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## **Environment, Climate Change and Land Reform Committee**

## **Comataidh Atharrachadh Clìomaid is Ath-leasachaidh Fearann**

# **Stage 1 report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill**



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# Environment, Climate Change and Land Reform Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Environment, Climate Change and Land Reform.



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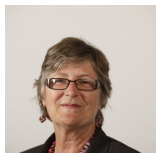
# Committee Membership



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# Membership changes

The membership of the Committee changed during the course of the Committee's consideration of the Bill at Stage 1. Annie Wells MSP left the Committee on 18 August 2020.

# Introduction

1. The UK Withdrawal from the European Union (Continuity) (Scotland) Bill was introduced in to the Scottish Parliament on 18 June 2020. <sup>1</sup> The Policy Memorandum <sup>2</sup> states—
  - ” The purpose of introducing the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (“the Bill”) is to enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate; to ensure that there continue to be guiding principles on the environment in Scotland; and to establish an environmental governance body, Environmental Standards Scotland, to continue the role and functions of the European institutions in ensuring the complete and effective implementation of environmental law.
2. The Bill was referred to the Finance and Constitution Committee as the lead committee and the Environment, Climate Change and Land Reform Committee was designated a secondary committee. This Committee considered the environmental aspects of the keeping pace power in Part 1 of the Bill and focused on the proposals in Part 2 in relation to the environmental principles and Environmental Standards Scotland (ESS).
3. The Committee launched a call for written views and received 24 submissions. All submissions can be viewed on the Committee’s web pages. <sup>3</sup> The Committee took evidence from Scottish Government officials on 11 August 2020; academics and stakeholders on 18 and 25 August 2020; and from the Cabinet Secretary for the Environment, Climate Change and Land Reform and the Cabinet Secretary for the Constitution, Europe and External Affairs on 1 September 2020. The Official Report from each evidence session can be found on the Committee’s web pages. <sup>4</sup> The Committee thanks all those who took the time to prepare a written submission and give oral evidence.
4. The Delegated Powers and Law Reform (DPLR) Committee was not able to report on the delegated power provisions contained in the Bill in advance of this report. The Committee has, however, noted the letter it sent to the Finance and Constitution Committee setting out provisional questions and issues it had identified in relation to the Bill. <sup>5</sup>



## Part 1 – alignment with EU law

5. The Policy Memorandum published to accompany the Bill states the purpose of Part 1 is to—
  - ” enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate. These changes are designed to ensure certainty, stability and predictability for the people who live and work in Scotland and those who do business here and with Scotland in Europe by updating or aligning devolved law with new EU law where that is appropriate and practicable.<sup>6</sup>
6. The Policy Memorandum goes on to state that there will be policy areas where the Scottish Government will want to voluntarily maintain regulatory alignment with EU rules. As the legislative basis for making regulations in those policy areas currently within EU law, the European Communities Act 1972, will be repealed when the UK leaves the EU at the end of 2020, the Bill provides an alternative regulatory making power. This will avoid the Scottish Government having to introduce primary legislation when it wishes to legislate to keep pace with EU law.
7. Section 1 of the Bill, therefore, gives Scottish Ministers the power, by regulations, to make provision corresponding to EU law. There are certain limitations on the power set out in s2, and s3 provides the power expires after ten years, although Scottish Ministers may, on a rolling basis, extend that 10-year period by periods of up to five years. There is no maximum total duration for these extensions of the power and, therefore, the power could be extended indefinitely. Section 4 sets out the parliamentary procedure that applies to instruments made under section 1. The procedure varies depending on the type of provision that each instrument makes. The affirmative procedure is required for instruments which contain any of five specified types of provision, which include provision abolishing a function of an EU entity without providing a replacement, or provision creating criminal offence. All other instruments are subject to the negative procedure unless the Scottish Ministers choose to lay it under the affirmative procedure. Section 5 requires that Ministers must lay an explanatory statement before the Scottish Parliament every time it makes regulations under s1 setting out their “good reasons” for making the provision and an equalities statement.
8. The written evidence received by the Committee welcomed the ‘keeping pace’ power, although there were differing views as to whether this should be a power or a duty. Further discussion on this is set out within the report.
9. Professor Campbell Gemmill stated that “the EU environmental acquis is well developed, albeit of course capable of improvement and greater integration and simplification, but represents in its operational nexus the best-known set of arrangements, policies and institutions to protect and improve the environment of Scotland”.<sup>7</sup>

