demand-concrete-action-for-scotlands-nature/>

Executive summary

Planet Earth is currently facing two linked existential crises – climate change and biodiversity loss. Both these crises are human-induced, and require urgent action, especially Government-led policy action, to be addressed. These challenges would be both important and difficult at any time. However, with 80% of our environment law being derived from EU law, the potential for the UK to leave the EU (“Brexit”) makes them even more important and difficult. However, with commitment, LINK believes these are challenges that can be met – if decisive and speedy action, including new legislation, is taken.

Scottish Environment LINK engaged with the environmental implications of the UK’s referendum on membership of the EU as soon as it was announced², and has continued this work since the result was announced³. As well as seeking to influence the debate in Scotland, LINK and its members have also engaged with the debate at UK level, both directly and with partners in Greener UK and through Environment Links UK⁴. As members of the EEB, we have also sought to engage with discussions at European level.

LINK therefore warmly welcome the publication of this consultation, and its consideration of all the issues raised by the Round Table sub-group’s report. However, LINK and its members did indicate some disappointment that, while highlighting the issues that need to be addressed, it makes no specific proposals and offers no suggested timetable for doing so. We hope the responses to the paper’s questions (set out below) will help enable the Scottish Government to reach conclusions, and swiftly plan/announce its intentions. On basis of those answers, LINK and its members consider that the Scottish Government must announce its intention to introduce an Environment (Scotland) Bill during the remainder of this Parliament. Such a bill should have at least three parts, namely: -

- **To embed EU and international environmental principles in Scots law so that they can underpin all environmental decision-making.**

This should include a duty to apply the four EU environmental principles, but also additional duties in relation to some, or all, the other principles mentioned in the consultation paper. Consideration should also be given to a “keeping pace” or “highest international standards” duty. These duties should be accompanied by a statutory requirement to produce (subject to stakeholder involvement, consultation and Parliamentary approval) a policy statement to guide implementation.

- **To set up an independent watchdog to enforce environmental protections.**

- (a) Improve monitoring and reporting – as well as publication - by existing bodies, including both the Scottish Government itself and its agencies;
- (b) Empower Audit Scotland and the Public Audit and Post-legislative Scrutiny (PAPLS) Committee with an environmental remit to provide scrutiny – of both environmental policy and its delivery, including resource allocation;
- (c) Establish a new body to initiate inquiries (into policy/delivery), investigate complaints from public and enforce environmental law – with the power to publish own reports, report to Audit Scotland /PAPLS Committee and refer cases to the Courts, including an environmental court.

Although the ‘hard’ powers of scrutiny under these processes must be available, it is important to stress that ‘softer’ mechanisms of review/engagement, both formal and informal, should also be available and used. This will include private and public discussions with the media, with NGOs or business, and with Parliamentary Committees – but also potentially more formal mediation or arbitration.

- **To set clear targets for environmental protection alongside adequate financial resources.**

While all the above would mitigate the impacts of any exit from the EU, a new overarching environmental objective and a clear statutory duty to develop and publish an environmental

² <http://www.scotlink.org/public-documents/the-eu-and-our-environment/>

³ <http://www.scotlink.org/work-areas/brexit-information/>

⁴ <https://greeneruk.org/>; <https://www.wcl.org.uk/environmentlinksuk.asp>

strategy, setting out Scotland's environmental objectives and complemented by clear targets, milestones and indicators are also needed. This would both replace the objectives set out in Art. 191.1 of the TFEU, as well as provide a purpose and rationale for the implementation of the environmental principles and a 'benchmark' against the new governance processes could assess and, if necessary, enforce progress. This new overarching aim must encompass both environmental protection and restoration/enhancement.

As part of this governance, Audit Scotland and the PAPLS Committee should be empowered to report on whether sufficient resources have been allocated to the different parts of Government and its agencies for the delivery of these environmental objectives/targets.

This bill, and the governmental actions associated with it, should be better co-ordinated with similar steps being taken in other part of the UK.

Many of the actions described here may not be necessary if political developments result in a 'no Brexit' outcome; however, as illustrated in our answers, there are many existing deficiencies (e.g. Aarhus compliance) that need to be addressed whatever the outcome. In contrast, if a 'no deal' Brexit is the outcome, the Scottish Government should ensure interim arrangements are in place for the end of October.

Introduction

Planet Earth is currently facing two linked existential crises – climate change and biodiversity loss. The former is highlighted by the UN's IPCC and the Paris agreement – as well as the First Minister's recent and very welcome declaration of a "Climate Emergency"⁵. The latter has been highlighted recently by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) report⁶. Both these crises are human-induced, and require urgent action, especially Government-led policy action, to be addressed. Scottish Environment LINK welcome the Scottish Government's response to the climate change challenge – both the rhetorical declaration of a climate emergency and proposals to improve emissions reduction targets in the Climate Change (Emissions Reduction Targets) (Scotland) Bill⁷.

These actions, however, need to be supported by policy actions on land use, transport, housing, etc if the new targets are to be met. In addition, similar urgency needs to be demonstrated in addressing the potential demise of our natural world. Scotland is not immune to the global loss of biodiversity - 1 in 11 species in Scotland is at risk of extinction, and this is on top of historic declines that require reversal.

These challenges would be both important and difficult at any time. However, with 80% of our environment law being derived from EU law, the potential for the UK to leave the EU ("Brexit") makes them even more important and difficult. However, with commitment, LINK believes these are challenges that can be met – if decisive and speedy action, including new legislation, is taken.

LINK engaged with the environmental implications of the UK's referendum on membership of the EU as soon as it was announced⁸, and has continued this work since the result was announced⁹. As well as seeking to influence the debate in Scotland, LINK and its members have also engaged with the debate at UK level, both directly and with partners in Greener UK and Environment Links UK¹⁰. As members of the EEB, we have also sought to engage with discussions at European level.

In these discussions, we have been guided by our view that: -

"Neither the UK electorate's decision to vote in favour of leaving the EU, nor the Scottish electorate's decision to vote in favour of remaining in the EU, changes the fact that Scotland and the UK are facing tremendous challenges in terms of environmental degradation. No change in political or constitutional structures alters the need for well-designed and well-enforced legislation to protect and maintain our precious natural environment."¹¹

Early in the discussions, environmental NGOs identified the so-called 'governance gap' that would arise in the event of the UK leaving the EU¹². In particular, it was identified that the environmental provisions of the EU treaties and the environmental roles of the EU institutions would need to be replaced – as their role in ensuring the care of the environment was an aspect of EU membership all parties recognised as a benefit. The existence of, and challenges posed by, this governance gap are now acknowledged by all the governments across the UK (including officials on behalf of Northern Ireland). It is notable that the governance gap is also a matter that concerns the EU27, and that recognition that it must be addressed forms part of the current (and probably any amended) Withdrawal Agreement – so unless the final outcome is 'no deal' or 'no Brexit', addressing these issues will become part of an international commitment.

Although the almost constant uncertainty about the nature of 'Brexit' (both the process/act of withdrawal and the long-term future relationship) remains, it is important that the Scottish Government plans for all eventualities. LINK therefore welcomed the establishment of the Round Table of Environment and Climate Change and was pleased to participate. We further welcomed the request

⁵ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-48077802>

⁶ <https://www.bbc.co.uk/news/science-environment-48169783>

⁷ <https://www.gov.scot/news/reaching-net-zero/>

⁸ <http://www.scotlink.org/public-documents/the-eu-and-our-environment/>

⁹ <http://www.scotlink.org/work-areas/brexit-information/>

¹⁰ <https://greeneruk.org/>; <https://www.wcl.org.uk/environmentlinksuk.asp>

¹¹ LINK response to the Scottish Parliament's European and External Relations Committee call for evidence on the EU referendum and its implications for Scotland, September 2016: <http://www.scotlink.org/wp/files/documents/LINK-response-to-call-for-evidence-on-the-EU-referendum-and-its-implications-for-Scotland.pdf>

¹² https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf

to a sub-group to examine the challenges raised by the governance gap, and that sub-group's report¹³.

