



Summary

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 38 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

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 49% of species in decline. 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.

This briefing focuses on the principles and governance measures contained in Part 2 of the Bill. For Part 1 on aligning with EU law, please see LINK's joint briefing with the Human Rights Consortium Scotland. [add link]

These provisions must be strengthened in the following key areas:

1. Achieve high environmental standards

- Include a commitment to bring forward nature recovery targets

2. Environmental Principles

- Strengthen the duty on Scottish Ministers to act in line with environmental principles.
- Include additional principles, including the Integration Principle.
- Remove the exclusion on applying the principles to finance and budgets.
- Improve the application of the principles by other public bodies
- Provide clarity on consultation processes.

3. Environmental Standards Scotland (ESS)

- Strengthen ESS's independence from government.
- Extend ESS's powers to take enforcement action on individual complaints.
- Ensure secure, transparent funding which is reported upon annually.
- Require Parliament to be part of the ESS appointments process.
- Ensure environmental expertise on the board.
- Confirm ESS will monitor compliance with international law.
- Improve the definition of environmental law.
- Commit to a future consultation on Environmental Courts.

With 80% of Scotland's environmental legislation stemming from EU legislation, it is vital that measures to close the environmental governance gap are put in place by the end of 2020. Maintaining high environmental standards is critical for addressing the nature and climate emergency as well as underpinning efforts to deliver a green economic recovery to Covid-19.

LINK members welcome the provisions in the Bill which embed the four EU environmental principles directly in Scots law, which goes beyond measures being considered in other parts of the UK, and the creation of a new watchdog, Environment Standards Scotland, to oversee compliance with environmental law. However, there are several areas where LINK members believe these arrangements can be improved to ensure Scotland has a robust replacement to the EU in relation to environmental matters.

1. Achieving high environmental standards

Commit to bring forward nature recovery targets

Scotland's Environment Strategy is intended to provide an overarching framework for existing environmental plans and to identify new strategic priorities for protecting and restoring Scotland's natural environment. However, the Strategy is currently being developed on a non-statutory basis and there is no legal requirement to ensure progress is made to deliver the six outcomes for the environment identified by the Strategy so far. Without a duty to implement action plans and monitor and report on progress to achieve outcomes, there is a serious risk that the vision and outcomes will not be prioritised in terms of resourcing and political commitment leading to an insufficient pace of action on addressing the nature and climate emergency. **The Bill presents an opportunity to place the Environment Strategy on a statutory footing, linking it to the delivery of nature recovery targets as part of achieving the outcomes set by the Strategy.**

Provisions to set nature recovery targets for England are included in the UK Government's Environment Bill. There is no commitment to similar targets for nature recovery in Scotland, despite warnings about the crisis nature faces with 1 in 9 species at risk of extinction from Scotland. Developing a set of legally-binding targets for nature recovery, with regular monitoring and reporting, would allow Scotland to be a world leader and drive action for nature recovery across all sectors as the climate change targets have successfully achieved. We note that the ECCLR Committee's Stage 1 report recognised this wider debate.

2. Environmental Principles

Strengthen the duty to act in line with environmental principles

The Bill as drafted requires Scottish Ministers to "have regard to" the four environmental principles. The EU Treaties state that Union policy "shall be based on the" four environmental principles. This is a more substantial obligation than developing policy 'having regard to' the principles. Thus, if the Bill and the Scottish Government's intention is to maintain alignment and ensure continuity with the EU, this duty needs to be strengthened.

