

# 'CONSULTATION ON ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN SCOTLAND'

Consultation response from Friends of the Earth Scotland

May 2019



## Summary

We support the call from Scottish Environment LINK and others to introduce an Environment Bill as a matter of priority, to embed environmental principles in Scots law, to set up scrutiny mechanisms for environmental protections, including recourse to a specialist environmental court or tribunal, and to establish a duty to have an environmental strategy with appropriate reporting mechanisms.

The political commitment to mirror developments in environmental legislation in the EU should also be established in law.

Even if Brexit is cancelled there are serious deficiencies in our compliance with international environmental law under the Aarhus Convention which need to be remedied. An environmental court or tribunal is the obvious way to address the most serious of these deficiencies, and a proportionate response to the growing complexity and importance of environmental law.

During the referendum Friends of the Earth Scotland opposed the EU exit from the EU, particularly on environmental grounds.<sup>1</sup> Friends of the Earth Scotland was represented on the Scottish Government's Roundtable on Environment and Climate Change in relation to Brexit.

## Introduction

We welcome the opportunity to give our views on this subject, and respond to the consultation questions below. We also endorse the response submitted by Scottish Environment LINK.

We support the call from Scottish Environment LINK and others to introduce an Environment Bill as a matter of priority. As a minimum this should aim to:

- embed environmental principles in Scots law, with a duty to base policy and legislation on these applicable to any public bodies and its functions,
- introduce a duty to maintaining or exceeding EU environmental policy and standards, or international best practice, as it evolves
- set up scrutiny mechanisms to enforce environmental protections, including a role for an independent watchdog and a specialist environmental court or tribunal
- establish a duty to have an environmental strategy with appropriate reporting mechanisms

At a time when we are facing the interconnected challenges of climate emergency and impending biodiversity collapse, strong environmental protections have never been more urgently needed. It is critical that the Scottish Government ensures that EU protections are wholly and robustly replaced at the Scottish level.

The Scottish Government must be prepared for interim measures from October this year in the event that a 'no deal' Brexit is the eventual outcome.

We note that even if Brexit is cancelled there are deficiencies in our compliance with international environmental law under the Aarhus Convention which need to be remedied. An environmental court or tribunal is the obvious way to address the most serious of these deficiencies, to better enable citizens to exercise their rights – and responsibility – to defend the environment.

<sup>1</sup> <https://foe.scot/wp-content/uploads/2017/08/Position-EU-referendum-1.pdf>

## About Friends of the Earth Scotland

Friends of the Earth Scotland exists to campaign, with partners here and across the globe, for a just transition to a sustainable society. We work in Scotland for socially just solutions to environmental problems and to create a green economy; we campaign to end the degradation of our environment and to create a society which cherishes and protects the natural world on which we depend; we think globally and act locally, enabling people to take individual and collective action. We are part of Friends of the Earth International - the world's largest grassroots environmental network, uniting 75 national member groups, over 2 million members and 5,000 local activist groups around the world. We are an independent Scottish charity with a network of thousands of supporters, and 10 active local groups across Scotland. Friends of the Earth Scotland's vision is of a world where everyone can enjoy a healthy environment without exceeding their fair share of the planet's resources, now and in the future.

During the referendum Friends of the Earth Scotland opposed the UK exit from the EU, particularly on environmental grounds. Friends of the Earth Scotland was represented on the Scottish Government's Roundtable on Environment and Climate Change in relation to Brexit, a sub group of which conducted the governance review for the government.

### **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, Friends of the Earth Scotland strongly supports the inclusion of the four EU environmental principles in legislation. Simply adopting them in policy or through any route other than legislation would not replace the strength of protection currently afforded by EU membership by way of Article 191 of the Treaty on the Functioning of the European Union (TFEU).

We welcome Mike Russell's commitment to "*strengthen environmental protection, including seeking opportunities to legislate*" last month.<sup>2</sup> A new Environment Act is the obvious way to strengthen environmental protection, including by embedding the four principles in Scots law.

However, the proposed wording of the duty - 'to have regard to' the principles - is weak, unenforceable, and does not replicate the legal strength of the four principles in EU law making and policy development, and therefore does not meet the Minister's commitment. The House of Commons Environment Audit Committee highlighted the weakness of this approach in their analysis of the draft UK Environment Bill, calling the proposed duty to 'have regard to' various environmental principles 'not fit for purpose.'<sup>3</sup> We would welcome the opportunity to work with the Scottish Government and others to develop a stronger duty, equivalent to the EU Treaty's 'shall be based on.'