In welcoming this consultation, we note and applaud the Cabinet Secretary's comment that: -

*"The Scottish Government has committed to maintain or exceed EU environmental standards."*¹⁴

While there are occasions where, in LINK's view, this commitment appears to be repeated more often in principle than delivered in practice¹⁵, it remains welcome. The environmental provisions of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill were a clear example of the Scottish Government fulfilling this commitment being honoured in practice¹⁶. This consultation paper fulfils, in part, some of the commitments made within s.26A of that Bill – and we look forward to the Government acting to implement decisions to address the issues covered.

LINK therefore warmly welcome the publication of this consultation, and its consideration of all the issues raised by the Roundtable sub-group's report. However, LINK and its members did indicate some disappointment that, while highlighting the issues that need to be addressed, it makes no specific proposals and offers no suggested timetable for doing so. We hope the responses to the paper's questions (set out below) will help enable the Scottish Government to reach conclusions, and swiftly plan/announce its intentions.

¹³ <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>

¹⁴ Ministerial Foreword, para 2.

¹⁵ For example, in just one area, it is reported that, in Scotland, 8% of SAC features and 17% SPA features declined in condition between 2010 and 2018. Thus, we are failing to meet our commitment to avoid deterioration of natural habitats and species' habitats.

¹⁶ Notwithstanding the subsequent UKSC decision, which did not question the environmental provisions, it is our understanding that those provisions remain Government policy even if the bill (or alternative statute) never receives Royal Assent.

Scottish Environment LINK responses to the questions in the Scottish Government's consultation on environmental principles and governance.

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, subject to the following comments on its formulation and application.

Scottish Environment LINK strongly supports the inclusion of the four EU environmental principles in legislation. These four principles (the precautionary principle, and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay) are fundamental environmental principles strongly supported by all NGOs but also, as the consultation paper makes clear, incorporated with the support of all Member State Governments in the EU Treaties.

If there is one issue that highlights the importance of these principles, it is the management of invasive non-native species (INNS). This issue, more than many, demonstrates the importance of precaution and prevention as a priority, but where this is unsuccessful on the need to rectify the problem at source and ensure the 'polluter' pays. This is important as (a) prevention is always cheaper (both to the Government and those affected) than addressing a problem *post hoc* and (b) if 'polluters' are required to pay for any issues caused, there is a greater incentive to comply with prevention rules. Of course, similar arguments apply to most environmental issues, hence our strong support for these key principles and, subject to the following comments, for the Scottish Government's proposed new duty.

We note that although the consultation paper does not specifically refer to or propose new legislation, we cannot see how a "new legal duty" (para 29) can be created without primary legislation. We therefore look forward to a proposal for legislation being part of the post-consultation process. In this regard, we warmly welcome the commitment, on behalf of the Scottish Government, by Mr Russell, in his letter of 5th April 2019, updating Parliament on actions to be taken following the UK Supreme Court's ruling on the Continuity Bill¹⁷ and, in particular, the pledges to: -

*"strengthen environmental protection, including seeking opportunities to legislate" and
"look at how best to safeguard important EU human rights values".*

Thus, if s.26A of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is not to become law, and – in its place – there is to be a "new legal duty" to "strengthen environmental protection, including seeking opportunities to legislate", it is quite clear that there must be an Environment (Scotland) Bill introduced to Parliament within this session. Whilst, we understand that this consultation is unable to state that explicitly, as it is a matter for announcement in the Programme for Government, Scottish Environment LINK consider that such a Bill is essential – and the remainder of this response assumes it is inevitable, focusing therefore on what its content should be, rather than whether or not it is needed.

As the consultation makes clear, any new legal duty raises issues of application, scope and implementation. These issues are covered in our responses to questions 2, 3 and 4, respectively. To inform these responses and to provide some more general context to the response to this question, however, box 1 below reproduces the text of Article 191 of the Treaty on the Functioning of the European Union (TFEU), as referred to in para 18 of the consultation paper.

¹⁷ <https://news.gov.scot/news/continuity-bill-update>

Box 1: Article 191 of the Treaty on the Functioning of the European Union (TFEU)

(Four “EU environmental principles” underlined – our emphasis)

1. Union policy on the environment shall contribute to pursuit of the following objectives:
 - preserving, protecting and improving the quality of the environment,
 - protecting human health,
 - prudent and rational utilisation of natural resources,
 - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
- In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.
3. In preparing its policy on the environment, the Union shall take account of:
 - available scientific and technical data,
 - environmental conditions in the various regions of the Union,
 - the potential benefits and costs of action or lack of action,
 - the economic and social development of the Union as a whole and the balanced development of its regions.
 4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Our strong support for the limited proposition suggested by question 1 is based on the fact that, without it, Scotland will lose the environmental protection provided by Art. 191.2. In this regard, we note that Art. 191.2 states that environmental policy “**shall be based on**” the four principles. A duty to “have regard to” the principles (which would, on occasion, allow Ministers to set them aside), therefore, does not replicate the clear intention of the treaty, as the strength of the principles would be considerably weakened. The weakness of this “have regard to” wording has been widely recognised; for instance, a House of Lords Select Committee inquiry into the Natural Environment and Rural Communities Act 2006 concluded that (referring to England’s biodiversity duty): -

“The Government should consider changes to the wording of the duty, as the requirement to ‘have regard’ for biodiversity is weak, unenforceable and lacks clear meaning”¹⁸.

We note that the House of Commons Environmental Audit Committee (including its Scottish member) reached a similar conclusion in relation to the UK Government’s draft Environment Bill, saying: -

*“We remain convinced that the requirement to ‘have regard to’ the policy statement on principles is so vague that every decision could result in litigation. The Bill downgrades the principles’ legal effect and does not connect to the rest of the Bill or other pieces of environmental legislation. **This aspect of the Bill is not fit for purpose.**”¹⁹ (emphasis added)*

¹⁸ <https://publications.parliament.uk/pa/ld201719/ldselect/ldnerc/99/99.pdf>, paras 206 and 207.

¹⁹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf> (para 23)

Likewise, the House of Commons Environment, Food and Rural Affairs Select Committee (again, including a different Scottish member) reached the same conclusion; stating: -

“The Government should amend [...] the duty to “have regard to” environmental principles with the stronger wording of “act in accordance with”.”²⁰

Accordingly, Scottish Environment LINK’s support for this proposal is conditional on the strengthening of the proposed duty to one, ideally, that replicates the Treaty’s words of “shall be based on”. Alternative, stronger wordings for such duties that exist in other of domestic legislation include “act in accordance with”, “seek to further” and “ensure the application of”. If “shall be based on” is deemed unacceptable, other wordings should be explored to ensure that this intention, explicit in the Treaty, is replicated.

In addition to the wording of the proposed duty, any such duty also raises questions as to how its application will be reported on, monitored and scrutinised. This issue is addressed further in question 8, but whatever proposals emerge from the consideration of that aspect of the consultation, it is important that application of this duty is a core target of any such scrutiny.

In relation to reporting, monitoring or scrutinising the application of the duty, there may be different roles for Scottish Ministers (and/or one or more of their agencies), for the Scottish Parliament or any ‘watchdog’ body. However, it is important that these roles are clearly stated, and the relevant body or bodies adequately resourced to fulfil these functions. At a minimum, Scottish Environment LINK would suggest that the legislation introducing the duty should also require a triannual report (as is the case for the current biodiversity duty) on application of the principles to be published, presented to Parliament and scrutinised by a relevant Committee. This might be compiled, by a central government unit, from regular reports, submitted to them by all parts of government (and other bodies) as a short form completed as part of the process of developing any new policy or legislation and describing how the principles had been applied. Such a mechanism was raised at one of the Government’s stakeholder workshops – by public bodies who did not consider such a task to be excessively burdensome.

