



Summary

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

With nature and the climate in crisis - and a green recovery from the Covid-19 pandemic essential - Scotland must not lose crucial environmental safeguards as the UK exits the EU. Around 80% of Scotland's environmental protections currently stem from EU legislation, which have had a positive impact on our environment. However, nature continues to be under threat, with the State of Nature Scotland 2019 report finding 1 in 9 species in Scotland is threatened with national extinction and declines in wildlife across the board. Leaving the EU without robust environmental protections and standards in place risks driving further decline at the very time we need to take bold action to tackle the nature and climate crisis while making sure nature is at the heart of a green recovery. These issues are not separate to economic considerations - for example, Scotland's £6bn tourism sector and £14bn food and drink sector depend on a thriving environment.

LINK members welcome the publication of the Withdrawal from the European Union (Continuity) (Scotland) Bill to embed key environmental principles in Scots law and put in place new environmental governance arrangements. However, the draft Bill falls short of matching Scottish Ministers' stated ambitions to "maintain or exceed EU environmental standards." **As a priority, the Bill must:**

- Include a specific duty to use keeping pace powers to deliver high environmental outcomes.

In addition, in evidence submitted to the ECCLR Committee, LINK has highlighted the need for the Bill to:

- Strengthen the watchdog: ensure its independence and extend its powers to investigate casework.
- Include a commitment to future Nature Recovery Targets.
- Strengthen the duty on Scottish Ministers to act in line with environmental principles.
- Broaden duties on Ministers and other public bodies to apply environmental principles.
- Require that any guidance on application of the principles is informed by public consultation.
- Ensure the watchdog has secure, transparent funding.
- Make provision for continued oversight following any legal judgement.
- Clarify the definition of 'environmental law' and address the implementation of international law.
- Ensure any interim watchdog has a transparent public appointments process and confirm its powers to take enforcement action on complaints.

1. What are the implications of the keeping pace power in the Bill potentially leading to substantial policy divergence with the rest of the UK following the end of the transitional period?

We welcome the introduction of the keeping pace power through this Bill. Scottish Environment LINK and our members have been calling for such powers to enable Scotland to continue to maintain high



environmental standards following the end of the EU transition period. Environmental standards are critical for addressing the nature and climate emergency and delivering a green recovery from the Covid-19 crisis, to which the Scottish Government has already made welcome commitments. The Bill allows Scottish Ministers to continue to align with the EU on environmental matters - a welcome proposal as EU ambition on the environment has been driven forward through a number of emerging EU programmes including its Farm to Fork strategy, Circular Economy Action Plan, Biodiversity Strategy 2030 and the Green Deal proposals. Keeping pace powers allow Scotland to remain aligned with these positive developments and uphold the Government's commitment to "maintain or exceed environmental standards."¹

LINK members believe Part 1 of the Bill should be amended to specifically require Scottish Ministers to use keeping pace powers to deliver high environmental outcomes. Currently the draft Bill enables Ministers to align with changes in environmental law at the EU level but it does not require them to do so. This leaves open a significant risk of backsliding on environmental standards, whether in the short term or under a future government. The commitment to "maintain or exceed environmental standards" cannot be firm unless Ministers have a duty to keep pace on environmental matters.

Scotland remaining aligned with the EU will not cause divergence but instead will maintain the current status quo as a baseline. However, any backsliding of standards elsewhere in the UK will cause divergence, and place pressure on other nations to deregulate, and so **commonly agreed minimum standards are essential**. This should be set out in common frameworks that are developed and mutually agreed between the UK Government and devolved administrations. The standards should allow for flexibility to local circumstances and minimum standards should not constrain any of the four countries from developing higher standards in areas of devolved competence where they choose to do so.

For the last 40 years, significant policy divergence has been constrained by EU membership which has provided an overarching common framework. LINK has previously emphasised² to the Committee the need for common objective and minimum standards in a number of crucial environmental areas in order to safeguard our natural environment and continue to address cross-border environmental challenges. Any lowering of environmental standards could place our nature and climate at greater risk and damage Scotland's overseas trade reputation. LINK members believe common minimum standards are required to secure a common starting point from which policy divergence can take place at the discretion of each nation's government.

It is vital that there is good cooperation between the new environmental watchdogs covering the four nations of the UK, including Environmental Standards Scotland (ESS) as created by this bill and the UK Government's Office for Environmental Protection (OEP). Cooperation will help ensure policy areas which are devolved but have UK-wide impacts are appropriately dealt with. For example, water is devolved but non-compliant discharges can cause pollution which impacts water quality in both Scotland and England. Cooperation is also essential to ensure that reserved environmental issues which have impacts for Scotland are captured, and to ensure that any UK bodies carrying out devolved functions in Scotland and devolved bodies carrying out reserved functions are adequately covered. Additionally, cooperation between the ESS and OEP will allow space for policy learning and transfer between the two new environmental bodies.