## Power – or duty – to align with EU law (s1)

10. The views expressed to the Committee about the Bill differed over whether the discretionary power, as set out in the Bill, should rather be a duty on Scottish Ministers to 'keep pace'. Scottish Environment LINK argued a statutory duty to align with EU law "would prevent backsliding of environmental standards in future".<sup>8</sup>
11. The Brexit and Environment Network, however, disagreed, arguing against such a requirement because of the potential economic cost and possibility for Scottish economic actors to be undercut by counterparts in other parts of the UK who are not keeping pace.<sup>9</sup> NFU Scotland also argued against the requirement for alignment, arguing this "may not be in the best interests of Scotland, or Scottish agriculture, to be so bound to environmental legislation over which Scotland has no meaningful input – especially if the EU environmental legislation starts to significantly diverge from that in the rest of the UK".<sup>10</sup>
12. ClientEarth stated that, as the Bill does not make a statutory commitment to align with EU environmental law, the s1 power should not be used where it "would have the effect of reducing or rolling back environmental protections: in fact any such regression in environmental law should be prohibited". ClientEarth emphasised the importance of "adequate democratic processes, including meaningful consultation with the public and proper scrutiny by the Scottish Parliament" and that, "without this, there is a risk that these powers are used to introduce new legislation and regulation 'by the backdoor'". ClientEarth argued the requirement at s7 for Scottish Ministers to report annually explaining how the s1 powers have been used "is an important step in the right direction but more is needed to ensure adequate scrutiny and participation".<sup>11</sup>
13. In response to questions about why the Bill does not include a duty to keep pace, Scottish Government officials answered that this would not be possible, as some law falls in reserved competence and other law "makes sense only for member states, so it would not make sense for us to legislate to align with it".<sup>12</sup>
14. The Committee discussed the s1 power in relation to environmental policy with witnesses. Professor Campbell Gemmill and Scottish Environmental (SE) LINK both gave their support to the power being a duty, rather than a discretionary power.
15. SE LINK also highlighted its support for the Bill to include a commitment to non-regression and minimum environmental standards. It argued that this could be achieved "by a formulation that would ensure that the keeping pace powers are actually used to achieve high environmental outcomes, perhaps through the powers having a kind of overarching purpose".<sup>13</sup>
16. **The Committee notes the Scottish Government policy commitment to match or exceed EU environmental law on an ongoing basis.**
17. **The Committee also notes the range of views of stakeholders on the question of alignment with EU law. Some stakeholders called for the discretionary power at s1 to align with EU environmental law to be strengthened to require alignment. Other stakeholders considered that a**

**discretionary power is a more appropriate approach as it would give Scottish Ministers the flexibility to align, or not, with EU law where it is “appropriate and practicable” to do so.**

18. **The Committee supports the policy commitment to maintain or exceed EU environmental law to ensure the continuation of high environmental standards in Scotland. The Committee believes that, in delivering this commitment, a flexible approach will be required in some circumstances to ensure the best policy decisions for Scottish interests are made in response to changes in EU law. On balance, the Committee is content, therefore, with the provision for the s1 power to be a discretionary power, rather than a statutory requirement.**

## **Parliamentary scrutiny of Scottish Ministers’ use of s1 powers**

19. As outlined at the start of this section, the Policy Memorandum states Scottish Ministers would exercise their powers under s1 “where that is appropriate and practicable”. Officials provided some further explanation about the instances when the Scottish Government would want to use the s1 power, telling the Committee this would include “the practical implications—the economic and social benefits, and the costs on resources, whether financial or parliamentary. We would also have to look at whether an alternative approach could deliver the same or better outcomes than the EU measure”.<sup>14</sup>
20. The Cabinet Secretary for the Constitution, Europe and External Affairs provided further information about the “matrix of issues, which would allow us to decide which of the regulations we felt it was important to continue and to keep pace with”. He went on—