As well as the strength of the duty to apply these four principles, Art. 191 also provides guidance on other matters that the Scottish Government will wish to consider if it is “to maintain or exceed EU environmental standards”. These include the fact that the Treaty, at Art. 191.1, sets broad objectives for Union policy on the environment and states that this policy “shall contribute to pursuit of [those] objectives”.

At present, the objectives of Scottish Government policy on the environment mirror these. However, they are not replicated in law, but set out in a wide range of government policy documents, Ministerial statements, etc. This may become somewhat more streamlined with the development of the proposed Environment Strategy²¹ but, to date, it is our understanding that the final form of such a strategy, and its role, is yet to be finalised.

This underlines the need to (a) determine and announce the purpose, nature and role of the proposed Environment Strategy and (b) to use the opportunity of legislating for EU environmental principles and governance to place the Strategy on a statutory basis. Accordingly, Scottish Environment LINK consider that a Scottish Environment Bill should include the requirement to produce (and regularly update) an Environment Strategy – as well as require that Strategy to set broad objectives (as per Art. 191.1), clear targets that interpret these objectives and a defined set of appropriate indicators by which to judge their delivery.

In addition, this requirement to produce a strategy (with objectives, targets and indicators) should be linked to an overarching aim (or high level, guiding objective) to protect and restore the environment. We note that the House of Commons Environmental Audit Committee (including its Scottish member) offers a similar observation on the UK Government’s draft Environment Bill, saying: -

²⁰ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/1893/189308.htm>

²¹ <https://www.gov.scot/publications/developing-environment-strategy-scotland-discussion-paper/>

“We remain convinced that the Bill should include an objective to achieve a high level of environmental protection to guide the application of the principles. We recommend that a high level of environmental protection is put on the face of the Bill. This should be inserted at the start of clause 2, as an overarching guiding objective rather than a principle, in the same way as Article 191(2) of the Treaty of the Functioning of the European Union, for example: “Environmental policy shall pursue a high level of protection and it should be based on the principles”.”²²

Such an overarching aim would deliver, in statute, the Scottish Government’s oft-repeated high environmental ambition. This is discussed further in box 2, below – between Q4 and Q5.

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

No.

Scottish Environment LINK does not agree with the assertion (para 31) that “the current application of the EU environmental principles” is as narrow as described. Art. 191 (box 1, above) refers to “Union policy on the environment” (which shall be based on the principles). It does not refer specifically to the Council, Commission or any individual institution. Being purposefully generic, it includes all institutions and emanations of the Union, and all their functions. The same approach should be adopted in Scotland.

Thus, the duty to base policy on the EU environmental principles should apply to any public body and to any function of those bodies, where those bodies/functions may impact on the environment. In this regard, we would commend the wording of the biodiversity duty (Nature Conservation (Scotland) Act 2004; section 1), which states: -

“It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity”.

We note that the House of Commons Environmental Audit Committee (including its Scottish member) offers a similar observation on the UK Government’s draft Environment Bill, saying: -

*“We recommend the environmental principles are put on an unqualified legal basis in relation to environmental policy. **All public bodies** should have a duty to apply the principles as is currently the case under EU law.”²³ (emphasis added)*

The duty should not extend, of course, to policies, decisions or functions that have no potential to impact on the environment. The policy statement (see question 4), produced to guide the implementation of the duty, should therefore, provide guidance to Ministers and other public bodies on how to determine whether a policy, decision or other function is one that may impact on the environment. This might be similar to either the ‘screening’ approach adopted for Strategic Environmental Assessment or the process adopted in Environmental Information legislation (see question 9).

Such a test, or ‘screening process’, would also help to ensure that the introduction of this duty did not conflict with other duties or functions – or, if such a conflict did arise, that the process of determining the outcome (which duty was accorded precedence) was transparent. Scottish Environment LINK, therefore, does not agree with the assertion in paras 33 and 34 of the consultation paper – as, either a screening process would ensure that no such conflicts arose or, where they did, a clear and transparent process would resolve these. In our view, a mature government would admit the likelihood of such conflicts and seek to address them – rather than limit the application of environmental principles in order to avoid such an issue.

²² <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf> (para 11)

²³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf> (para 24)

In applying a duty to base all (relevant) decision-making on these principles, the Scottish Government must be aware of the resource consequences for other bodies pursuing this new duty, especially local authorities. It is important that, while many positive environmental decisions will be cost-free or, in the long term, beneficial, others may require funding. This needs to be taken in account when determining budgets.

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; Scottish Environment LINK believes that there should be a duty based on the four EU environmental principles. However, we also consider that several of other principles, or legal constructs, merit consideration for incorporation in legislation.

We understand that any duties, principles or rights would apply to decisions affecting our environment; we have provided a response for what we consider as falling within that scope in response to question 9. In practical terms this would mean that for example, these principles and duties would apply to landscapes: the European Landscape Convention (ELC) requires that landscape policy considerations are seen as part of wider environmental policy making.

In summary, we believe that the Scottish Government should legislate in each of the following headings:

- a) Four EU environmental principles;
- b) A right to a healthy environment;
- c) Other 'principles' in the UK Government's draft Environment Bill²⁴;
- d) Other principles mentioned in the consultation paper, including those related to the Biodiversity Duty.

We, therefore, answer this question by addressing each of these matters in turn.

a) Four EU environmental principles

Yes, there should be a new duty focussed on the four EU environmental principles – as discussed in our response, above, to questions 1 and 2.

However, the other principles mentioned in the paper (including those in the UK Government's draft Environment Bill²⁵) also require attention, and thus legislation. This may be achieved by adding them to the duty discussed above, as suggested by the drafting of this question – or it may be achieved by creating separate duties or other legal means of implementation, alongside the EU environmental principles duty. If the latter option is selected, the further duties might be included elsewhere in an Environment Bill or in alternative legislation. Ministers should, therefore, as a result of this consultation clearly state their intention to incorporate these other international commitments in domestic law (and state when/where this will be done), rather than, as suggested in the consultation paper, to rely purely on the existence of those international agreements. These other matters are discussed in the following sections.

b) A right to a healthy environment

Scottish Environment LINK strongly supports the incorporation into domestic law of the "right to a healthy environment" – as recommended by the First Minister's Advisory Group on Human Rights Leadership²⁶. We are pleased the First Minister agreed these recommendations and look forward to details of the proposed National Taskforce to deliver on this agreement²⁷. That said, whether this right (and parallel access to justice rights) are legislated for in an Environment Bill, a Human Rights Bill or other bill is less important than that it is legislated for – and that Ministers state both a

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf (clause 2)

²⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf (clause 2)

²⁶ <https://humanrightsleadership.scot/>

²⁷ <https://firstminister.gov.scot/human-rights-day/>

commitment to do so and indicate a timescale for their enactment. This timescale needs to recognise that, if the UK does exit the EU, the impact may be immediate (“no deal”) or within a two to three-year transition (proposed deal).

The need for such legislation is not, however, entirely linked to “Brexit”. It is also necessary because Scotland’s implementation of its Aarhus Convention commitments (procedural rights that enable the realisation of any right to a healthy environment) is inadequate. Despite Scottish Government claims to the contrary, the Convention’s Meeting of the Parties regularly finds Scotland (as well as the other jurisdictions of the UK) to be non-compliant²⁸. However, any exit from the EU and loss of oversight by the European Commission and the Court of Justice would exacerbate this inadequacy, thus rendering this issue more urgent.

Further views on access to justice, and its importance in any adequate response to the ‘governance gap’ created by any exit from the EU are set out in our responses to questions 8-13.