Furthermore, it has already been noted that "have regard to" can be an ineffective duty. For example, a House of Lords Select Committee inquiry into the Natural Environment and Rural Communities Act

2006 concluded that the use of this wording in England’s biodiversity duty has been one factor in the overall ineffectiveness of the duty, and that it is “weak, unenforceable and lacks clear meaning.”¹ The House of Commons Environmental Audit Committee has also found ‘to have regard to’ to be too weak and recommended that the UK Environment Bill’s duty on the EU principles policy statement be strengthened to “act in accordance with”.²

The UK Government’s Environment Bill (Clause 18) which introduces the same four principles in relation to their responsibilities for England uses the term “have due regard to” - which is an improvement on that proposed here. **The Scottish legislation should, at least, match that for England.** We note that the ECCLR Committee’s Stage 1 report recommends that amendments be brought forward at Stage 2 to strengthen its wording.

There should also be a requirement for public bodies to report on how they applied the environmental principles during any SEA process. We note the ECCLR Committee has expressed concern about the narrowness of the application of the duty on other public bodies in its Stage 1 report.

Include additional principles, including the Integration Principle

In order to tackle the twin ecological and climate crises it is critical to ensure that non environmental policies in Scotland do not contradict the objectives of environmental policy, and effectively cancel out work to improve the state of the environment elsewhere. **Placing the Integration Principle in law will set a clear requirement and steer for all parts of Government to consider how their portfolios can contribute to nature’s recovery and achieving net zero.**

This is also essential in order to ensure continuity or equivalence with current EU arrangements, as the EU Treaties state, “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”³

We note the ECCLR Committee supported the inclusion of the Integration Principle and a high-level principle requiring a high level of environmental protection, reflecting the Treaty of the Functioning of the European Union (TFEU), be included in the Bill.

Remove the exclusion on applying the principles to finance and budgets

Budgets and finance, and the decisions made as a result of such spending arrangements, can have considerable impact on the environment and action taken to restore nature. This is particularly clear in light of the need for a green recovery from the Covid-19 pandemic, which polling for LINK found that 76% of people in Scotland favoured.⁴ They should therefore not be excluded from the application of the environmental principles. No such exclusion applies to the principles in the TFEU and, as a result, EU finance and budgets are subject to the principles. **Removing this exemption provides true continuity with EU arrangements in Scotland.** We note that the ECCLR Committee’s comments that “all decisions involving fiscal measures and capital expenditure can have a significant environmental impact and must, therefore be guided by the s.9 environmental principles.”⁵

¹ <https://publications.parliament.uk/pa/ld201719/ldselect/ldnerc/99/99.pdf>, paragraphs 206 and 207

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf>

³ [Article 11](#) of the Treaty on the Functioning of the European Union

⁴ <https://www.scotlink.org/most-people-living-in-scotland-want-a-green-recovery-from-the-covid-19-pandemic/> Full polling results available upon request.

⁵ https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf p.23

Provide clarity on the consultation processes

Section 14 of the Bill requires Scottish Ministers to consult on the guidance for applying the environmental principles. Current drafting does not specify who should be consulted, though current good practice is to ensure representative bodies are engaged. Amending the Bill to require that representative bodies with an interest in the principles are consulted ensures that current good practice is maintained as a matter of law. We note the ECCLR Stage 1 report supports “a wide public consultation on the draft guidance.”⁶

3. Environmental Standards Scotland (ESS)

Strengthen ESS’s independence from government

Our environmental laws are only as good as the institutions which uphold them, and a watchdog can only be robust and effective if it is truly independent of government. Schedule 1, paragraph 1(1) sets out that ESS is “not subject to the direction or control of any member of the Scottish Government.” However this is followed by paragraph 1(2) which includes an exception to this in the case of any future amendment to the Bill or any contradiction in a future act of parliament. This exception is unnecessary and serves only to suggest that the independence of ESS might be undermined in the future.

