



## Summary

- LINK welcomes the previous unanimous support of the Scottish Parliament to retain the four EU environmental principles once the UK exits the EU. LINK also welcomes the Scottish Government's proposal to place a new legal duty on Scottish Ministers to consider to these principles when drafting policy and legislation, though urges that the current wording of the duty is strengthened to ensure Ministers act in accordance with the principles.
- LINK strongly supports the inclusion of a 'keeping pace' power in the forthcoming Continuity Bill to allow Scotland to keep pace with EU law and policy. This power should be linked to additional provisions to achieve non-regression of environmental standards.
- With 80% of current environmental protections stemming from EU legislation, Scotland must urgently put in place new measures for environmental governance. LINK strongly recommends an independent Parliamentary Commissioner for the Environment is established to act as a watchdog, with sufficient powers and resources to monitor and enforce, and that a dedicated Environmental Court is set up to receive public complaints.
- The forthcoming Scottish Environment Strategy must set future goals and aspirations for the environment, including measurable targets for nature's recovery, underpinned by legislation to ensure real progress.
- Common Frameworks between UK and devolved administrations must use existing EU legislation to establish a common baseline from which individual countries can pursue more ambitious standards.

## 1. EU environmental principles

### The Four Environmental Principles and the proposed duty

EU law and policy is based on four environmental principles: the precautionary principle, 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. These principles are enshrined in the EU treaties and will no longer apply once the UK exits the EU. LINK strongly welcomed the unanimous support by the Scottish Parliament to pass amendments to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill to retain these principles. We have also supported the activity that the Scottish Government has been undertaking to establish the future of these principles in Scotland through the *Environmental Principles and Governance consultation*.

The Scottish Government has proposed to "address the loss of legal force for the EU environmental principles through a new legal duty on Scottish Ministers to have regard to the four EU environmental principles in the development of policies and legislation". LINK supports the proposal to apply a duty to the principles, but we have advised that the proposed scope and wording of the duty are too weak to ensure implementation. It is



LINK's view that if the duty is to maintain equivalence with the current EU arrangements - where the principles play a role in interpreting the law, in guiding future decision making and as a basis for legal challenge in court - then the duty should apply to all public bodies and their functions, where those bodies/functions may impact on the environment. The wording of the duty should also be strengthened from 'have regard to' to 'act in accordance with' – this would be equivalent to the Lisbon Treaty's requirement that policy "shall be based on" these principles.

### Other principles

LINK would strongly support powers to add further principles to the duty once they have been duly considered, or exploration of alternative ways to enshrine other key principles in law. LINK is particularly concerned about the loss of the Integration Principle, which is also embedded within the EU treaties and requires that environmental protection is integrated into all other policy areas and activities, with a view to promoting sustainable development. This principle will be key to tackling the climate and nature emergencies, and achieving the vision and outcomes of the forthcoming Environment Strategy. If this principle is not included in the Continuity Bill it could be legislated for as an overarching objective of government policy in future legislation, such as a Scottish Environment Bill.

### 'Keeping pace' power and non-regression of environmental standards

LINK strongly supports the proposal to incorporate a 'keeping pace' power within the forthcoming Continuity Bill, to allow Scotland to keep pace with EU law and policy where possible. LINK suggests that this 'keeping pace' power should be linked to provisions to achieve non-regression of environmental standards. Non-regression of environmental standards has been the focus of recent public debate and has been developed as a principle in international environmental policy by e.g. the IUCN. Given that commitments to non-regression have been removed from the legally-binding Withdrawal Agreement and moved to the non-binding political declaration, there is a risk of environmental standards being weakened by future trade agreements between the UK and other countries, such as the US or China.

The Scottish Government has made welcome commitments to maintain or exceed EU standards and not engage in a race to the bottom in environmental standards across the UK. Linking the proposed 'keeping pace' provision to non-regression would help ensure that Scotland's strong environmental protections are not rolled back whilst at the same time keeping track of the latest policy and science.

## 2. Future options for environmental governance in Scotland

Scotland has strong standards for environmental protection, but to date we have relied on EU arrangements to implement and enforce these. Leaving the EU would create an environmental 'governance gap' as the oversight and enforcement roles currently undertaken by the EU Commission, EU Court of Justice and other EU bodies will no longer apply. The Scottish Government committed in its 2019-20 Programme for Government to include measures on environmental governance in the upcoming Continuity Bill. LINK has welcomed this but is urging



that any measures on environmental governance contained in the Bill must be meaningful, adequate and equivalent to existing EU processes.

To aid this, LINK has built on the work begun by the Scottish Government's Expert Roundtable and commissioned a report, undertaken by Professor Campbell Gemmill, to consider future governance arrangements which Scotland could adopt post-Brexit, following best practise from other countries. The report recommends the Scottish Government:

- **Creates a new, independent watchdog for the environment**

A Scottish Parliamentary Commissioner for the Environment must be created as a response to leaving the EU. The Commissioner's role would be to: ensure that environmental protections are being implemented and enforced correctly; receive public complaints about failures to protect the environment; and investigate potential breaches of environment law with the power to refer serious cases to the Courts.