However, while the UK Government’s draft Environment Bill includes access to justice, access to environmental information and public participation as ‘environmental principles’, Scottish Environment LINK considers these to be procedural rights, rather than principles. They are enshrined in the Aarhus Convention and enable the realisation of a “right to a healthy environment”. So long as this is understood and explicitly recognised by, for instance, ensuring that such a right is to be applied by reference to the UN Framework Principles on Human Rights and the Environment²⁹, we do not consider these to be ‘principles’ requiring separate legislation – but that they would be legislated for and implemented via the “right to a healthy environment”. If this does not happen, however, we would seek Scottish legislation to refer to them in the same way as the UK Government’s draft Environment Bill.

c) Other ‘principles’ in the UK Government’s draft Environment Bill

The consultation paper (para 21) also refers to the principles of sustainable development and integration (the latter being one of the 27 principles set out to guide sustainable development in the 1992 UN Declaration on Environment and Development).

Although not mentioned in the consultation paper, the principle of integration is also one mentioned in the TFEU (albeit not as one of the four in Art. 191). First mentioned in the Treaty of Amsterdam (1999), this principle now forms Article 11 of the TFEU (ex-Article 6 TEC), which reads: -

“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.”

Given their international acceptance, including in the TFEU, Scottish Environment LINK considers that there is merit in incorporating these concepts in domestic law – not least as any exit from the EU would remove that stage in the process of international law and policy being reflected in domestic law and policy. However, it is of merit in any event – and we note that there are several references to sustainable development in individual, sectoral legislation³⁰. We also note that these principles are proposed for inclusion in the UK Government’s Environment Bill³¹. There is, therefore, much merit, not least to ensure consistency across Scottish Government functions and with the rest of the UK, in developing and legislating for a general duty related to sustainable development and integration. Scottish Environment LINK believe these two principles should be included in a Scottish Environment Bill, alongside the duty related to the four EU environmental principles.

In regard to sustainable development, it should of course be noted that – contrary to the assertion at para 23 of the consultation paper – that the National Performance Framework is (a) not a statutory

²⁸ For instance,

https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/Second_progress_review_on_V.9n_UK_final.pdf

²⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/42/PDF/G1801742.pdf?OpenElement>

³⁰ Probably the earliest such reference is the Natural Heritage (Scotland) Act 1991 (s.1A). It is, however, also to be found in the Town and Country Planning (Scotland) Act 1997 (e.g. s.3D and 3E) and Marine (Scotland) Act 2010 (e.g. s.3 and 5).

³¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf (clause 2(e) and (f)).

mechanism and (b) while referring to the UN's Sustainable Development Goals, still continues to use the misleading term "sustainable (and inclusive) economic growth" rather than sustainable development. Scottish Environment LINK has consistently and regularly argued that this is inappropriate, and this remains our position. It is, in part, because of the Scottish Government's continued confusion, illustrated in this consultation, between sustainable development and "sustainable economic growth" that we believe that a statutory principle of sustainable development is required³².

d) Other principles mentioned in the consultation paper, including those related to the Biodiversity Duty

The consultation paper (para 21) also refers to the principles of sustainable use and ecosystem approach, as well as one related to the appropriate spatial and temporal scales. These three principles all derive from the UN Convention on Biological Diversity agreed in 1992. In theory, these principles should already be in use to inform the development and implementation of law and policy in Scotland. This is because the Biodiversity Duty in section 1(1) of the Nature Conservation (Scotland) Act 2004 is subject to subsection (2) which states that, in complying with the duty imposed by subsection (1), a body or office-holder must have regard to, *inter alia*, the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (or any United Nations Convention replacing that Convention).

However, SNH's report on Scotland's progress towards the "Aichi targets" demonstrates that we are 'on track' in relation to only 7 out of 20 targets for 2020³³. There would, therefore, as part of re-doubling our efforts and in order to prepare for the post-2020 period, after the next Biodiversity CoP in Beijing, be considerable merit in reviewing the Biodiversity Duty with a view to ensuring it is more effective. Specific "sub-duties", related to sustainable use and ecosystem approach, as well as one related to the appropriate spatial and temporal scales, may be a means to do this. Thus, as part of the process of taking forward the results of this consultation and the preparation of a Scottish Environment Bill, Scottish Environment LINK recommends that the Scottish Government undertake, or commission, a review of the Biodiversity Duty with a view to ensuring it is more effective. If the results of this review indicate that amendments to the 2004 Act (for instance, by expanding or clarifying the Biodiversity Duty) are desirable, these should be incorporated in a forthcoming Environment Bill.

The final principle referred to in para 21 of the consultation paper is that of non-regression – which is receiving wide international recognition and is built into the UNFCCC's Paris agreement³⁴. At the 2016 IUCN World Congress in Hawaii, the Union adopted a resolution on non-regression (WCC-2016-Res-074-EN) which urge "all governments to take steps to implement effectively and to reinforce the principle of non-regression in the areas of environmental policy and law"³⁵. Based on the application of this principle in various parts of the world, Greener UK (including many Scottish Environment LINK members, have argued that the non-regression principle should be included in the UK Government's Environment Bill³⁶. This is a call we support and would argue that, if the Scottish Government wishes to maintain its desire to be a world leader in environmental matters and to fulfil the commitment "to maintain or exceed EU environmental standards", it will wish to include the principle of non-regression into any forthcoming environment bill. In considering this matter, the Scottish Government may wish to note (and seek to emulate) the French legislation applying this principle that states: -

"Le principe de non-régression, selon lequel la protection de l'environnement, assurée par les dispositions législatives et réglementaires relatives à l'environnement, ne peut faire l'objet que

³² Also illustrated by this definition: <https://www.gov.scot/policies/economic-growth/> - where "sustainable is defined as defined as "steady and long-lasting" with no environmental concerns or limits mentioned.

³³ <https://www.cbd.int/doc/world/gb/gb-nr-oth-p2-en.pdf>

³⁴ Although a relatively new concept in international (and some domestic) law, the idea of non-regression has been a longstanding and established principle in Human Rights law.

³⁵ https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_074_EN.pdf

³⁶ [https://greeneruk.org/sites/default/files/download/2019-01/Greener UK briefing on non-regression in the Environment Bill.pdf](https://greeneruk.org/sites/default/files/download/2019-01/Greener%20UK%20briefing%20on%20non-regression%20in%20the%20Environment%20Bill.pdf)

*d'une amélioration constante, compte tenu des connaissances scientifiques et techniques du moment*³⁷.

However, in addition to non-regression, we also note that, in the debate about the UK's proposed exit from the EU, Scottish Ministers have also said that: -

*"New legislation will be brought forward to enable devolved laws to keep pace with the EU if Brexit occurs"*³⁸.

Whether through membership of the EU, 'keeping pace' from outside or simply seeking to be a 'leader', Scottish Environment LINK believe and support the principle suggested here. Therefore, we believe that, in addition to the principles that have been outlined in the consultation paper and discussed above, there is merit (to fulfil the intention quoted) in legislating for a duty that requires Scottish Ministers to:

"seek to implement the highest standards in environmental law and policy – whether these be based on those of the EU, the rest of the UK or other parts of the world."

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.

Scottish Environment LINK agree that such a policy statement would be necessary, and that the legislation establishing the duty (or duties) should also require the production of such a statement. There should be an associated duty on Ministers/public bodies to "act in accordance with" the statement.

In addition to the above, the statement should also provide guidance to the Courts in the interpretation of the principles and their application should they be required to determine whether any future application has been appropriate. The statute must also, therefore, indicate that in determining whether the principles have been correctly applied regard is to be had to the policy statement³⁹.

As well as a requirement to produce such a statement and accord it the importance described above, there should also be a statutory process set out for the preparation (with stakeholder participation), consultation on and formal adoption of the policy statement. This approach might be based on process required to produce the National Planning Framework, the Scottish Outdoor Access Code or National Marine Plan. Whatever approach is adopted, Scottish Environment LINK believe that: -

- The process should be set out in statute (such as the forthcoming Environment Bill);
- The process should fully and genuinely involve all relevant stakeholders;
- The above participation should be during development, not solely a formal consultation on a draft, although the latter will be required as well;
- A final draft should be considered by Parliament, and Parliament should be able to report its views, that should be considered by Ministers before adoption; and
- On adoption, Ministers should be required to report how they have incorporated Parliament's comments and, if not, why.

