

# POLICY BRIEF

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## Response to the Public Consultation on 'Environmental Principles and Governance in Scotland'

Miranda Geelhoed

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The integrated and inter-disciplinary research conducted by the **Strathclyde Centre for Environmental Law and Governance (SCELG)** seeks to address real-world knowledge gaps in partnership with government institutions, NGOs, private institutions and local communities. Our researchers hold considerable expertise in the fields of comparative, EU and international environmental law, with regard to, among others, biodiversity, land, food and agriculture, climate change and energy, water and oceans, as well as corporate accountability, environmental justice, human rights and sustainable development.

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## **Public Consultation: *Environmental Principles and Governance in Scotland***

**Response from the Strathclyde Centre for Environmental Law and Governance**

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Submission date: 10 May 2019**

### **Section 1: Environmental principles**

- 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?**

Answer: Yes

#### **Please explain your answer:**

SCELG welcomes the efforts by the Scottish Government to ensure that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the UK from the EU, by enshrining the EU's four environmental principles in Scots law: the precautionary, polluter pays, prevention and the rectification at source principles.

We urge for any legislation to also include the standard of a high level of environmental protection that can be found in many EU legal foundations (e.g. Arts 114 and 191 TFEU) as well as secondary legislation and which, as an overarching objective, should serve as a benchmark against which action can be assessed.

We reiterate our response to the consultation on an Environment Strategy for Scotland that it is necessary for Scotland to have bold environmental aspirations that go beyond maintaining EU standards, also taking into account Scotland's international responsibilities. Also, clear connections need to be made between global visions and local realities by

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This submission has greatly benefited from the inputs of our SCELG members and represents the views of the centre. In particular, the author would like to thank Prof Elisa Morgera, Dr Stephanie Switzer and Mara Ntona for their helpful suggestions.

recognising the relevance of human rights. In this regard we draw attention to the recommendations of the First Minister's Advisory Group on Human Rights and the UN Framework Principles on Human Rights and the Environment. In that connection, we underscore that experience in Scotland with regard to equality has proven that a duty of due regard often has little impact on improving actual outcomes (Recommendations Advisory Group, p 28). We thus call for alignment with the proposals made by the Advisory Group also with regard to environmental principles, notably a 'sunrise clause' that would replace a duty to pay due regard with a duty to comply after a specified period (Recommendations, p 33).

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

Answer: No

**Please explain your answer:**

SCELG recognises the potential complexities associated with the extension of the four EU principles to all public authorities. Nonetheless, and in line with the recommendations of the Advisory Group on Human Rights in the context of human rights legislation for Scotland, we believe that it is important that the duty does extend to other functions exercised by all public bodies, to ensure practical and effective implementation. Capacity building is key to make such an extension workable.

Inspiration can be drawn from the recommendations by the Advisory Group on Human Rights. Capacity building should include training of decision makers on the content of environmental principles and their practical implications. They could also include the development of good practices, guidance on the principles and development of impact assessments.

**3. Do you agree that a new duty should be focused on the four EU environmental principles?**

Answer: No

**If not, which other principles should be included and why?:**

It is noted that the UK Environmental Bill includes nine environmental principles and it is recommended that Scotland takes account of the conclusions of the Environmental Audit Committee in this regard:

<<https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/195105.htm> - footnote-334>.

In particular, SCELG calls for a more prominent role for the environmental integration principle under EU law (Article 11 TFEU) and for the principle to be transferred into Scottish legislation. The integration principle is a general principle of EU law, as well as an EU environmental law principle. Integration of environmental protection requirements into cross-sectoral and sectoral institutional frameworks, legislation and policies is crucial for an effective and holistic approach to environmental governance. Integration is also in line with international efforts for mainstreaming, such as mainstreaming of biodiversity under the Convention on Biological Diversity. See also Elisa Morgera et al, "Contribution of the EU Birds and Habitats Directives to Nature Protection in Scotland" SCELG Policy Brief No. 7, March 2017 available at <[https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/brexit/Policy\\_Brief\\_No.\\_7,\\_March\\_2017.pdf](https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/strathclydecentreforenvironmentallawandgovernance/pdf/brexit/Policy_Brief_No._7,_March_2017.pdf)>.

We also draw attention to other relevant frameworks that follow from international law, notably regarding procedural environmental rights, the ecosystem approach as developed under the Convention on Biological Diversity and evolving interpretations of precaution. We urge for explicit recognition in Scottish legislation, and for due regard for international developments, as well as the making of clear linkages between all principles and legislative action on human rights.

**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?**

Answer: Yes

**Please explain your answer:**

We agree that there should be a policy statement to guide the interpretation and application of the environmental principles. Such a document would contribute to capacity building of decision makers, including local authorities (see above Q2), as well as awareness-raising among the public.

It would be necessary to evaluate the content of the policy statement at regular intervals, taking account of evolving interpretations under EU law and developments at international level.

## **Section 2: Environmental governance arrangements**

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

Monitoring, measuring and reporting is a two-way street: it allows for the evaluation of Scottish legislative and policy action in light of international (including EU) obligations and allows for capacity building of Scottish decision makers through feedback and dialogue with external agencies.

It is important that Scotland makes full use of continuous opportunities for monitoring, measuring and reporting, whether it be at international level (e.g. Clearing Houses) or at regional level (e.g. European Environment Agency). See in this regard also the Report 'Environmental Governance in Scotland on the UK's withdrawal from the EU' (Scottish Government, 2018) available at <<https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>>.