The Scottish Parliamentary Commissioner should be appointed by and accountable to Parliament in order to be fully independent of government and provide effective accountability. Appointing a Commissioner to begin establishing their role and remit during the current transition period (until December 2020) would go a long way to mitigating problems created by the governance gap.

The key test for an environmental watchdog, whether a Parliamentary Commissioner or another model, must be its independence from government and its agencies, and that it has sufficient powers and adequate resources to enforce, investigate and refer breaches of environmental law.

- **Establishes a dedicated Environmental Court**

A dedicated Environmental Court should be brought in over the longer term, building on the findings of the 2016 Environmental Justice consultation. This specialised court would work alongside the Commissioner, to provide a specialist forum to hear cases relating to the environment and determine more appropriate remedies than can currently be applied through the narrow scope of Judicial Review. Irrespective of Brexit, the current system for bringing environmental cases to court is prohibitively expensive and does not meet the conditions for accessibility under the Aarhus Convention; an Environmental Court would address this failing as well as strengthen Scotland's response to leaving the EU.

### **3. Priorities for the Scottish Government's Environment Strategy**

Scottish Environment LINK welcomes the Scottish Government's initiative to develop a strategic approach on environmental policy. Strategic direction is a critical step in achieving the step change in ambition and action needed to address the nature and climate emergencies. Whilst we recognise the strain that Brexit has placed on



resources and capacity, the urgency of these global environmental crises has become increasingly clear, and it is critical that this strategy is progressed and put into action as soon as possible so that Scotland does not fall behind action elsewhere in the UK and internationally.

In order to move beyond welcome ambition and lead to measurable, on the ground improvements for the environment, the strategy must:

- Define future goals and aspirations, including measurable targets for nature's recovery and indicators for achieving them, underpinned by legislation to ensure real progress;
- Provide a science-based overview of the state of the environment, including past and current trends;
- Identify priority actions and provide timeframe for delivery of set actions;
- Set out a clear governance framework for the delivery of actions, including regular review of actions and the Strategy itself; and
- Identify clear funding streams for taking forward those actions.

Some priorities for action should include:

- Protecting, restoring and expanding Scotland's most important habitats for climate and nature, including native woodlands, peatlands, coastal and marine habitats;
- Ensuring that Scotland's protected areas are effectively managed, monitored and on a trajectory towards favourable condition;
- Creating a Scottish Nature Network that restores and connects habitats and allows species to move throughout our landscapes;
- Achieving clean, healthy and biodiverse seas through ecosystem restoration, effective management of protected areas, and halting overfishing and pollution;
- Implementing an integrated approach to land management through Scotland's Land Use Strategy and Regional Land Use Frameworks;
- Eradicating wildlife crime; and
- Supporting a transition to a Circular Economy.

#### **4. UK Context and Common Frameworks**

##### **Common Frameworks**

Nature and environmental challenges cross borders and joint working will be necessary to tackle the nature and climate emergency. A collaborative and joint approach, which respects devolution settlements across the UK



and where all administrations are involved in a meaningful way, is needed to ensure that environmental standards are protected and enhanced. Ambitious common environmental standards would ensure that there is no drive towards environmentally damaging competitive deregulation in any part of the UK. LINK suggests frameworks be based on existing EU legislation, which should act as a common baseline on top of which individual countries can pursue more ambitious standards.

In terms of a new governance regime, common frameworks will need to address:

- Collaboration between the Scottish Parliamentary Commissioner and the soon to be established Office of Environmental Protection along with other bodies for Wales and Northern Ireland on shared governance arrangements;
- Information-sharing on cross-border and international matters;
- Agreement on common interpretation and application of the EU environment principles, to be enshrined in UK and devolved legislation;
- Arrangements, where appropriate, for joint working or the determination of lead bodies for 'joint' cases;
- Agreement and monitoring of common minimum standards, and the report of progress;
- A secretariat with responsibility for coordinating approaches across the UK;
- Adequate, fair and transparent environmental funding arrangements; and
- Clarification of governance arrangements for reserved functions carried out by statutory agencies in Scotland, and devolved functions carried out by UK agencies in Scotland.

#### UK trade agreements and the UK internal market

It is vital that the UK commits to non-regression of environmental standards, to provide a safeguard against weakening of environmental protections in the future. The revised Withdrawal Agreement Bill passing through Westminster has removed an earlier commitment to non-regression. This could allow the UK Government to drive down environmental standards in order to form trade deals with other countries that have lower standards, including the US and China. Despite the Scottish Government's welcome commitment to maintain or exceed current environmental standards, in such a situation, Scotland would come under considerable pressure to weaken environmental standards in order to align with the wider UK internal market. It is imperative that the Scottish Government seeks a formal commitment from the UK Government to non-regression of environmental standards. Of course, even if the UK Government refuses such a commitment, the devolution settlement permits the Scottish Government to make such a commitment in relation to issues where it has authority – such a commitment would be consistent with its policy of continued alignment with and possible re-entry to the EU.



**This statement represents the consensus view of LINK's Governance Group. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.**

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.

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