¹ Letter to ECCLR Committee from the Cabinet Secretary for the Environment, Climate Change and Land Reform, October 2019. https://www.parliament.scot/S5_Environment/ECCLR_20191024_Cab_Sec_ECCLR_-_EU_Exit_preparations.pdf

² See LINK's evidence on the UK Internal Market in February 2020. <https://www.scotlink.org/wp-content/uploads/2020/03/Finance-and-Constitution-Committee-UK-Internal-Market-LINK-Response.pdf>



2. What are your views on the proposals within the Bill for the Scottish Government to voluntarily maintain regulatory alignment with EU law in devolved areas using secondary rather than primary legislation?

LINK members are content with the proposals to maintain alignment through secondary rather than primary legislation. This allows already limited parliamentary time to be saved and for keeping pace powers to be used effectively to match developments at the EU level.

However, it is vital that Parliament has the time and resources to adequately scrutinise secondary legislation arising from the use of the keeping pace power. Section 4(2) of the Bill specifies that the affirmative procedure is required in certain circumstances, including where regulations abolish a function of the EU but do not provide an alternative; where a function formerly of the EU is to be exercised by a Scottish equivalent; involves charging fees or changing criminal offences. LINK believes this should also include deviation from current EU environmental standards. This would mean that if there is deviation from EU standards, for example because a more appropriate implementation method has been identified for Scotland, there is oversight from Parliament and environmental standards are not compromised.

3. What are the implications of the UK and devolved governments no longer having a formal role in influencing the EU policy making process on the keeping pace proposals within the Bill?

With no formal role, the specific needs of the UK and devolved administrations will not be taken into account. However, on environmental matters, a continued close relationship between Scotland and the EU is critically important for continued cooperation on cross-border and shared environmental challenges. There are signs that the EU is being bolder on implementing policies and programmes to address the nature and climate emergencies. As mentioned in Q1 new EU initiatives have emerged in 2020 to deliver significant change in agriculture, biodiversity and building a circular economy.

The keeping pace proposals in the Bill should place a duty on Scottish Ministers to match this ambition and deliver sustainable food systems, healthy soils, the recovery of nature and wildlife, and reduce our waste.

4. The policy memorandum states that “the Scottish Government considers it necessary to give Scottish Ministers the power to ensure that Scotland’s laws may keep pace with changes to EU law, where appropriate and practicable.” The Committee would welcome your views on how wide-ranging this power is likely to be given the following statutory and non-statutory constraints –

a. Compliance with UK international obligations including future trade deals and other international agreements;

We share the concerns of other third sector organisations that there must be greater transparency, parliamentary scrutiny and involvement from all devolved parliaments and stakeholders in the negotiation of post-Brexit trade deals.³ LINK members, along with our sister organisations in other parts of the UK, have been urging for a clear commitment from the UK Government that trade deals will not negatively impact environmental standards in any of the four UK countries. A set of commonly

³ Brexit Civil Society Alliance, 2020. <https://www.brexitcivilsocietyalliance.org/resources-indexpage/wab-2nd-reading-briefing>



agreed minimum standards across the UK to support actions to address the climate and nature crises is critical. There must be clear processes in place for all four nations to be involved in the process of agreeing common frameworks for environmental standards, as well as clarity as to how common frameworks will operate in the context of trade negotiations.

A legally binding commitment to maintain environmental standards is absent from the UK Environment Bill, this makes commonly agreed minimum standards even more vital to prevent any backsliding on current standards. Given that there will be a high level of interaction between trade (a reserved matter) and the environment (a devolved matter), a common framework, or series of frameworks, is vital for ensuring environmental standards continue to be upheld.

The Scottish Parliament should have sight of and be able to comment on any international agreements, including trade deals, before ratification where they are likely to impose obligations in relation to devolved matters. There is a very real risk of sustained pressure to deregulate at the UK level in the course of striking trade deals with non-EU countries. The UK Government and devolved administrations must agree how common frameworks will operate in the context of trade negotiations.

b. Statutory and non-statutory common frameworks;

The detail of any common frameworks related to environmental matters have not yet been made public and so we cannot yet say how they may constrain Scottish Ministers ability to exercise keeping pace powers.

Any post-Brexit frameworks must be set up with commonly agreed minimum environmental standards across the UK to manage shared resources and deal with environmental problems that cross borders. This would ensure there is no drive for competitive deregulation in any part of the UK that would damage our environment. LINK believes existing EU legislation should provide the basis of common frameworks so there is no backsliding of current environmental standards. A vague or light-touch framework could constrain Ministers from keeping pace with the EU by increasing economic and political pressure to deregulate to maintain competitiveness.

As mentioned in Q1, any frameworks should respect the devolution settlements of the UK and must be jointly developed and agreed by all four nations.

Previous LINK evidence to the Committee on Common Frameworks can be [found here](#).

c. The functioning of a UK internal market;

The UK internal market will involve regulations and standards that will have a direct impact on our natural environment, including food, fisheries, chemicals regulations and more. It is LINK's view that a well-functioning UK internal market must maintain environmental standards and prevent the undermining of environmental protections for competitive advantage.

