Law Society of Scotland

Written Evidence

Draft Environment (Principles and Governance) Bill inquiry

January 2019

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law sub-committee welcomes the opportunity to consider and respond to the Environment, Food and Rural Affairs Committee and the Environmental Audit Committee's call for written evidence on the draft Environment (Principles and Governance) Bill.[1] We make the following comments for consideration.

Consultation questions

Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

It is important that the new body, the Office of Environmental Protection (OEP), is able to hold Ministers of the Crown and public bodies to account. This requires the body to be independent and able to apply sanctions that will have sufficient deterrent effect on the acts of Ministers.

We note concerns regarding the extent of discretion given to the Secretary of State in Paragraph 1 of the Schedule to the Bill in relation to constitution of the OEP and appointment of members. The wide scope of these powers may impact upon the OEP's independence from Government.

Provision is made in paragraph 2 of the Schedule to the Bill about terms of appointment of an OEP member. We are supportive of the requirement for non-executive members to be appointed for a fixed term. We suggest that the relevant term is set out in the Bill to reinforce the independence and impartiality of the OEP so that the duration of service could not be subject to Ministerial discretion. While the OEP will cover UK functions, we suggest that the Secretary of State should nevertheless consider the devolved

[1] https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/inquiries/parliament-2017/scrutiny-of-the-draft-environment-bill-17-19/

administrations as having a stake in the appointment process due to the potential effects upon devolved matters.

We note the provisions of paragraph 2(5) which provides for a non-executive member to be removed from office in certain circumstances by the Secretary of State. We suggest this provision be subject to a requirement to consult with the Chair. We also propose that a definition of "unable or unfit to carry out the member's functions" is provided within the provisions and suggest the following wording:

> *A person shall be considered unable or unfit if the Chair is satisfied as regards any of the following matters –*
> *(a) That the member becomes insolvent;*
> *(b) That the member has been convicted of a criminal offence;*
> *(c) That the member is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member."*

We note the terms of the Environment Act 1995, Schedules 1 and 6 which contain provisions on membership of the Environment Agency and the Scottish Environment Protection Agency respectively. We consider there is scope for additional safeguards to be made in this Bill to ensure the independence of the OEP.

It is crucial that the new body is properly resourced and staffed. By way of comparison, we understand that the EU's Directorate General for the Environment has approximately 500 staff members and shares around 90 staff with the Directorate General for Climate Action. There are various other European Directorates relevant to the environment - Energy, Maritime Affairs and Fisheries, and Health and Food Safety.

The body needs to be properly and independently funded. This will be key to the body's ability to effectively scrutinise the Government. Paragraph 9 of the Schedule provides that: "The Secretary of State must pay to the OEP such sums as the Secretary of State considers are reasonably sufficient to enable to OEP to carry out its functions." We are concerned that if the body is not funded with some independence from Government, there is the potential for funding to be reduced, thereby affecting the body's functions as an independent entity.

Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action'?

The enforcement powers of the OEP are set out in clauses 17 to 29 of the Bill. It is important that a comprehensive system of enforcement is available.

In clause 17, we note that those persons "exercising functions in connection with proceedings in Parliament" and "in a devolved legislature" are excluded from the definition of a "public authority". It is not clear as to who will be covered by this exclusion.

We consider there is benefit in the OEP having powers to investigate complaints and we welcome the discretion which is given to the body in this regard. We note that one of the conditions for the OEP to carry out an investigation is that the failure to comply with environmental law is "serious" (clause 19(1)(b)).

The extent to which the OEP will be able to compel compliance is unclear. The Bill does not currently provide for any further sanctions following an investigation of a public authority, for example, fines. We recognise however the potentially circular nature of enforcement against public authorities by way of fines, which may result in reducing the budget available for compliance in the future.

We welcome the provisions in relation to information notices (clause 22) and decision notices (clause 23).

It is appropriate that an application for judicial review may be made by the OEP (clause 25). A judicial review, however, may be of limited value in some situations as it is a review of the original decision by an authority. There is the potential for there to be a considerable delay between a decision being made by an authority and perhaps action taken, and the OEP concluding their investigation, information and decision notice stages. A judicial review would follow only after conclusion of these steps, thereby meaning that the review may take place sometime after the initial decision by the authority has been implemented. There is the potential for environmental damage to have taken place during this time. As currently framed, the draft Bill does not afford the OEP powers to take interim measures. At the time of writing, the absence of any such powers does not appear to fulfil the obligation regarding preventative action in Article 2 of Annex 4 of the Protocol on Ireland/Northern Ireland to the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018*.