Removing the exception in Schedule 1 paragraph 1(2) would not prevent a future parliament from deciding differently - it would however require new legislation to do so (although Scottish Environment LINK members would be concerned by any such proposal). We note the ECCLR Stage 1 report has also expressed concerns about the exemption contained in Schedule 1. An alternative could also be to establish ESS as a fully independent Parliamentary Commission as recommended by Professor Campbell Gemmill in research for Scottish Environment LINK.⁷

Ensure secure, transparent funding which is reported upon annually

The independence of ESS depends, in part, on the adequacy of its funding. The Bill should **require Scottish Ministers to provide sufficient funding for ESS to carry out its functions** in a reasonable manner. Greater transparency about funding can also help secure more independence. **ESS’s annual report to Parliament must include an assessment of the sufficiency of its funding.** This would allow Parliament to be aware of its workload, if necessary, scrutinise future funding or encourage Ministers to provide more. We note the ECCLR Committee’s Stage 1 report recommends that “ESS is sufficiently resourced and has the capacity to act as a robust, independent governance body, able to hold the Scottish Government to account.”⁸

Require Parliament to be part of the appointments process

⁶ https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf p.20

⁷ <https://www.fightforscotlandsnature.scot/wp/wp-content/uploads/2019/10/REPORT-Environmental-Governance-effective-approaches-for-Scotland-post-Brexit-OCT-2019.pdf>

⁸ https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf p.42

In its Stage 1 report, the ECCLR Committee expressed a desire for more parliamentary oversight and involvement in ministerial appointments to ESS. **Greater involvement of Parliament would further enhance the independence of ESS.** We note that the ECCLR Committee’s Stage 1 report also expressed concern about whether the current arrangements would “provide ESS with sufficient distance and autonomy from the Scottish Government.”⁹

An alternative could also be to establish ESS as a fully independent Parliamentary Commission as recommended by Professor Campbell Gemmill in research for Scottish Environment LINK.¹⁰

Extend the powers of ESS to take enforcement action on individual complaints

The European Commission has played a critical role in the oversight and enforcement of environmental protections, in particular through receiving complaints on potential failures to apply or the misapplication of EU environment law, investigating these complaints and taking enforcement action where necessary.

This has included receiving and acting upon representations that concern individual decisions with the potential to affect the environment, such as planning applications or licensing decisions. Such cases have played a critical role in identification of more systemic problems with the application and interpretation of environmental law.

For example, action was taken forward by members of the local community to protect Scotland’s Firth of Lorn SAC from the impact of scallop dredging. When the community’s complaint to public authorities about illegal scallop dredging went unacted upon, they turned to the EU Commission’s complaints mechanism. That led to the EU’s Director General for the Environment to write to the Scottish Ministers to say that they had failed to carry out an appropriate assessment of the impact of scallop dredging had on the Firth’s protected reefs and that dredging would have to stop unless it could be demonstrated the SAC was not adversely affected.

Following an assessment by the Scottish authorities, informed by scientific research, it was found it could not be demonstrated that scallop dredging was not adversely affecting the integrity of the SAC. The result was that in 2007, the Scottish Parliament passed regulations to prevent the Firth of Lorn SAC from further dredging. The ability of the community to raise a complaint with a higher body, in this case the EU Commission, and for it to independently require the matter be investigated was crucial to the successful outcome of the complaint. This case also shows how these matters can be resolved before reaching court, with the EU Commission’s notice prompting action by the Scottish government. This ‘soft’ enforcement option isn’t available to ESS under current arrangements, as complaints would have to go straight to judicial review, a costly process both in terms of time and resources.

The arrangements for ESS must replicate the ability for citizens to raise complaints about their local environment and for ESS to be empowered to force public authorities to take action as a result.

Sections 23 and 28 of the Bill restrict ESS from using its enforcement powers in cases involving individual decisions. As drafted, the Bill places a fundamental limitation on the ESS’s powers, which tie its hands behind its back so that it can receive information about such cases but is not able to take any action to remedy issues. **Unless the limitations are removed the ESS will not provide continuity**

⁹ https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf p.35

¹⁰ <https://www.scotlink.org/wp-content/uploads/2019/12/REPORT-Environmental-Governance-effective-approaches-for-Scotland-post-Brexit-OCT-2019.pdf>

with existing EU arrangements and would represent a significant erosion of environmental governance in Scotland, as well as Scots' rights and ability to take action on the environment. A screening mechanism could be implemented to sift out trivial cases that should be dealt with through existing appeal processes.