” The matrix would consist of things such as the practical implications of doing that. Would it be too difficult to do that? What about the economic and social benefits and costs? Are they things that would be good for us, just as membership of the EU is good for us? Would taking the regulations on be good for us? We do not have unlimited resources, either financially or in terms of personnel, so could we do that within our means? As the Government has made it clear that its ambition is for Scotland to return to the EU, are there things that we should hold on to because they will be important to us in the process of accession? If any of the factors mitigate against aligning, are there alternatives, such as the frameworks that you mentioned, which are another way to go about it?”<sup>15</sup>
21. Much of the discussion with the Committee on this issue focused on the scope for stakeholder involvement and effective parliamentary scrutiny. The Bill requires the Scottish Government to report to Parliament once a year on how it has used the s1 power. However, there is no parliamentary involvement in assessing the panoply of EU obligations with which the Scottish Government could choose to align and no

opportunity for parliamentary engagement or influence before a decision is taken to – or not to – align. There is also a question as to how the Scottish Government is going to be able to track all EU legislation and then choose what to keep pace with.

22. The Committee also considered the role for the Scottish Parliament at the ‘end’ of the process, when the s1 power is used to make regulations. The Law Society of Scotland argued that “the keeping pace powers in the Bill are very wide secondary legislative powers. The Law Society’s view is that those powers are inappropriate unless there is some overriding justification and that, even then, there are opportunities for enhanced scrutiny.” The Law Society of Scotland argued that a default affirmative procedure, or use of the super-affirmative procedure, might be the more appropriate form of parliamentary scrutiny rather than the provisions set out in s4. <sup>16</sup>

23. In response to a question about the role of the Scottish Parliament in terms of s1 powers, the Cabinet Secretary for the Constitution, Europe and External Affairs stated—

” The Parliament will have a clear role at the beginning, middle and end. ... The Parliament will be central to the process. There are functions for each part of the democracy—the Government has some functions and Parliament has others, but the interface is quite clear. I am also open to considering whether we need to publish more on the issue, so that there is an even bigger sense of ownership. <sup>17</sup>

24. Given the Scottish Government’s objective for the Bill is to provide continuity with EU law, the Committee considered how developments in EU environmental law would be appropriately monitored, in a way that would enable the Scottish Parliament to scrutinise the Scottish Government’s performance against its commitment to maintain and keep pace with EU environmental standards, where possible. The Committee notes two amendments agreed to the UK Environment Bill to inform Parliament of the wider, EU and international context; first, for the Secretary of State to conduct a two-yearly review of significant developments in international legislation on the environment and to publish a report. Second, a requirement was made of UK Ministers to make a statement to Parliament setting out the effect of new primary environmental legislation on existing levels of environmental protection.

25. The Committee notes that, in its letter to the Finance and Constitution Committee, the DPLR Committee said that, “in light of the unprecedented significance of the proposed keeping pace power, the Parliament may also wish to concentrate its scrutiny not just on the areas where decisions are to be taken to keep pace, but also where decisions are taken not to keep pace, with EU law in devolved areas”.

**26. The Committee notes the concerns raised about the need for transparency around when the Scottish Government would, and would not, decide to exercise its s1 powers and align its policies to EU law. In this regard, the Committee welcomes the further information the Cabinet Secretary for the Constitution, Europe and External Affairs provided about the “matrix of issues” which would inform Scottish Ministers’ decisions on whether or not to align.**