We anticipate that the provisions contained with clauses 26 and 27 relating to co-operation and provision of information will assist the OEP in their enforcement actions.

Are there any conflicts of interest or overlap with existing government bodies?

We note the requirement in the draft Bill that the OEP sets out in its strategy how it "intends to avoid any overlap between the exercise of its functions under sections 14 to 16…and the exercise by the Committee on Climate Change of that committee's functions". Emissions of greenhouse gases, other than the Fluorinated Greenhouse Gases Regulations 2015, are expressly excluded from the meaning of "Environmental Law" (clause 31). Although there is merit in the draft Bill seeking to avoid duplicating the advisory and reporting roles of the Committee on Climate Change, it can be difficult to extrapolate climate change matters from other environmental matters such as air quality.

Paragraph 212 of the Explanatory Notes to the draft Bill states that planning law is unlikely to fall within the provisions of clause 31(2). On our assessment, planning law dealing with matters such as Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA), waste management, contaminated

land, habitats and noise and these would be likely be caught by the definition. It is important, however, that that is made clear. We suggest that the Explanatory Notes are amended accordingly.

We consider that the OEP should be able to deal with matters arising in the scope of agriculture which are relevant to environmental law and any breaches thereof and similarly, should have scope to deal with the marine environment as relevant to environmental law, particularly given the inextricable link between the marine and land environments.

With regards to the OEP's monitoring and reporting powers in clauses 14 and 15, we note the interaction with the functions of other relevant bodies, in particular, the Environment Agency and Scottish Environment Protection Agency (SEPA).

As drafted are the principles legally enforceable? What will need to be included in the National Policy Statement to interpret the application of the principles?

It is of central importance to the rule of law that the law is clear and has specification. Therefore, the policy statement, as required by clause 1 of the draft Bill, should set out clear expectations as to the role and interpretation of the environmental principles. The extent to which the courts are entitled to have regard to the principles must be made clear and organisations must have effective guidance as to the necessary standards of conduct.

The current policy paper states:

> "The Environment Bill will … requir[e] the publication of a statutory policy statement on the interpretation and application of the principles, to which Ministers will have a duty to have regard to when making policy. This duty will provide a clear basis to ensure that Ministers are considering the relevant environmental principles when making policy."

Clause 4(1) of the draft Bill states: "A Minister of the Crown must *have regard to* the policy statement on environmental principles when making, developing or revising policies dealt with by the statement" (our emphasis). We consider that there is the potential for a Minister of the Crown to 'have regard to' the principles but choose to attach little or no weight to them. This could result in little practical weight being attached to the principles when action is taken. It is likely to be difficult to challenge a decision of a Minister, for example by Judicial Review, to attach little or no weight to the principles.

While we recognise the need for appropriate checks and balances, in particular reflecting the need to balance environmental principles against other principles and priorities, it is important that the environmental principles will be given meaningful attention when relevant policies are made, developed or revised. In addition, the restriction to "when making, developing or revising policies" means that the principles have limited application.

The draft Bill does not provide for a Minister to explain how principles have been taken into account and/or to publicise reasons for failure to implement the principles. Such measures would go some way to providing further scrutiny and accountability of decision makers in their fulfilment of the duty. We recognise that some may still feel that that would still allow for little weight to be given to the principles in particular cases. An alternative form of wording which would likely strengthen environmental protection could be to require Ministers to "act in accordance with" the principles. At the same time, we recognise that that may limit the flexibility sought for the application of the principles. Whatever the mechanism finally decided upon, it is important that it allows transparency of decision making in accordance with the principles, to allow effective oversight by the OEP and other interested parties.

In addition, we note that the principles referred to in clause 2(g) – (i) of the draft Bill may be considered to be rights rather than principles. These rights are set out in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[2] (the Aarhus Convention 1998). These rights are conferred on UK citizens and citizens within all states that have ratified the Convention. While we welcome the inclusion of these matters in the Bill, we note that by referring to them as principles rather than recognising their status as rights, there is the potential for this to have the effect of devaluing them.