We note the ECCLR Stage 1 report requests clarification from the Scottish Government about how an individual could raise a complaint post-Brexit and the compatibility of these arrangements with the Aarhus Convention obligation to ensure citizens have access to environmental justice.

Ensure environmental expertise on ESS Board

It is beneficial for the Chair and members of the ESS Board to be qualified and/or experienced in matters relevant to its functions. While the current recruitment process for members of the interim, non-statutory Board appears to follow this good practice, this amendment would ensure that continues to be the case in further recruitment rounds and under future governments. Such a requirement for relevant experience has previously been made for the Board of the Scottish Land Commission and it also mirrors the approach being taken by the UK Government in establishing the Office for Environmental Protection (the equivalent to ESS for England and Northern Ireland).

Improve the definition of environment law

During Stage 1, the ECCLR Committee heard evidence about the need to improve the definition of environmental law in the Bill. Scottish Environment LINK members agree with the concerns raised and **recommend the definition of the environment is borrowed from the existing Environmental Information (Scotland) Regulations 2004.** We note the ECCLR Committee supported this approach in its Stage 1 report.

Confirm ESS will monitor and report on the use of the 'keeping pace power' and compliance with international environment law

The Bill must clarify that one of ESS's functions is to monitor and report on the use of the keeping pace power (Part 1 of the Bill) to maintain high environmental standards. Similarly, it should monitor compliance with international environmental protection legislation. Making this explicit on the face of the Bill would underline the Scottish Government's commitment to (where possible) remain aligned with EU environmental standards by allowing ESS to monitor compliance with wider international law and take action if needed.

Commit to a future consultation on an Environmental Court

Whilst the creation of ESS is welcome and necessary, it will not be sufficient on its own to fill the environmental governance gap that will arise due to EU exit. The Scottish Government's Roundtable on Environment and Climate Change¹¹ and a report on Environmental Governance by Professor Campbell Gemmell¹², commissioned by LINK, found that the loss of access to the Court of Justice of

¹¹<https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2018/06/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/documents/00536067-pdf/00536067-pdf/govscot%3Adocument/00536067.pdf>

¹²<https://www.scotlink.org/wp-content/uploads/2019/12/REPORT-Environmental-Governance-effective-approaches-for-Scotland-post-Brexit-OCT-2019.pdf>

the EU would create a gap relating to access to justice and the ability to conduct merits based reviews of environmental cases.

The creation of ESS and the use of Judicial Review as an ultimate backstop will not be sufficient to fill these aspects of the governance gap. Scottish Ministers are urged to bring forward and consult on the need for a dedicated Environmental Court or Tribunal (ECT) in Scotland.

The benefits of a specialist ECT – of which there are over 1,500 across 44 countries in the world - are numerous. The specialisation of an ECT is much more accommodating to environmental law, which is particularly scientifically and legally technical, through the use of specialist environmental judges and legal teams or improved access to the necessary expertise. ECTs also tend to focus on the key merits of a case rather than procedural issues, thereby improving access to justice for all. **The specialism of ECTs can make them fairer, cheaper and quicker, therefore not only benefitting environmental groups but also decision-makers, business and land managers through more consistent and robust decisions.**

This briefing is supported by the following LINK member organisations:

Association for the Protection of Rural Scotland

Badenoch and Strathspey Conservation Group

Butterfly Conservation Scotland

Environmental Rights Centre for Scotland

Fidra

Friends of the Earth Scotland

Keep Scotland Beautiful

Hebridean Whale and Dolphin Trust

John Muir Trust

Marine Conservation Society

North East Mountain Trust

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RSPB Scotland

Scottish Badgers

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