27. **The Committee believes, however, that there needs to be more clarity about the instances when the Scottish Government would use this regulation-making power and draws this concern to the attention of Parliament and the Finance and Constitution Committee. Furthermore, the Committee notes that the “matrix of issues” does not include the climate or ecological emergency, climate targets, commitment to maintain environmental standards, sustainable development. The Committee recommends these considerations form part of any decision-making tools or assessments the Scottish Government would use when deciding whether to keep pace.**
28. **The Committee also notes the commitment given by the Cabinet Secretary for the Constitution, Europe and External Affairs that “the Parliament will have a clear role at the beginning, middle and end. ... The Parliament will be central to the process”. The Committee believes that a transparent and accountable process for parliamentary engagement needs to be in place. The Committee remains unclear as to the role of the Parliament at the beginning of the process, given it appears the decision on what, and what not, to keep pace with is a matter for Ministers. The Committee recommends the Finance and Constitution Committee seeks clarification on this in its Stage 1 report.**
29. **The Committee considers that the Bill could be strengthened by the inclusion of a requirement for the Scottish Government to report on a regular basis to Parliament (annually or every two years) on developments in EU environmental law, with a statement as to how this has been matched in Scotland, how it will be matched or, if it is not to be, an explanation as to why not. The Committee considers that would inform ongoing parliamentary scrutiny and accountability beyond the requirement at s7 for the Scottish Government to report to the Parliament explaining how the s1 power has been used. The inclusion of a requirement for the Scottish Government to set out its methodology and regularly report in such a manner would strengthen the Bill and support SEPA, NatureScot and ultimately ESS.**
30. **The Committee notes the UK Environment Bill, as introduced, requires the UK Government to lay a report before the UK Parliament every 2 years on “developments in international environmental protection legislation which appear to the Secretary of State to be significant”. The Committee recommends the Bill be amended to require the Scottish Government to provide a similar report to the Scottish Parliament. This information would inform parliamentary scrutiny of Scottish Ministers’ commitment to keep pace with EU environmental law, be properly appraised of changes in other international law and ensure that “Parliament will be central to the process”. The Committee urges the Scottish Government to consider amendments to the Bill to give effect to this recommendation.**

## Implications of the proposed UK Internal Market Bill

31. The UK Government's white paper on a UK internal market was published after the Committee's call for evidence had closed; there was, therefore, very little comment about it in the written submissions. The Committee did, however, explore with witnesses the potential implications of the white paper and, especially, the proposed principles of mutual recognition and non-discrimination. The Committee notes the publication of the UK Internal Market Bill, <sup>18</sup> introduced after the Committee's oral evidence sessions had been held.
32. Witnesses raised concerns about the implications of the internal market, as proposed in the white paper, for Scottish Ministers' ability to exercise powers under s1.
33. Dr Gravey, representing the Brexit and Environment Network, stated—

” The problem is more that the internal market, as it is promised in the white paper, would include Scotland's being able to keep pace with EU rules, and to adopt more ambitious rules, while products from the rest of the UK—England and Wales—that did not follow those rules would be available in Scottish shops. There would then be issues for Scottish businesses in terms of their perhaps being held to higher standards than their Welsh and English competitors. It would be perfectly possible to do that, but it would come, potentially, at a very high economic cost. There is then the question of pitting high environmental ambition against business competitiveness. That would be very problematic, especially in terms of Covid recovery. <sup>19</sup>
34. Dr Gravey went on to say that, within the EU internal market, environmental considerations are given a high priority and provide one of the reasons justifying the enforcement of local rules even though they do interfere with the single market; the white paper, however, does not have “similar strong environmental exemptions” to those principles [of mutual recognition and non-discrimination]. Dr Gravey concluded “that is where there is a lot of tension: on paper, you might be able to continue to be ambitious, but it will cost you. In the current EU context, it does not cost you.”
35. Professor Harrison highlighted the constitutional implications of the proposals. He highlighted the principle of subsidiarity operational within the EU and argued that “it would be appropriate for there to be some kind of reflection of that principle in the new UK set-up”. He went on, “inevitably, the environment will be tangled up in the internal market discussions, and we need a serious, robust conversation about what we want the future UK to look like”. <sup>20</sup>
36. The Committee discussed with Dr Savaresi the potential environmental impact associated with any policy divergence relating to internal market trading. She stated—

” the areas where we are likely to see more tension are around things that are traded, such as chemicals and agricultural products. For example, if Scotland were ever to adopt a ban on pesticides, that would have a significant impact on the internal UK market and on the external relations of the UK. Therefore, from now on, a measure like that would have to be assessed for its implications. That is where measures adopted by the UK might affect the exercise of regulatory powers in Scotland.