Are there any conflicts with other legislators or legislation, for example the Scottish Continuity Bill?

We note that clauses 5 to 10 and 14 of the draft Bill do not extend or apply to Scotland. The OEP's monitoring and reporting powers in clause 15 will cover environmental law which is not devolved but may impact upon devolved administrations. It is important that the OEP works alongside SEPA where appropriate. In relation to the OEP's advisory role (clause 16), we note the importance of the OEP being able to provide advice to a Minister of the Crown on proposed changes to the law or on other matters relating to the natural environment which may take place in one jurisdiction but which by virtue of the connectivity of our land, water and air, impact the environment in another geographical area.

Section 13B of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill contains a different set of principles to that found within the draft Bill. This provision requires Scottish Ministers to have regard to the guiding principles on the environment and animal welfare when making certain regulations under the Bill: section 11 (deficiencies arising from UK withdrawal), section 12 (complying with international obligations), and section 13 (power to make provision corresponding to EU law after exit day). In addition, section 26A provides that Scottish Ministers must prepare proposals about:

[2] http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

1) How regard is to be had to the guiding principles on the environment by the Scottish Ministers in developing policies and determining how to exercise any of their functions, and by any other Scottish public authority in determining how to exercise any of its functions, and

2) How to ensure that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU.

These provisions require all public authorities to have regard to the principles whereas the draft Bill covers Ministers of the Crown only. Following a reference under section 33 of the Scotland Act 1998 by the Attorney General and Advocate General for Scotland, the Supreme Court has ruled that some provisions of the Bill are out with the legislative competence of the Scottish Parliament. The Bill cannot be submitted for Royal Assent in its unamended form. It is anticipated that in due course, the Scottish Government will set out how they intend to proceed in terms of the Bill and their preparations around the UK's withdrawal from the EU.

In addition, we note the work undertaken in Scotland by the Roundtable on Environment and Climate Change. The report of the Roundtable[3] considers a variety of options for environmental governance following the UK's withdrawal from the EU. It is anticipated that the Scottish Government will announce their future plans in relation to environmental governance in early course.

We consider that strong collaboration between the UK Government and devolved administrations is of considerable importance. This is particularly significant given the transboundary effects of environmental impacts. There may be merit in the Bill providing a power to the OEP to share information with and work with relevant bodies in devolved administrations where necessary. Coherence in the manner in which principles are applied will be of benefit in ensuring that international environmental obligations are met and avoiding 'environmental regulatory tourism'.

The Cabinet Office published in late 2017 a list of 111 points where EU law intersects with devolved matters. This has been supplemented by the publication of the UK Government's Frameworks analysis: *breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* on 9 March 2018. 24 of the policy areas in question are subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. Some of these policy areas relate to environmental matters[4].

The Scottish Government has consented to regulations on a variety of environmental matters which have been, or are due to be, laid in Parliament in preparation for the UK's EU exit [5]. To date, these regulations

[3] http://www.gov.scot/Resource/0053/00536067.pdf

[4] For further information, we offer a survey of these 24 policy areas which includes details of the EU law concerned and the implementing legislation in the UK https://www.lawscot.org.uk/media/361709/18-10-15-updated-table-24-policy-areas-from-111-list.pdf

[5] Further information about the Scottish Parliament's consideration of these instruments can be found here: https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/109366.aspx

cover: ionising radiation; emissions trading; health and safety in connection with genetically modified organisms, control of major accident hazards; water environment and environmental policy; persistent organic pollutants; control of mercury; animal health; nuclear reactors; fluorinated greenhouse gasses and ozone-depleting substances; waste management; Nagoya Protocol; air quality carbon capture and storage; marine environment; import and trade of animals and animal products; registration, evaluation, authorisation and restriction of chemicals (REACH); genetically modified organisms; and animals and food.

Does the Bill meet the government's commitment to non-regression from EU environmental standards?

The draft Bill does not currently provide for a situation if or when there are changes to EU environmental standards.

Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

We note that the draft Bill does not provide for the monitoring of environmental procedures and standards. For example, there is no provision concerning the continuing comparability with EU measures.

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