Other than a high-level explanation of the purpose of such a statement (i.e. "to guide interpretation and application"), the primary legislation need not set out the content of the statement. However, in our view, it is important to be aware of the likely (and desirable) content – and this might be set out in

³⁷ LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages. Art. 2(4). An unofficial translation would be: "Legislative and regulatory provisions relating to the environment shall ensure that the principle of non-regression is applied, meaning that the protection of the environment must see a constant improvement taking into account the latest scientific and technical knowledge." However, whether this translation is correct or poor, the key message to the Scottish Government is that this principle can and has been incorporated into domestic legislation – a precedent that should be followed in Scotland.

³⁸ <https://news.gov.scot/news/continuity-bill-update>

³⁹ cf Section 3(2) of the Land Reform (Scotland) Act 2003 which requires regard to the the Scottish Outdoor Access Code in determining whether land management is "responsible".

the policy memorandum accompanying an environment bill. Scottish Environment LINK believes that such a statement should include: -

- A clear explanation of the history of the principles, their purpose and pre-Brexit application;
- A guide to interpretation, including references to cases where they have been applied across the EU and elsewhere; and
- Good practice examples of their application.

The statement should also be written in a manner that makes it readable and relevant to those with the responsibility to apply the principles in their day-to-work.

In addition, the Scottish Government may wish to consider what “implementation actions” it will need to take when the statement is approved and becomes operable. This might include publication and promotion, workshops for key staff and relevant stakeholders, etc.

Box 2: Environmental ambition

Box 1, above, reproduced Art 191 of the TFEU in the context of proposals related to the EU environmental principles in Art 191 (2). However, it is notable that para (1) states: -

- “1. Union policy on the environment shall contribute to pursuit of the following objectives:
- preserving, protecting and improving the quality of the environment,
 - protecting human health,
 - prudent and rational utilisation of natural resources,
 - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”

Thus, if/when the UK leaves the EU, Scotland will (as well as losing the application of EU environmental principles) also lose the legal basis for an overall objective for its environmental policy.

The Scottish government has begun work on an environmental strategy⁴⁰ - which is intended to include a “vision and set of outcomes to set out what we are collectively working to achieve through Scotland’s environment and climate change policies”. This is very welcome – and we look forward to the its next stage of development. However, this intention needs to be underpinned in legislation – both to replace Art 191(1) but also to ensure the application of the principles (above) and new governance arrangements (below) work towards the achievement of this vision and outcomes.

Scottish Environment LINK, therefore, believe that an environment bill should introduce a new overarching environmental objective and a clear statutory duty to develop and publish an environmental strategy, setting out Scotland’s environmental objectives and complemented by clear targets, milestones and indicators. This would both replace the objectives set out in Art. 191(1) of the TFEU, as well as provide a purpose and rationale for the implementation of the environmental principles and a ‘benchmark’ against the new governance processes could assess and, if necessary, enforce progress. This new overarching aim must encompass both environmental protection and restoration/enhancement⁴¹.

In particular, a bill should set the following overarching duties: -

1. An overarching public sector duty that integrates environmental protection and restoration across government
2. A duty to achieve and act compatibly with the objectives, targets and milestones
3. A duty to set targets and milestones (according to a certain process/parameters)
4. A due diligence duty

⁴⁰ https://consult.gov.scot/environment-forestry/environment-strategy/user_uploads/224042_sct0618871430-001_developing-an-environment-strategy-for-scotland-v3.pdf

⁴¹ Such an approach is needed to (a) ensure that the crisis in e.g. biodiversity loss is reversed, not simply halted and (b) to reflect and expand current aspirations (e.g. biodiversity duty “to further”, Marine Act duty “to protect and enhance” and Islands Act reference to “environmental wellbeing”).

These should be accompanied by a set of binding objectives listed on the face of the bill, covering air, nature, waste, water, etc as well as a duty on Ministers to set, by secondary legislation, specific targets, target-dates and milestones for each objective.

This approach has been supported, with regard to UK/England legislation, by the **House of Commons** Environment, Food and Rural Affairs **Select Committee (including its Scottish member)**, saying: -

“An overarching objective to ensure a “high level of protection for the environment”, as is currently outlined in the Treaty on the Functioning of the European Union, should be inserted into the draft [UK] Bill to underpin the other environmental principles.”⁴²

The principles (above) and the governance arrangements (below) would inform and ensure the achievement of this vision/outcomes/targets.

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

Scottish Environment LINK considers that a loss of engagement will be damaging – to both the environment (through decisions being less well informed) and to relationships with European partners.

One example of this relates to Invasive Non-Native Species (INNS) and biosecurity. All the UK Administrations have already failed to meet their statutory deadlines for the biosecurity measures under the EU IAS Regulation – in particular, an overarching analysis of INNS pathways due 18 months after the adoption of the first list of Species of Union Concern. If Brexit results in the loss of EU science, information and co-ordinating functions, LINK is concerned how critical INNS biosecurity and management actions will function across UK countries and EU trading partners.

However, steps can be taken to minimise and mitigate this damage. Thus, whatever the outcome, Scotland should seek (either as part of the UK or of its own accord) as much co-operation and co-ordination as possible. While much monitoring, measuring and reporting may, currently be carried out as a result of EU legislation or policy, there is no reason why the Scottish Government cannot commit to continue this work on a voluntary basis. After all, if it is a worthwhile task in itself (and mostly it is), it does not have to be a legally required task in order to undertake it. This applies both to the actual monitoring, measuring and reporting but also to the sharing of these data with others.

Mitigation measures might include: -

- EEA membership – the Scottish Government should press UK to join as non-EU member or find way for Scotland as “sub-national entity” to join.
- Academic and inter-agency networks – the Scottish Government should promote, and support with resources, cooperation and co-ordination between public sector actors, academic groups and others to encourage data exchange, understanding and promotion of best practice and inter-jurisdictional comparisons.
- In particular, the Scottish Government should support existing eNGO networks, such as EEB, BirdLife, WWF Europe, FoE Europe and Butterfly Conservation Europe, but also encourage and support new bilateral or multilateral partnerships.

The Scottish Government may wish to consider whether some of the actions above may be carried out in partnership with other Governments – either others across the UK (not necessarily all four), bilaterally (especially where good bilateral relations already operate, such as the Republic of Ireland, Norway or Malawi) or multilaterally through networks with which it is engaged such as the Nordic Council.

⁴² <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/1893/189308.htm>

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

The following (non-exhaustive) list sets out the issues that LINK members believe should be included in such a review: -

- Biodiversity: species abundance/distribution, etc;
- Representativeness, condition and connectivity of protected areas;
- INNS;
- Air, water, marine quality standards, light pollution, etc;
- Waste;
- Chemicals;
- Procedural comparisons: e.g. SEA, EIA, access to justice, etc.

In some sectors, there is already good material available to contribute to the review; this should not be ignored. For instance, in relation to biological recording, the Scottish Biodiversity Information Forum has already conducted a review⁴³. This analysis and its recommendations should be adopted.

However, beyond the issue of what data, and how they are collected and collated, there is one principle that must be adopted: that is, that (unless serious issues of potential environmental crime are likely) all such data should be openly published. Such an approach would be consistent with the Scottish Government's "Open Data Strategy"⁴⁴ and commitment to "to making its data accessible"⁴⁵.

The Brexit context for this question leads to a focus on "replicating what was reported to the EU" as a result of EU obligations (e.g. paras 54 & 57). This is important – however, far more important "customers" of such monitoring and reporting are the people of Scotland (who wish to know if their environment is in good health). There should therefore be a presumption of publication and transparency – and reporting is primarily both for and to the public. Reports to international bodies, whether the EU or others, are important and complementary, but not the *raison d'être*.