We do not know much about the UK Government’s proposals regarding that issue, but it has talked about market access and mutual recognition. The implication of such principles is that Scottish producers might have to abide by a ban on the use of pesticides while producers in other parts of the UK would not and would still be able to sell their products freely within the UK. As you can imagine, that would create tensions and disadvantages for Scottish producers, as well as issues of control and enforcement in Scotland.<sup>21</sup>

37. The Cabinet Secretary for the Constitution, Europe and External Affairs stated the white paper proposals represented a “very serious threat” to the Scottish Government’s ability to align with European environmental law, in policy areas where the UK Government does not take that approach. He went on to say that the white paper “undermines and, indeed, destroys the ability of the Scottish Parliament to make choices for the people of Scotland in the devolved areas of competence. It is as serious as that.”<sup>22</sup>

38. The Cabinet Secretary for the Environment, Climate Change and Land Reform added that—

” We could go through all our perfectly proper processes, including all the parliamentary scrutiny in the world, and discover that that does not amount to a hill of beans as far as Westminster is concerned and that what we decide could get overridden completely. That is the real concern about the proposals.<sup>23</sup>

39. **The policy development of the UK internal market is ongoing and consideration of the implications fall more widely than this Committee’s remit. The principles of mutual recognition and non-discrimination would permit goods produced in other parts of the UK access to the market in Scotland, regardless of whether or not they met with higher environmental standards required by the Scottish Government. This would have clear implications for the economic competitiveness of those goods produced in Scotland to higher environmental standards than goods produced elsewhere in the UK. This would also have clear implications for Scottish Ministers’ ability to exercise their powers effectively – both in relation to the s1 power provided for in this Bill and more widely within devolved competence. The Finance and Constitution Committee will – undoubtedly – consider this in more detail in its Stage 1 report; this Committee, however, highlights its concern at the practical and economic constraint the proposed internal market could have on the Scottish Government’s stated ambition to align with EU environmental law.**

40. **The Committee has previously expressed its serious concern at the impact of the Brexit process on the operation of the devolution settlement in its report on the legislative consent memorandum on the UK Environment Bill.** <sup>24</sup> **The Committee is likewise seriously concerned about the consequences of the internal market proposals on the operation of the devolution settlement. The Committee draws its strong concerns to the Parliament’s attention and supports the Finance and Constitution Committee’s consideration of the wide constitutional implications of the proposed UK internal market.**

## Common frameworks

41. A number of submissions highlight the relevance of common frameworks – a common approach in specific policy areas agreed across the four administrations – to the effective running of a UK internal market. The Policy Memorandum stresses the importance of this agreement between the UK Government and devolved administrations to “work together in some devolved areas currently subject to EU law, by agreeing frameworks to govern matters currently regulated at the EU level”. <sup>25</sup> During evidence, Scottish Government officials confirmed that – by the end of 2020 – seven frameworks are expected to be finalised and implemented, with “effective interim measures” to be put in place for the remaining estimated 25 areas where final agreement isn’t considered “feasible”. <sup>26</sup>
42. The Committee has previously highlighted its concerns about the lack of information about, and progress on, common frameworks despite legislation being progressed in agriculture, fisheries and environment policy. A number of witnesses also expressed their concern during the Committee’s inquiry about a lack of progress. There was also uncertainty about how frameworks would work alongside the proposed internal market.
43. The Committee discussed common frameworks with witnesses. SE LINK expressed concern that the process of stakeholder consultation “has not really happened yet” and that “we are keen to ensure that it does happen and that the process is transparent”. <sup>27</sup> NatureScot stated that it was “not directly involved in any of those discussions” but that it was “working very closely with officials in the Scottish Government to make sure that all the common frameworks that impact on our remit are adequately dealt with”. SEPA’s experience was, however, different as “officials have been extremely good about involving us in the technical development of the frameworks and other rules and systems that are needed”. <sup>28</sup>
44. In his letter to the Chancellor of the Duchy of Lancaster, dated 3 July 2020, the Cabinet Secretary for the Constitution, Europe and External Affairs stated the Scottish Government did not agree with the “need nor demand for additional measures beyond the agreement of common frameworks” because they “are designed to manage cross-UK divergence where EU law and devolved competence intersect, including in relation to the functioning of the UK’s domestic market



together with existing processes for regulatory impact assessment and existing structures for regulatory co-operation and information sharing”.<sup>29</sup>

45. When he gave evidence to the Committee, the Cabinet Secretary for the Constitution, Europe and External Affairs stated—

” It is difficult to underestimate the damage that the internal market white paper proposals would do to the frameworks process. We have made it clear that we cannot accept the proposals, and the Scottish Parliament made it clear when it voted two weeks ago, 92 to 31, that it is against the proposals.<sup>30</sup>

46. The Cabinet Secretary went on to refer to the ongoing intergovernmental review and need to establish a dispute-resolution mechanism.