The proposed UK Internal Market Bill has enormous potential to affect the ability of all governments across the UK to achieve their environmental ambitions and NGOs to hold those governments to



account. The recently published White Paper⁴ proposes to recreate the pre-EU/EEC internal market within the UK. In LINK's view, this is a lost opportunity to shape the internal market in a way that takes into consideration the other objectives of the Devolved Administrations and UK Government.

The White Paper has a strong focus on preventing unnecessary regulatory barriers and highlights assumed disadvantages of regulatory difference - this is unfortunate as it gives the impression that the UK Government is seeking both a deregulation agenda and for remaining regulation to be uniform across the UK. The paper fails to recognise the benefits of regulation to protect the public interest and for different approaches to be taken in different jurisdictions. Providing there is agreement on common minimum standards as a baseline there is an opportunity for the UK Internal Market to be structured so as to facilitate a 'race to the top' for strong environmental standards. Indeed, the thrust of the White Paper suggests there is considerable risk of a 'race to the bottom' for standards across the UK, with no legislative underpinning to maintain high environmental standards proposed.

Without agreement of common minimum environmental standards across all four nations and a clear framework outlining the interaction of these standards with trade agreements, there is a risk Ministers' ability to keep pace with EU environmental standards are jeopardised by pressure to remain competitive. A transparent and cooperative process for agreeing common frameworks is urgently needed.

Please note, LINK is preparing a response to the UK Government's consultation on the White Paper and can make this available to the Committee following the 13th August.

5. Are there any other constraints which may affect the Scottish Ministers' ability to use the keeping pace power in the ways envisaged?

LINK members believe Part 1 of the Bill should be amended to specifically require Scottish Ministers to use keeping pace powers to deliver high environmental outcomes. Currently the draft Bill enables Ministers to align with changes in environmental law at the EU level, but it does not require them to do so. This leaves open a significant risk of backsliding on environmental standards, whether in the short term or under a future government. Given the significant threats to our environment from climate change and biodiversity loss, and the need for a green recovery from the Covid-19 pandemic, the power to exercise keeping pace provision regarding environmental matters must be strengthened to a duty.

6. The current power which Scottish Ministers have to implement EU law under section 2(2) of the European Communities Act 1972 will not be available after 31 December 2020. How does the proposed keeping pace power in the Bill compare with the current arrangements for implementing EU law?

LINK members believe that the key difference between pre-Brexit powers and post-Brexit powers proposed in this Bill lies in the requirement on Scottish Ministers to implement changes in EU law. Under the European Communities Act 1972, if Ministers failed to use the power to implement EU law the European Commission and/or Court of Justice of the EU could intervene. However, under the proposed Bill the powers to keep pace are solely at Ministers' discretion. **It is therefore vital that Environmental Standards Scotland has a role in enforcing the use of the keeping pace power.**

⁴ UK Government, 2020. White Paper, UK Internal Market Bill. <https://www.gov.uk/government/publications/uk-internal-market/uk-internal-market>



7. Is there a need for clearly defined criteria to apply to assessing whether or not to replicate any particular EU law into domestic law and, if so, should this be set out in more detail on the face of the Bill?

As set out in Q1, LINK members urge that a specific duty is placed on Scottish Ministers to use keeping pace powers to deliver high environmental outcomes. This is vital for addressing the climate and nature crises and as part of efforts to deliver a green recovery to the Covid-19 pandemic. This duty should be set out on the face of the Bill.

8. Are the arrangements for scrutiny by the Parliament of subordinate legislation made under the keeping pace power adequate?

LINK supports the scrutiny arrangements in the Bill as currently drafted, allowing for certain regulations made under the section 1(1) power to be subject to affirmative procedure. However, in line with adopting a specific duty to keep pace on environmental matters, LINK members believe the Scottish Government should be subject to parliamentary scrutiny in cases where they choose *not* to keep pace. In such cases, Ministers should be required to present a statement to Parliament explaining the reasons for the non-adoption of any EU environmental measures and seek Parliament's approval.

9. Does the Financial Memorandum reflect all of the costs of implementing the Bill?

The Bill must ensure Environmental Standards Scotland has secure, transparent funding. An effective watchdog needs the resources - people, expertise and funds - to do its job. The Bill itself contains no provisions for the watchdog's resources but will be subject to the Scottish Government's annual budget process. LINK urges Scottish Ministers to commit to multi-annual, ring-fenced funding. To ensure transparency, ESS should also be required to report annually on its funding mirroring the requirements for the UK OEP.

This response is supported by the following LINK member organisations:

Association for the Protection of Rural Scotland
Bat Conservation Trust
Buglife Scotland
Environmental Rights Centre for Scotland
Friends of the Earth Scotland
Keep Scotland Beautiful
Marine Conservation Society
National Trust for Scotland
North East Mountain Trust
Nourish Scotland
Plantlife Scotland
RSPB Scotland
Scottish Badgers
Scottish Campaign for National Parks
Scottish Wild Land Group
Scottish Wildlife Trust
Trees for Life
Woodland Trust Scotland
WWF Scotland



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