

Parliamentary Briefing
UK Withdrawal from the European
Union (Continuity) (Scotland) Bill
Stage 3

17 December 2020



Scottish
Environment
LINK

Summary

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 and 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.¹ 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.

LINK members welcome the provisions in the Bill which embed EU environmental principles directly in Scots law and the create a new watchdog, Environment Standards Scotland, to oversee compliance with environmental law.

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.

LINK members strongly support the following Stage 3 amendments:

- **1 and 2 (Claudia Beamish)** - Empowering ESS to take enforcement action on individual decisions
- **3 (Liz Smith)** - Committing to a future consultation on effectiveness of governance arrangements, including environmental courts.
- **33, 34 and 36 (Roseanna Cunningham)** - Strengthening the duty on applying environmental principles
- **35 and 38 (Mark Ruskell)** - Narrowing the exclusions in relation to matters of finance
- **39 and 40 (Roseanna Cunningham)** - Removing the exclusion of climate change from ESS's remit
- **41 (Claudia Beamish)** - placing Scotland's Environment Strategy on a statutory footing
- **41A (Mark Ruskell)** - ensuring policies in the Environment Strategy aim at achieving a high level of environmental protection.
- **41B (Mark Ruskell)** - setting a date by which the Environment Strategy objectives are to be achieved.
- **41C (Claudia Beamish)** - technical amendment, using have 'due regard to' wording as per amendments 33, 34 and 36.
- **43 (Mark Ruskell)** - ensuring that ESS receives sufficient and transparent funding.

¹ State of Nature Scotland report, 2019. https://scotlink.org/files/state-of-nature-Report-Scotland_.pdf

Introduction

LINK members welcome the provisions in the Bill which embed EU environmental principles directly in Scots law 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 must be strengthened to ensure Scotland has robust arrangements to maintain and exceed environmental standards, and so that Scotland becomes a leader on environmental governance across the UK by going further than the proposals for the UK Government's Office for Environmental Protection (OEP).

Empowering ESS to take enforcement action on individual decisions

Amendments 1 and 2 (Claudia Beamish) are critical for ensuring ESS provides continuity with existing arrangements under the EU. Currently, anyone in Scotland can raise a complaint where they think a decision taken by a public body is at odds with environmental law and can expect action to be taken if this turns out to be the case. These amendments would ensure that everyone in Scotland will still have this right.

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 environmental law in individual decisions. This has included planning applications or licensing decisions. This amendment would remove the exemptions set out in sections 23 and 28, which restrict ESS from using its enforcement powers in cases involving individual decisions. As drafted, the Bill places a limitation on ESS's enforcement powers - it can receive information about a complaint but it cannot take action (short of Judicial Review) to remedy the issues. **The Office for Environmental Protection as proposed in the UK Environment Bill does not face this same limitation. Under current arrangements, Scottish citizens will have fewer rights to raise their concerns with ESS than English counterparts will with the OEP.** Cost to the public purse would also increase if an individual environmental problem is left to get worse.

Removing these exemptions would not mean that ESS would be able to overturn any decision; it would not become an "additional layer of appeal" as has been asserted. Rather, ESS would simply advise the original body of their error/failure, and it would be up to them if/how to address it. If they had powers to reverse or amend their original decision, ESS might advise they are used. It would also not cause ESS to be overwhelmed with a large volume of casework as it will, and should, set up a triage system to prioritise strategic cases (and remove vexatious cases) through its strategy. **It would, however, remove the legal barrier to allowing the occasional case on an individual decision to be fully investigated and enforcement action taken.** This is a right that has existed under EU membership, where many strategic, precedent-setting cases have begun life as a complaint about an individual decisions.

Over 6,000 members of the public have backed a Scottish Environment LINK petition calling for ESS to have the powers to take enforcement action on individual complaints.

LINK members strongly support these critical amendments.

Committing to a future consultation on effectiveness of governance arrangements

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 Change² and Professor Campbell Gemmell's research for LINK,³ found that the loss of access to the Court of Justice of 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. Amendment 3 (Liz Smith) would require Scottish Ministers to bring forward and consult on the effectiveness of governance arrangements. This would include consideration of a dedicated Environmental Court or Tribunal in Scotland, but could also look at improvements to the status and powers of ESS.

LINK members strongly support this amendment.

Strengthening the duty on applying environmental principles - "have due regard to"

Amendments 33, 34 and 36 (Roseanna Cunningham) strengthen the duty on Scottish Ministers and public authorities to "have due regard to" the five environmental principles in the course of carrying out their functions. Strengthening the duty in this way represents an improvement on the current wording of the draft bill and would ensure that the principles are properly considered. The UK Government's Environment Bill (clause 18) which introduces the same four principles in relation to the responsibilities of Secretaries of State uses the term 'have due regard to.' LINK members believe that the Scottish legislation should, at least, match that for England.

In addition, should Amendment 7 to Part 1 of the Bill be accepted, there will be a duty on Ministers to 'have due regard to' the purpose outlined in the amendment when using the keeping pace powers. Including a similar duty in Part 2 of the Bill maintains consistency.