**47. The Committee re-iterates its strong concerns about the implications of the proposals for a UK internal market on the development and agreement of common frameworks. The Committee draws its strong concerns to the Parliament’s attention and supports the Finance and Constitution Committee’s consideration of the wide constitutional implications of the proposed UK internal market.**

**48. The Committee notes the comments made by a number of stakeholders that the Scottish Government has not engaged with them in relation to common frameworks. The Committee believes that, for frameworks to work effectively, they must be developed with the full involvement of stakeholders. Again, the Committee draws this to the attention of the Scottish Government, Scottish Parliament and the Finance and Constitution Committee.**

## Part 2 – environment

49. In line with the Scottish Government’s objective for the Bill to provide for continuity with EU law in relation to environmental principles and governance arrangements following EU exit, these provisions are set out in Part 2. The Policy Memorandum states that these “are also necessary to ensure that Scotland’s environmental standards can continue to keep pace with those at the EU level”.<sup>31</sup>
50. A number of environmental organisations raised concerns with this perceived ‘narrow’ approach and argued this was a missed opportunity to legislate on a wider range of environmental issues, as the UK Government proposes to do with its Environment Bill.
51. A number of stakeholders argued the Scottish Government could have used this Bill to address concerns in relation to environmental governance and the continuity of environmental governance and legislation – such as putting the environment strategy on a legislative footing, introducing targets, improving on the status quo in substantive and procedural justice, links to human rights – or broader policy areas where the loss of EU institutions does not leave a complete gap in oversight – such as environmental information and climate targets, and also in relation to individual regulatory decisions.
52. This links to environmental frameworks which are also part of the package of environmental governance arrangements, setting out clear, strategic, environmental ambitions and outcomes that provide a basis for subsequent negotiation and agreement of common frameworks.
53. Dr Gravey, representing the Brexit and Environment Network, argued this wider, strategic approach “may also be something that you could do in another bill, but it must be done if Scotland is to remain ahead of the game regarding environmental ambition in the UK”.<sup>32</sup>
54. **The Committee notes the Scottish Government’s commitment to maintain or exceed EU standards, made in its consultation on environmental principles and governance.<sup>33</sup> The Committee considers that this Bill is fundamental in consolidating the framework for environment law, and other policy and law, which could have either a detrimental environmental impact, or could improve the environment.**
55. **The Committee notes the Scottish Government’s objective for this Bill to be focused on providing continuity of EU law following the UK’s exit from the EU. The Committee is also aware, however, of calls for a wider debate about the need for legislation to give statutory effect to the environment and related Scottish Government strategies in light of EU exit, and heightened environmental challenges, particularly climate change and biodiversity loss.**
56. **The Committee understands the constraints in timing for consideration of the Bill, as a result of delays caused by the impact of the current Covid**

**health crisis and the need to have legislation in place before the end of the transition period. This has impacted on the opportunity to hold this wider debate. However, the Committee considers that clarity in the legislative landscape is required in order to ensure that Scotland's environmental ambitions can be achieved. The Committee expects its successor committee, and other committees of the Parliament, to play a central role in this wider debate in Session 6, as decisions taken in other policy areas have an impact on the environment.**