An Environment Act would also be the place to spell out the reporting duties associated with the four principles and to put into law a requirement to produce, and regularly update, an Environment Strategy, with objectives, targets and indicators. While we welcomed the Scottish Government's discussion paper on environmental strategy last year, we were critical of its lack of clarity on the purpose and relative status of such a Strategy.<sup>4</sup>

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

No. The EU principles are widely applicable to Member States, the European Parliament and the Commission's bodies, and the same wide applicability should be adopted in measures to replace them in Scotland.

We do not agree with the analysis in the consultation paper about the parameters of application of the EU principles at present. The language of Article 191 TFEU is broad and encompasses all EU institutions and functions, and therefore to retain the strength of these environmental protections, the

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

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

4 <https://foe.scot/wp-content/uploads/2018/08/FoES-response-to-SG-Environment-Strategy-consultation.pdf>

same should be applied at the Scottish level. This would not be a significant departure from current practice: there are already duties on Scottish public bodies to, for instance, further the conservation of biodiversity and to contribute to the achievement of climate targets. In relation to the UK Environment Bill the Environmental Audit Committee recommended this approach for UK public bodies.<sup>5</sup>

A screening process, similar to that used for Strategic Environmental Assessment and Access to Environmental Information could be used to determine which policies, functions and decisions fall under the duty.

**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?**

A new duty should focus on the four environmental principles, but there are further important principles which should also be incorporated into Scots law, either by way of inclusion in an Environment Act and this duty, or through separate legislation, e.g. A Human Rights Act.

For example, the principle of sustainable development, and the principle of integration of environmental protection should be included in the Environment Act. The former principle is misunderstood and misapplied by the Scottish Government with its continued conflation with sustainable economic development.<sup>6</sup> Enshrining it in an Environment Act alongside the four EU principles would give it greater strength and clarity. Meanwhile the principle of integration is also contained within the TFEU and therefore should be incorporated into Scots Law to avoid its loss on Brexit.

We strongly supported the recommendation of the First Minister's Advisory Group on Human Rights Leadership to include a right to a healthy environment in a new Human Rights Act,<sup>7</sup> and warmly welcomed the First Minister's agreement to this recommendation. We note that it is increasingly accepted that such a right is critical in underpinning all other human rights.

Delivering on this commitment to enshrine a right to a healthy a safe environment would therefore help bring Scotland up to best international standards, and significantly improve the application of environmental rights in practice. It could be done either by way of a new Scottish Human Rights Act (which is necessary to enshrine other human rights) or by way of an Environment Act.

The right to a healthy and safe environment must be enshrined with reference to the UN Framework Principles which elaborate what this overarching right means in practice. Three such elaborations are already enshrined in the Aarhus Convention, as is evident in its full name - the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters - which Scotland is a signatory to under both the UK and EU.

Despite some improvements, Scotland is failing in its compliance with the Aarhus Convention,<sup>8</sup> particularly in terms of the latter of these three rights – that of access to justice in environmental matters. Therefore even if Brexit is cancelled these deficiencies must be remedied. Referring to the UN Framework Principles in elaborating the overarching right to a healthy and safe environment, or including them in an Environment Act could be an important step towards compliance.

However, reforms to the legal system are needed to properly implement these rights and we strongly believe the establishment of a specialist environmental court or tribunal is an essential part of addressing both environmental governance in relation to Brexit and compliance with the Aarhus Convention.

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

6 As 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.

7 <http://www.scotlink.org/public-documents/first-ministers-advisory-group-call-for-a-right-to-a-healthy-environment-fundamental-for-a-fairer-scotland-say-scottish-environmental-ngos/>

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

Finally, we very much welcomed the theme of 'protecting, maintaining and enhancing EU environmental standards' in the environmental strategy discussion paper.<sup>9</sup> Scottish Ministers have further said that *"new legislation will be brought forward to enable devolved laws to keep pace with the EU if Brexit occurs."*<sup>10</sup> Keeping pace with environmental legislation as it evolves in the EU is another essential principle that should be included in a new Environment Act.