Finally, monitoring and reporting should be structured in accordance with the outcomes/targets set under the environmental strategy, and required by an Environment Act (see box 2 and other responses).

Whilst scrutiny (of environmental policy, decisions, etc) is dealt with in later questions to this consultation, it is important to highlight here the strong link between monitoring and reporting functions and scrutinising functions. The European Commission, and other EU institutions, currently play a strong role in receiving and scrutinising data and reports on the state of the environment and performance against environmental objectives. Though monitoring and reporting requirements are being retained, many of these functions are being transferred from the European Commission to the Scottish Government, raising questions about accountability and transparency. It was therefore concerning that, when giving evidence on the SSI to domesticate the Habitats Regulations, the Cabinet Secretary did not acknowledge any governance gaps arising from reporting requirements transferring from the European Commission to the Scottish Government and the loss of independent review.

As noted in the Roundtable report, one aspect of the environmental governance gap will be the absence of capacity and expertise to scrutinise the publication of reports required under EU legislation as well as pressure to improve their quality and delivery.

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.

⁴³ <https://nbn.org.uk/about-us/where-we-are/in-scotland/the-sbif-review/>

⁴⁴ <https://www.gov.scot/publications/open-data-strategy/>

⁴⁵ <https://www2.gov.scot/Topics/Statistics/About/DataAccess>

EU scrutiny takes many forms – it may be ‘soft’ (for instance, an inquiring phone call from a colleague in Brussels), through various informal and formal stages/activities, to the ‘hardest’ being a reference to and prosecution in the European Court of Justice. It may also be ‘generic’ (for instance, a report on the implementation of Directive X) or specific (an investigation into an individual decision). All these need to be replaced by different or complementary domestic mechanisms.

However, the key issue will be loss of oversight (that is, scrutiny of plans, decisions, etc to ensure proper implementation) and which, should failure be demonstrated, can lead to enforcement (see subsequent sections). A second, but important, issue will be the loss of inter-jurisdictional comparisons, provided in, for instance, Commission reports on implementation.

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

The Scottish Government should devise ways, implemented via the proposed Environment Bill, to ensure it (and its agencies) are subject to some form of scrutiny (including inter-jurisdictional comparisons if possible). This should be conducted by a body that is not part of the “executive branch” – otherwise a situation will arise where one part of government is ‘marking the homework’ of another.

As such scrutiny is not, strictly a judicial matter, it thus becomes inevitable that this function should rest with the legislative branch – that is, in our case, the Scottish Parliament. However, this is a new function – it is an activity that existing Committees/structures do not have within their current remits and are not resourced/supported sufficiently at present to undertake. For instance, were it to be assumed that this function could simply be carried out by the Environment, Climate Change and Land Reform Committee, it would legitimately be asked, given their current work programme, how and when would this be possible? Moreover, such resources would need to include expert staff as well as the ability to commission external expertise.

To be properly independent of Government, but linked to Parliament, the function should rest with a body with the independence of Audit Scotland. Indeed, there is merit in considering whether (subject to adjustments of powers and duties, and provision of additional resources) Audit Scotland might take on this role – with the Public Audit and Post-legislative Scrutiny (PAPLS) Committee of the Scottish Parliament’s remit being widened to include oversight of this role. In relation to the latter question, we note that Westminster has an Environment Audit Committee (as well as a select committee overseeing Defra and the Public Accounts Committee). An extended remit for the PAPLS Committee (or a new Committee or sub-Committee) would be akin to the EAC role – which may also expand its role in any post-Brexit scenario.

Audit Scotland and the PAPLS Committee should be also empowered to report on whether sufficient resources have been allocated to the different parts of Government and its agencies for the delivery of its these environmental policies.

In addition to the above independent scrutiny (both via Audit Scotland and Parliament), there may be a case for this to be supported by additional remits for Ministers (and agencies such as SNH, SEPA, etc) to be more transparent about their work, to publish more detailed information on decision-making and to commission and publish analysis by (independent) assessors (academics, NGOs, international networks, etc). This would aid scrutiny by stakeholders, media, Parliamentarians, etc – as well as provide valuable source material for Audit Scotland and the new Audit Committee.

Alternatively, or preferably additionally, scrutiny functions should also be undertaken by a new independent ‘watchdog’ body. Such a body is certainly required for the consideration of complaints and the investigation of specific cases, but it may also usefully perform generic advisory and/or scrutiny functions.

A crucial issue that must be within the remit of this scrutiny (whether by Parliament, (an expanded) Audit Scotland and/or a new independent watchdog) will be the issue of resources. The scrutiny bodies require, as discussed above to be adequately resourced, but they should also be empowered to scrutinise the Government’s allocation of resources to its environmental functions (both within the

Scottish Government itself and via local authorities or agencies). This scrutiny of resources will not be simply about “is there enough money?” – but should also cover value for money, return on investment, cost-benefit assessment and comparisons with alternative strategies (for instance, effective scrutiny might highlight damaging spend in other policy areas that might be reduced to benefit the environment).

While it is important that Parliament, (an expanded) Audit Scotland and a new independent watchdog do not replicate activities, they may all be necessary – with clearly defined roles and responsibilities.

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

While we agree that “there is no simple way to define the scope of environmental policy” (para 71), we believe it is possible and should be done. The lists provided in annex A of the consultation paper are a good start.

However, we would approach matters the other way – rather than seek to define “environmental policy”, it may be better to consider “policy that has the potential to affect the environment”. This is the approach adopted in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repeated in the Environmental Information (Scotland) Regulations 2004.

Thus, the scope of any scrutiny function would be any law, policy or decision that impacts on: -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)⁴⁶.

As suggested above (question 2), this approach may also be adopted to define the scope of laws and policies to which the environmental principles would apply.

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

It will be significant – a major loss. While used relatively infrequently, it provides an essential and affordable legal recourse for individuals and organisations concerned about public authorities’ implementation of environmental legislation to seek an investigation/redress. As with any ultimate legal recourse, the power of this mechanism is less its use or application, but rather its availability. That is, it provides a mechanism for accountability and is thus an important mechanism for ensuring access to justice. By ‘being there’ (even if used rarely), it also encourages public authorities to

⁴⁶ From Reg. 2 of the Environmental Information (Scotland) Regulations 2004

engage and respond positively at an early stage – in order to try and avoid potential complainants resorting to the complaint procedure.

Such a procedure is not available from domestic processes. At present, the only comparable processes are Parliamentary inquiry or the Judicial Review. Both of these processes are severely limited. For example, Parliamentary inquiries will rarely examine individual issues, but are generally targeted at wider policy matters. Meanwhile, Judicial Review is both prohibitively expensive for most individuals and NGOs and therefore is effectively inaccessible; it is also purely procedural in nature⁴⁷. These factors are known to deter citizens/NGOs seeking such action, a fact that is also known to public authorities. These options are, therefore, no replacement for EU compliant mechanism.

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.

If the Scottish Government is serious that it wishes “*to maintain or exceed EU environmental standards*” it is essential that a new function to replace the EU complaint mechanism is established. This will, in all likelihood, require the creation of a new body to undertake this function. We observe that such a conclusion has already been reached by the UK Government and Parliament, and that the proposed Office of Environmental Protection (notwithstanding issues with its nature/remit) would implement this function in England (and for reserved matters).

However, while this new function is clearly necessary, there is no one, single and simple answer (‘silver bullet’) to how it should be implemented and who should undertake it. There is no doubt that existing public authorities could, and should, improve their systems of monitoring and reporting (see above); and that Parliament could, and should, improve its scrutiny roles (including the new audit arrangements suggested above). These improvements, however, must be accompanied by a clear – and independent from the previous processes – mechanism to allow citizens/NGOs to raise specific complaints, for those complaints to be investigated and the appropriate remedies required.

It may be possible to implement access to justice improvement in Judicial Review (especially on costs and merits), to comply with the Aarhus Convention fully and properly. This should be considered, and action taken in any event – however, it is no substitute for the EU complaint mechanism or a proper replacement.