Involvement in existing networks will assist Scotland to make sure it stays on track with the implementation of the principles, in light of evolving interpretations.

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

In the short run, we consider it most important that Scotland transposes monitoring and reporting requirements that currently follow from EU law into national legislation. In the long run, there may be an opportunity for Scotland to evaluate such requirements in light of its local conditions and needs, also taking into account possibilities for more efficient and user-friendly data gathering.

It is also important that linkages are made between reporting and monitoring requirements regarding the implementation of the environmental principles, and related proposals for reporting in other relevant areas of law, such as those suggested in the consultations for an Environmental Strategy and for the development of Good Food Nation legislation.

**7. Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?**

Answer: Yes

**Please explain your answer:**

The loss of the enforcement edge currently provided at EU level by the European Commission is significant. It is likely that more emphasis will be placed on the scrutiny role of Scottish Parliament and other (regional and local) public bodies. However, due to the technical nature of environmental law it is likely that a capacity gap will become evident due to the loss of oversight by EU institutions.

In this regard we also refer to the findings of the Environment Round Table on governance (see above Q5) that have highlighted the need for “an institution entirely independent of governments” to avoid significant weakening of scrutiny and accountability due to poor separation of powers.

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

SCELG proposes that such a gap is filled through the creation of an independent environmental watchdog, which would be able to evaluate actions against the backdrop of the environmental principles at its own initiative or acting upon public complaints that are made at no cost.

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

Most important is that Scottish law should not take a too narrow approach to environmental law and policy. In particular, and in accordance with the recommendations above to include the integration principle, environmental requirements have been integrated into cross-sectoral and sectoral institutional frameworks, legislation and policies. These include, for example, agriculture, food and land, fisheries, health, tourism, energy, trade and development.

Important efforts have been made at EU level to integrate environmental protection requirements including environmental principles, such as the precautionary principle, into these areas of law and policy. It is important that any scrutiny arrangement has regard of this comprehensive approach to environmental law and policy and considers effective implementation of the environmental integration principle.

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

It must be noted that international obligations on environmental procedural rights are binding upon the UK as a party to the Aarhus Convention independently of EU law, and these include public participation and access to justice in environmental matters. Moreover, compliance is overseen by the Aarhus Convention Compliance Committee (ACCC), which is a quasi-judicial body that issues non-binding (but authoritative) recommendations.

As considered in-depth elsewhere (Elisa Morgera et al, "Rights Protected Under EU Law Concerning the Environment" Policy Brief No. 6, November 2016 available at <[https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/latestoutcomesfromourwork/publications-brexite/](https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/latestoutcomesfromourwork/publications-brexite/>)>), procedural environmental rights are key to empower the public and environmental NGOs to hold the State accountable for inadequate levels of environmental protection, and to enforce compliance with existing environmental standards.

Although there are already opportunities to make complaints or petition to various authorities, the loss of the complaint procedure at and oversight by the European Commission, including its ability to resolve concerns and problems without formal procedures, is considered to be significant.

### **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?**

Answer: Yes

#### **Please explain your answer:**

SCELG supports the Roundtable's recommendations for the creation of an environmental watchdog in Scotland that provides transparent and easily accessible opportunities for citizens to raise environmental concerns and complaints.

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

The loss of a "hard, enforceable edge" is one of the main risks arising for environmental law and governance after Brexit. This not only concerns the loss of the enforcement powers of the European Commission, but also the CJEU.

An increased focus on enforcement through parliamentary accountability and judicial review in the Scottish courts, also puts more emphasis on the issue of public access to justice in the Scottish setting. Despite improvements under the Courts Reform Scotland Act 2014, considerable obstacles still remain due to issues of standing, restrictive time limits and the lack of legal aid (see Elisa Morgera et al, "Rights Protected Under EU Law Concerning the Environment" Policy Brief No. 6, November 2016 available at <<https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/latestoutcomesfromourwork/publications-brexite/>>).

There is also a question of capacity of the Scottish courts, due to the technical complexity of many environmental law cases.

### **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?**

What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?: In addition to the creation of an independent environment watchdog in Scotland, SCELG urges the Scottish Government to consider and tackle current obstacles to access to justice for the public, including environmental NGOs, to strengthen private enforcement of enforcement law and its underlying principles.

It also raises the question of the need for a specialist environmental court, to effectively deal with complex and technical questions of environmental law. See in this regard also the recommendations from the Roundtable on the Environment on governance (p 28).

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For more information please visit our website: <https://www.strath.ac.uk/scelg/>.



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### SCELG Working papers

C Wambua, Promoting Public Acceptance of Wind Energy Projects in Kenya: Towards a Wind-Wind Solution, SCELG Working Paper 10/2017

LS Lynes, Climate Change Law and Colonialism: Legal Standing of Three Rivers and a Hypothetical Case of Bison Personhood in Canada, SCELG Working Paper 9/2017

### SCELG Policy Briefs

M Geelhoed, Response to the Public Consultation 'Environmental Principles and Governance in Scotland', SCELG Policy Brief 11/2019

M Geelhoed, Response to the Public Consultation 'Good Food Nation Proposals for Legislation', SCELG Dialogue 10/2019

### SCELG Dialogues

F Sindico and K McKenzie, Human Rights Thresholds in the Context of Climate Change: A Litigation Perspective in the Wake of the IPCC Special Report on 1.5°C or the Week in which Everything Changed..., SCELG Dialogue 7/2018

F Sindico and S Switzer, The Transformation of Environmental Law and Governance: Risk, Innovation and Resilience, SCELG Dialogue 6/2018

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