**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, a detailed policy statement and specific guidance is essential to ensure clear implementation of the environmental principles. As stated in Q.2 our preference is that the duty extends to Scottish public bodies so comprehensive guidance (and reporting and monitoring schemes) will be essential. Such a statement should also provide guidance to the Courts on the interpretation of the principles and their application should they be required to determine whether any future application has been appropriate.

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

Through membership of the EU Scotland has had a framework for environmental monitoring and reporting that allows us to share information and best practice with other Member States and to collect and report data consistently across Europe. The need for monitoring requirements will continue after Brexit and it is vital for intercomparability that Scotland continues to collect data to equivalent standards and, wherever possible, stays connected to European science and monitoring networks. Scotland has played an active and constructive role in these European networks and it is very much to our advantage to keep as strong a connection as possible after Brexit, including working with the UK Government to join the European Environment Agency as a non-EU member.

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

We should continue to carry out all of the monitoring currently required by EU Directives and Regulations, and maintain pace with any future requirements. Any review should therefore look not at what we monitor but how we overcome any difficulties in carrying out that monitoring that may be caused by Brexit, for instance, through the potential loss of access to historical data held by European institutions.

The default position should be that any data collected for environmental monitoring purposes should be in the public domain.

**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, a range of scrutiny mechanisms, from simple conversations about an issue right up to prosecution in the European Court of Justice have helped shaped the environmental framework and decision making in Scotland. The loss of oversight to ensure proper implementation of Directives, of inter-jurisdictional comparisons in e.g. Commission reports on implementation, and of the ability to prosecute are of great concern. Although actual prosecutions are rare, the power of the threat of infraction infringement proceeding should not be underestimated in ensuring adequate implementation of and adherence to environmental protections. All these measures need to be replaced by new, or expanded complementary domestic mechanisms.

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9 [https://consult.gov.scot/environment-forestry/environment-strategy/user\\_uploads/224042\\_sct0618871430-001\\_developing-an-environment-strategy-for-scotland-v3.pdf](https://consult.gov.scot/environment-forestry/environment-strategy/user_uploads/224042_sct0618871430-001_developing-an-environment-strategy-for-scotland-v3.pdf)

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

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

There are a number of possible routes to ensure proper scrutiny and challenge of the government's performance and it is clear that no single solution will suffice. However, any and all such scrutiny mechanisms must be independent of government and adequately resourced

Parliament could play a key role in providing scrutiny but time pressures on existing committees suggest that a new body would be necessary. The Westminster Environmental Audit Committee demonstrates a very effective example of both scrutiny of government and inquiries into developing issues.

Another route raised by the Roundtable's subgroup is to establish a new watchdog by way of an independent environment or sustainable development commissioner's office akin to the Scottish Information Commissioner and the Children and Young People's Commissioner. Like the Information Commissioner, this Commission would need to have the power to investigate complaints and to hold the government to account. Consideration should also be given to the Welsh approach of setting up a Future Generations Commissioner, extending the remit beyond the environment into sustainable development. Such a watchdog is certainly necessary for the investigation of complaints, but could also provide a scrutiny role additional to that of Parliament.

Extending the remit of Audit Scotland, and Holyrood's Public Audit and Post-legislative Scrutiny (PAPLS) Committee is a further option. Audit Scotland should also be 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.

It could be that elements of all these measures are necessary to provide adequate scrutiny.

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

Given that many policies have an impact on the environment it would be a mistake to create a narrow list of strictly environmental policies. Rather, scrutiny should focus on any policy which has the potential to significantly affect the environment, as used in EU and Scottish law in regard to access to environmental information.

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

It will be a major loss. As stated in answer to Q.7, although actual prosecutions are rare, the power of the threat of infringement proceedings should not be underestimated in ensuring the Scottish Government and public bodies adequately implement and uphold environmental protections. We note that EU legislation and the potential threat of legal action by the EU have also provided convenient excuses for Ministers in announcing policies they think might be unpopular.