In our view, there is a need for a new independent ‘watchdog’ body to administer and undertake investigations of such complaints. We note with interest that the UK Government is already committed to such an approach with the OEP proposed to have this role – and, indeed, with interim measures being developed in case of a ‘no deal’ Brexit in advance of the establishment of the OEP. A Scottish ‘watchdog’ body must be genuinely independent of the Scottish Government (established by and accountable to Parliament) and be empowered/resourced to undertake scrutiny and investigations – as well as, ultimately, if any investigation is unresolved, to issue notices of remedy and/or make a reference to an appropriate Court. Only with such powers, resources and rights, would a ‘watchdog’ become a sufficient replacement for the EU complaint mechanism - where, it must be stressed, the ultimate sanction, for the Commission, should it consider that a Member State is in breach of its environmental obligations is to refer that State to the Court of Justice.

This then leads to the issue of what is an appropriate Court as well as its rules of operation and powers of remedy. This is addressed in our response to question 13.

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

⁴⁷ And, thus, arguably non-compliant with the Aarhus Convention.

Whilst it is impossible to speculate on future impacts, there are important potential repercussions arising from the loss of a mechanism of accountability.

There is a clear and yawning gap between this, previous and, probably future Governments' rhetoric and their actual delivery of environmental outcomes. As discussed above and evidenced in the Roundtable's report⁴⁸, the EU's enforcement powers provide a 'backstop' role and, thus, an incentive to achieve environmental compliance.

In the absence of such a 'backstop', it is more than likely that future governments (and other public sector actors) will be tempted to de-prioritise environmental actions and/or to favour activities providing short-term political benefit that harm the environment. There is, therefore, a clear risk that without the "backstop" of EU enforcement, this gap between rhetoric (including international commitments) and actual delivery will widen.

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?

In addition to the improvements in monitoring and reporting, as well as scrutiny (by Audit Scotland, the PAPLS Committee and/or the new 'watchdog' body), all discussed above, there is a need for the new independent 'watchdog' body to have powers to refer alleged non-compliance to a Court. This then leads to the issue of what is an appropriate Court as well as its rules of operation and powers of remedy.

Scottish Environment LINK believes that there is a clear case that this Court should be, in the first instance, an environmental court. We consider that the case to re-open the debate on the benefits of an Environmental Court is unanswerable. To properly address an issue, referred to it as a result of a complaint, any Court must be fully Aarhus compliant – that is, *inter alia*, not prohibitively expensive (to the complainer) and able to fully consider the merits of the case. It must also have powers of appropriate remedy, including the ability to quash unlawful decisions and order remedial actions. Simply empowering any new investigatory body with the right to refer an issue to the existing Courts (whether a Sheriff Court or the Court of Session) under any current procedure would fail to replicate the compliance mechanisms of the EU systems.

In relation to the issue of environmental courts, we note that, following the last consultation on environmental justice matters⁴⁹, although Ministers decided not to proceed further with this issue at the time, this was based, in part, on Brexit uncertainty – and they resolved to keep the matter under review. In announcing that decision, Scottish Ministers said: -

*"The variety of views on what sort of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape caused by Brexit lead Ministers to the view that it is not appropriate to set up an [sic] specialised environmental court or tribunal at present. The Government will, however, remain committed to environmental justice and will keep the issue of whether there should be an environmental court or tribunal or even a review of environmental justice under review"*⁵⁰. (emphases added)

Accordingly, as the eventual outcome of the Brexit becomes known during the period that Ministers are considering the responses to this consultation, Scottish Environment LINK considers any comprehensive replacement for the EU complaints mechanism should include the establishment of an environmental court. The Scottish Government should, therefore, move swiftly to establish an expert group with a remit to consider the establishment and operation of such a Court and to make

⁴⁸ <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>

⁴⁹ In which it was notable that 16 out of the 21 responses that addressed the question, supported the establishment of an environmental court: see <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/pages/4/> (para 47 and table 3).

⁵⁰ <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/pages/2/>

recommendations⁵¹. These recommendations must then form part of a comprehensive “post-EU governance system”.

Of course, should the above argument not prevail, it remains necessary for the new ‘watchdog’ to be empowered to make references to a Court. In the absence of an environmental court, this would – presumably – be a Sheriff Court or the Court of Sessions. That would be a matter for any Government who chose not to establish an environmental court – but no adequate replacement for EU governance could be delivered without the ultimate sanction of a reference to Court.

Finally, both the ‘watchdog’ body and the Court must be empowered, as and when the case merits, to require appropriate remedies. These should include: -

- the power to quash decisions;
- the power to order certain legal or administrative actions to be taken;
- the power to require certain management measures/restoration.

In recommending the above solution, it should be noted that we would not expect many issues raised with the ‘watchdog’ body to reach the final stages of Court action. Although the ‘hard’ powers of scrutiny under these processes must be available, it is important to stress that ‘softer’ mechanisms of review/engagement, both formal and informal, should also be available and used. This will include private and public discussions with the media, with NGOs or business, and with Parliamentary Committees – but also potentially more formal mediation or arbitration.

The role of the ‘watchdog’ body should be varied (as in the case of the Commission) – the ‘rules of engagement’ should enable a wide range of actions - from “informal” compliance role, to early investigations, formal warning letters, etc. Court action should be a last resort – to be used only when other compliance actions are ignored or have failed.

Additional comments – on matters of ‘post-Brexit governance’ not addressed by the paper’s questions.

1. UK dimension:

The consultation questions do not address the issue of the UK dimension – whatever the shape the outcome of Brexit takes, Scotland will continue to operate in a shared environment with the other UK countries. While our future relationship with the UK is another legitimate political question, it is inevitable that many environmental issues will be cross-border and/or require co-ordinated approaches – or that, if Scotland wishes to live up to Ministers’ rhetoric, it will want to exceed standards elsewhere and/or prevent any ‘race to the bottom’.

These issues were discussed in the Roundtable sub-group’s report (see para 5.11-5.17) and subsequent to that report the UK Government has developed further proposals, including draft clauses for its Environment Bill) and the Welsh Government has now published a consultation.

In these circumstances, whatever the next steps, there should be a discussion with the UK Government and that of Wales/NI to address the UK-wide governance gap. In the view of Scottish Environment LINK (and other Greener UK partners), there are four outcomes that must be delivered by any future pan/intra-UK governance mechanisms, within and respectful of the current/future devolution settlements. These are listed and described in box 3, below.

Box 3: Four environmental outcomes that require new intra-UK governance mechanisms after Brexit

1. A co-ordinated transboundary approach to managing shared environmental resources

⁵¹ While this (and other) questions in the consultation paper relate to a replacement for the EU complaint mechanism and one role of an environmental court would be a final arbiter in addressing any such complaints, such a court should also be part of the current Scottish Courts system and accessible to litigants on any relevant matter (related or unrelated to compliance with EU/international law).

Environmental processes do not recognise borders, so the UK and devolved governments need to ensure co-operation on a range of transboundary issues, such as managing river catchments, invasive species, cross-boundary protected areas and air pollution.

2. A race to the top, with no backsliding

If environmental policymaking takes place completely independently in each of the four countries, there is a risk of inadvertent confusion, undermining of each other's aims, or, in the worst case, a race to the bottom with deregulation for competitive advantage. To support the integrity of the internal market and prevent unfair regulatory competition, there need to be minimum common standards across the UK. But to ensure each government is constantly striving towards a healthier environment and nature's recovery, there should not be a ceiling to anyone's ambition.

3. International credibility

Although the UK government is the sovereign state that participates in multilateral discussions and is the formal signatory to international agreements, the devolved administrations have full or partial responsibility for delivering on such commitments. To ensure the UK's international promises are credible, mechanisms are needed to translate them into progress on the ground in each country. This includes relevant provisions in the Withdrawal Agreement with the EU (if approved), and any future trade deals.