LINK members strongly support these amendments.

Narrowing the exclusions in relation to matters of finance

Fiscal measures can have a considerable impact on the environment and action taken to restore nature, through the funding levels attributed to policies and projects that benefit or harm the environment. The ECCLR Committee recognised this in its Stage 1 report on the Bill, stating "all decisions involving fiscal measures and capital expenditure can have a significant environmental

² Scottish Government, 2018.

<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>

³ Gemmell, C., 2019. <https://www.scotlink.org/wp-content/uploads/2019/12/REPORT-Environmental-Governance-effective-approaches-for-Scotland-post-Brexit-OCT-2019.pdf>

impact and must, therefore be guided by the s.9 environmental principles.”⁴ 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.⁵ Fiscal measures should therefore not be excluded from the application of the environmental principles. **Amendment 35 (Mark Ruskell)** achieves this by making forward-looking, strategic policy on the economy and fiscal matters subject to the principles - while retaining the exclusion in relation to annual budgeting.

A similar approach should be adopted to the definition of environmental law that is subject to the oversight of ESS. **Amendment 38 (Mark Ruskell)** achieves this by making forward-looking, strategic policy on the economy and fiscal matters subject to ESS oversight - while retaining the exclusion in relation to annual budgeting.

LINK members strongly support these amendments.

Removing the exclusion of climate change from ESS’s remit

Amendments 39 and 40 (Roseanna Cunningham) remove the exclusion of Parts 1 to 3 of the Climate Change (Scotland) Act 2009 from the definition of environmental law and brings these activities into the scope of ESS’s functions.

LINK members strongly support these amendments

Placing Scotland’s Environment Strategy on a statutory footing

Amendment 41 (Claudia Beamish) requires Scottish Ministers to bring forward a statutory Environmental Policy Strategy to secure the maintenance of environmental standards as have been in place under EU membership. This is critical to ensure there is a duty on Ministers to achieve the outcomes of the Strategy and report and monitor progress. Such a strategy will also ensure full ‘continuity’ with the current EU environmental policy regime, including its newly refreshed biodiversity strategy - which is a fundamental aim of this Bill.

Sub-section (5) of this amendment ensures that any preparations that have already been undertaken for a new Environment Strategy are able to be included as part of this.

Amendment 41C (Claudia Beamish) ensures Scottish Ministers have ‘due regard to’ the Strategy when making policies and in bringing forward new legislation. This wording strengthens the duty in line with the wording of the government amendments 33, 34 and 36.

LINK members strongly support these amendments.

⁴ ECCLR, 2020. https://www.parliament.scot/S5_Environment/Reports/ECCLRS0520R10.pdf p.23

⁵ <https://www.scotlink.org/most-people-living-in-scotland-want-a-green-recovery-from-the-covid-19-pandemic/> Full polling results available upon request.

Ensuring the Environment Strategy objectives are met in a timely manner

Amendment 41B (Mark Ruskell) requires that a date is set to meet the objectives of protecting and improving the environment as will be set out in the Environment Strategy.

We are facing a nature emergency that is inextricably interlinked with the climate emergency, with biodiversity declining at unprecedented rates globally and in Scotland. Provisions to set nature recovery targets for England are included in the UK Government's Environment Bill, with improvements to the environment to be achieved by a date specified by Ministers. **There is currently no development of similar targets to drive nature's recovery in Scotland.** Ensuring the objectives of protecting and improving the environment, as set out in the Strategy, are met by a certain date is a first step towards this. However, LINK members believe there remains a need for legally-binding nature recovery targets, similar to those provided for in the UK Bill, and hope the Scottish Parliament will soon return to the matter.

LINK members strongly support this amendment.

Ensuring the Environment Strategy aims at a 'high level of environmental protection'

Amendment 41A (Mark Ruskell) adds that when preparing the Environment Policy Strategy Scottish Ministers must have regard to securing environmental policy that 'aims at a high level of protection.' This mirrors language that is present in the Treaty of the Functioning of the European Union and ensures that the essence of this principle is reflected in the Scottish legislation.

LINK members strongly support this amendment.

Ensuring ESS has sufficient and transparent funding

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.

Amendment 43 (Mark Ruskell) adds a requirement on Scottish Ministers to provide ESS with sufficient funding to carry out its functions. This will ensure ESS has the resources required to carry out its functions and increase its independence of ESS from government. This amendment is based on a provision in the UK Environment Bill, in relation to the Office for Environmental Protection (OEP). LINK members believe that the funding of ESS should be as secure and transparent as possible.

The amendment further adds a requirement that ESS' annual reports include an assessment of whether it has been provided with sufficient funds to carry out its functions. This further increases the transparency of ESS' funding arrangements and independence from government, by aiding parliamentary scrutiny of its funding. This amendment is also based on a provision in the UK Environment Bill in relation to the OEP.

LINK members strongly support this amendment.

This response represents the collective view of LINK's [Governance Group](#). Members may also respond 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 40 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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