Such a procedure is not available from domestic processes. The current form of Judicial Review in Scotland deals almost exclusively with questions of process rather than the substance of a decision being challenged. This is in contravention of the Aarhus Convention and means it is near impossible to take a challenge which properly considers the merits of the issue at hand. Further, the prohibitive costs of such legal action in Scotland (which is also in contravention of our obligations under the Aarhus Convention) puts significant barriers in the way of citizens and NGOs effectively holding public and private bodies to account. This option is therefore, no replacement for EU compliant mechanism. We consider the establishment of a specialist environmental court or tribunal is the best way to address environmental governance in relation to both Brexit and compliance with the Aarhus Convention.<sup>11</sup>

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11 Report on options to implement and environmental court or tribunal in Scotland - <https://foe.scot/wp-content/uploads/2017/08/Litigation-Over-the-Environment-web-1.pdf>



**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 about maintaining or exceeding EU environmental standards it is essential that a new function to replace the EU complaint mechanism is established. The ability to take a complaint to the European Commission or even just the threat of doing so, has provided a strong incentive for governments to resolve issues before they reach this stage. As in our answer to Q.8 a variety of approaches are likely to be needed to replace the loss of EU oversight functions, but an independent complaints function is clearly an essential part of doing so. The UK approach has been to create the Office of Environmental Protection for English and UK reserved matters with the power to investigate complaints and refer cases to court. As in our answer to Q.8 we consider there is the need for an independent environment or sustainable development commissioner's office, or watchdog, accountable to Parliament with the powers to investigate complaints and take action in an appropriate court (see also answer to Q.13).

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

As stated under Q.7, although actual prosecutions are rare, the power of the threat of infringement proceeding should not be underestimated in ensuring adequate implementation of and adherence to environmental protections. The lack of a sufficiently-robust mechanism to hold the government of the day to account on the environment risks nature and the environment slipping down political priorities, There is already a considerable gap between rhetoric and delivery on environmental outcomes. The loss of EU enforcement mechanisms risks widening this gap at a time when climate emergency and impending collapse of biodiversity mean they have never been more vital.

**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?**

Improvements in monitoring, reporting and scrutiny (by the Parliament, a new and independent Commissioner / watchdog, Audit Scotland), and powers for the 'watchdog' body to refer alleged non-compliance to an appropriate Court, as noted above, are all necessary to address the loss of EU enforcement powers.

However, simply empowering a new watchdog with the right to refer an issue to the existing Courts under current procedures would fail to replicate the compliance mechanisms of the EU systems. The current form of Judicial Review in Scotland remains, despite some improvements, prohibitively expensive for citizens and NGOs to pursue cases. Further, it deals almost exclusively with questions of process rather than the substance of a decision being challenged. We note that as far back as 2014 the Stage 1 report on the Courts Reform Act highlighted "the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law," but there has been no subsequent movement to remedy this. It is not therefore, in its current form fit to replace the enforcement function of the EU.

We consider that instead, the establishment of a new specialist environmental court or tribunal is required to provide for adequate, Aarhus compliant review and remedy.<sup>12</sup> Such a court or tribunal should be designed to address the two main areas of non-compliance with the Aarhus Convention – affordability and review of the substance of an issue rather than just the process – to ensure the best outcomes for the environment. It must also have powers of appropriate remedy, including the ability to quash unlawful decisions and order remedial actions.

A specialist environmental court or tribunal (ECT) could be created by way of extending the remit of the Land Court. The Scottish Land Court, which has many of the strengths identified in ECTs in other jurisdictions (including lay experts, lower costs to litigants, an inquisitorial approach and the use of

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<sup>12</sup> Report on options to implement and environmental court or tribunal in Scotland - <https://foe.scot/wp-content/uploads/2017/08/Litigation-Over-the-Environment-web-1.pdf>

written submissions to focus court time and resources on the most important legal points) already functions as a de facto ECT in certain appeals.

We note that following the 2016 consultation on Developments in Environmental Justice<sup>13</sup>, Ministers decided not to proceed further with a specialist ECT at the time, despite strong support for such a court from respondents, including many in the legal establishment. This decision was based, in part, on Brexit uncertainty, with Ministers promising to keep the matter under review:

*“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”*<sup>14</sup>.” (emphases added)

Given the looming Brexit governance gap, the Scottish Government should immediately set up an expert group with a remit to consider the establishment and operation of such a Court and to make recommendations towards a comprehensive post-EU governance system.<sup>15</sup>

Any comprehensive replacement for the EU complaints mechanism should include the establishment of an environmental court. If Brexit should not ultimately go ahead, such a specialist ECT, or as a minimum, reform of judicial review costs, procedures and scope, is still necessary to meet our international obligation for access to justice in environmental matters under the Aarhus Convention.

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<sup>13</sup> 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).

<sup>14</sup> <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/pages/2/>

<sup>15</sup> 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).