4. Accountability, transparency and access to justice

Trusted institutions and processes, such as dispute mechanisms, are required to underpin the delivery of all the above. New robust, transparent and well-resourced domestic governance arrangements will need to replace functions currently carried out by EU institutions in securing compliance with common standards across the four nations. People across the UK need to have equivalent access to information, participation in decision-making and access to justice as set out in the Aarhus Convention. These new arrangements will need somehow to be shared or co-ordinated across the UK, while working with the different systems of accountability and respecting the devolution settlements.

LINK therefore urges the Scottish Government to work with the other Governments of the UK to develop governance arrangements that take account of this UK dimension⁵². This will include consideration of whether the Scottish 'watchdog' will either need to be part of a (co-designed) UK body or the separate bodies for each jurisdiction will need to have a duty to carry out their functions jointly (with a form of joint – or several) accountability for UK-wide matters. Notwithstanding the foregoing, of course, in relation to devolved matters, both the scrutiny and 'watchdog' roles must be accountable to the Scottish Parliament and any legal matters addressed under Scots law within the Scottish Court system.

On the UK dimension, we note the Scottish Parliament's Finance and Constitution Committee's recent report on the issue of Common Framework has also addressed this issue⁵³. Its view based on the Roundtable's report was that: -

“Given many environmental issues cut across national boundaries within the UK, and also for reasons of compliance with international standards and effectiveness and efficiency, there were thought to be advantages of a single UK body. On the other hand, a Scottish body with a thorough understanding of Scottish law, procedures and systems could be more focused on the issues that are most significant in a Scottish context, and Scotland was thought to be of a scale at which a separate body could be justifiable and effective. A Scottish body could also be part of a system of wider arrangements across the UK to allow collaboration, comparisons, efficient use of expertise and promotion of best practice.”

The Committee concluded: -

⁵² Note: our fellow LINKs and NGO partners in London, Cardiff and Belfast will be urging their respective Governments to act similarly. Lack of proper UK-wide consideration, at present, can be laid at the door of all the governments!

⁵³ <https://sp-bpr-en-prod-cdneq.azureedge.net/published/FCC/2019/3/25/Report-on-Common-Frameworks/FCC-S5-19-04.pdf>

“Whatever the final governance arrangements for each framework we consider that, in order to respect the devolution settlement, those who exercise oversight in relation to devolved areas should be accountable to the Scottish Parliament. This is irrespective of whether those functions are undertaken by new or existing Scottish or UK bodies. We therefore request confirmation from the UK and Scottish Governments that common frameworks will reflect this approach.”

2. Brexit or no Brexit?

Notwithstanding the Brexit backdrop to this consultation and the responses above, the Scottish Government should note that – even if the outcome of the current political turmoil is that we remain in the EU – there is still a clear case for action on many of these matters. For instance: -

- As is the case with Human Rights, internationally accepted environmental principles may be better observed and implemented if incorporated in domestic legislation. Thus, notwithstanding the primacy of EU law while we remain (or return to being) a member, the EU environmental principles could and should be incorporated in Scots law. For the other principles, for which there is no primacy, there is an even greater case for incorporation whatever the outcome.
- In relation to scrutiny, while the workload may be reduced if the Commission role is retained or returned, there remain benefits in domestic scrutiny and the Scottish Government (and Audit Scotland and the PAPLS Committee) should consider whether more effort is required in this area.
- In relation to compliance and enforcement, previous environment justice consultations have highlighted clear deficiencies in our current (within the EU) system. Foremost of these are the issues of Aarhus compliance and the case for an environmental court. These must be addressed whatever the outcome.
- Similarly, the case for an environmental strategy, as well as it being underpinned by statute with statutory targets for nature’s recovery, remains strong whether we are in the EU, in any form relationship with the EU or any other outcome of the Brexit debate.

Conclusion

Planet Earth is currently facing two linked existential crises – climate change and biodiversity loss. Both these crises are human-induced, and require urgent action, especially Government-led policy action, to be addressed. These challenges would be both important and difficult at any time. However, with 80% of our environment law being derived from EU law, the potential for the UK to leave the EU (“Brexit”) makes them even more important and difficult. However, with commitment, LINK believes these are challenges that can be met – if decisive and speedy action, including new legislation, is taken.

Scottish Environment LINK engaged with the environmental implications of the UK’s referendum on membership of the EU as soon as it was announced⁵⁴, and has continued this work since the result was announced⁵⁵. As well as seeking to influence the debate in Scotland, LINK and its members have also engaged with the debate at UK level, both directly and with partners in Greener UK⁵⁶. As members of the EEB, we have also sought to engage with discussions at European level.

LINK therefore warmly welcome the publication of this consultation, and its consideration of all the issues raised by the Round Table sub-group’s report. However, LINK and its members did indicate some disappointment that, while highlighting the issues that need to be addressed, it makes no specific proposals and offers no suggested timetable for doing so. We hope the responses to the paper’s questions (set out below) will help enable the Scottish Government to reach conclusions, and swiftly plan/announce its intentions. On basis of those answers, LINK and its members consider that the Scottish Government must announce its intention to introduce an Environment (Scotland) Bill during the remainder of this Parliament. Such a bill should have at least three parts, namely: -

- **To embed EU and international environmental principles in Scots law so that they can underpin all environmental decision-making.**

This should include a duty to apply the four EU environmental principles, but also additional duties in relation to some, or all, the other principles mentioned in the consultation paper. Consideration should also be given to a “keeping pace” or “highest international standards” duty. These duties should be accompanied by a statutory requirement to produce (subject to stakeholder involvement, consultation and Parliamentary approval) a policy statement to guide implementation.

- **To set up an independent watchdog to enforce environmental protections.**

- (a) Improve monitoring and reporting – as well as publication - by existing bodies, including both the Scottish Government itself and its agencies;
- (b) Empower Audit Scotland and the PAPLS Committee with an environmental remit to provide scrutiny – of both environmental policy and its delivery, including resource allocation;
- (c) Establish a new body to initiate inquiries (into policy/delivery), investigate complaints from public and enforce environmental law – with the power to publish own reports, report to AS/PAPLS Committee and refer cases to the Courts, including an environmental court.

Although the ‘hard’ powers of scrutiny under these processes must be available, it is important to stress that ‘softer’ mechanisms of review/engagement, both formal and informal, should also be available and used. This will include private and public discussions with the media, with NGOs or business, and with Parliamentary Committees – but also potentially more formal mediation or arbitration.

- **To set clear targets for environmental protection alongside adequate financial resources.**

While all the above would mitigate the impacts of any exit from the EU, a new overarching environmental objective and a clear statutory duty to develop and publish an environmental strategy, setting out Scotland’s environmental objectives and complemented by clear targets, milestones and indicators are also needed. This would both replace the objectives set out in Art.

⁵⁴ <http://www.scotlink.org/public-documents/the-eu-and-our-environment/>

⁵⁵ <http://www.scotlink.org/work-areas/brexit-information/>

⁵⁶ <https://greeneruk.org/>

191.1 of the TFEU, as well as provide a purpose and rationale for the implementation of the environmental principles and a 'benchmark' against the new governance processes could assess and, if necessary, enforce progress. This new overarching aim must encompass both environmental protection and restoration/enhancement.

As part of this governance, Audit Scotland and the PAPLS Committee should be empowered to report on whether sufficient resources have been allocated to the different parts of Government and its agencies for the delivery of these environmental objectives/targets.

This bill, and the governmental actions associated with it, should be better co-ordinated with similar steps being taken in other part of the UK.

Many of the actions described here may not be necessary if political developments result in a 'no Brexit' outcome; however, as illustrated in our answers, there are many existing deficiencies (e.g. Aarhus compliance) that need to be addressed whatever the outcome. In contrast, if a 'no deal' Brexit is the outcome, the Scottish Government should ensure interim arrangements are in place for the end of October.