# Part 2, chapter 1 – environmental principles

## The Bill

57. The Policy Memorandum highlights that the vast majority of Scotland’s environmental law has been developed due to, or as a consequence of, European legislation developed with reference to four environmental principles. It goes on to state that the Bill seeks “to ensure a continued role for domestic environmental principles informed by the four EU environmental principles” following EU exit.<sup>34</sup>
58. Section 9(1) of the Bill provides for four guiding principles on the environment—
- the precautionary principle as it relates to the environment;
  - the principle that preventative action should be taken to avert environmental damage;
  - the principle that environmental damage should as a priority be rectified at source; and
  - the principle that the polluter should pay.
59. Section 9(2) states that these derive from the environmental principles set out in EU law under the Treaty on the Functioning of the European Union (TFEU).<sup>35</sup> Scottish Ministers can – by regulations – add, remove, amend or further define these principles (s9(4)), but only so far as necessary to reflect a change made to the equivalent principle in EU law (s9(5)). Regulations made under s9(4) must be made under the affirmative procedure (s9(6)).
60. Section 10(1) of the Bill provides that Scottish Ministers must, in developing policies (including proposals for legislation), have regard to the guiding principles on the environment. UK Government Ministers are also required to have regard to the principles when developing policy in devolved policy areas (s10(2)). Section 10(3) excludes Scottish Ministers’ duty to have regard to these environmental principles in relation to any policy or proposal so far as relating to either national defence/civil emergency or finance/budgets.
61. Section 11 provides that responsible authorities, as defined in the Environmental Assessment (Scotland) Act 2005, must have regard to the environmental principles when making policy covered by the requirement to hold an environmental assessment under the 2005 Act.
62. Section 12 requires Scottish Ministers and responsible authorities to comply with s10 and s11 “with a view to (a) protecting and improving the environment, and (b) contributing to sustainable development”. Section 12(2) sets out definitions for ‘environment’ and ‘air’ for this purpose. Section 13 requires Scottish Ministers must publish guidance on both the guiding principles and the duties in s10 and s11 “as read with s12” and requires those who are subject to these duties to have regard to the guidance.

## EU environmental principles

63. Article 191, paragraph 2 of the TFEU states that—

” Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

## Environmental principles provided for in the Bill (s9(1))

64. All the evidence received by the Committee supported the principle of the Scottish Government providing for continuity of environmental principles via this Bill following the UK’s exit from the EU.
65. During their evidence, Scottish Government officials stated the four principles had been chosen by Ministers following a public consultation and that there had not been a “great deal of responses” supporting additional principles.<sup>36</sup> However, a number of additional principles were put forward during the Committee’s inquiry. The Committee’s oral evidence sessions focused on the rationale for the principles not provided for in the Bill.
66. A number of witnesses highlighted some of the wider considerations around providing for the EU principles in this Bill, including the wide-ranging application of EU principles across EU policy and decision making. Dr Gravey, representing the Brexit and Environment Network, cautioned that “we need to be careful about how we copy and paste from EU legislation to ensure that we do not narrow the scope of the principles to be just environmental, because they actually infuse the whole body of EU legislation.”<sup>37</sup>

## Additional principles - integration principle

67. The integration principle (article 11 of the TFEU) provides that “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”. ClientEarth, in its written evidence, stated the effect of this principle would be that “environmental protection is integrated into all other policy areas, in line with promoting sustainable development. That is to say, all government departments have responsibilities to protect our environment.”<sup>38</sup>
68. When asked why this principle had not been included in the Bill, a Scottish Government official responded—

” We think that it is there, but it is there in the construction rather than standing as a principle on its own. We achieve integration through the way in which we apply the duty to all decision making and not only a narrow range of decision making.<sup>39</sup>

69. The Committee explored this issue with SEPA and NatureScot. SEPA argued that most of the laws it administers come from being based on the principle set out in the Environment Act 1995 that economic, social and environmental objectives are integrated. SEPA’s chief executive concluded that “we think that there is—I do not think that safeguards is the right word—adequate guidance set through the current processes to ensure that the laws we administer adhere to those sorts of principles”. SEPA also referred to applying the principles to strategic environmental assessments in order to integrate environmental considerations into key decision making. NatureScot thought the principle of integration is already reasonably well embedded in some aspects of legislation in Scotland and did not have any firm views about the inclusion of additional principles.<sup>40</sup>
70. Other witnesses disagreed. Professor Scotford discussed this during her evidence to the Committee, arguing “I am not sure that that [comment by a Scottish Government official] fully addresses the challenge of including, for example, the integration principle”. She went on to argue that the integration principle “is a higher and stronger duty than that of having regard to the principles in the Bill” and, thus, “the integration principle in the EU sense puts a stronger and higher-order obligation on the integration of environmental protection requirements” than the proposed provisions in the Bill.<sup>41</sup> Professor Harrison agreed that the integration principle should be included in the Bill, commenting that “If the aim is continuity with the EU approach ... that would seem to be lacking”.<sup>42</sup> Other witnesses also agreed the Bill should include the integration principle.
71. During her evidence, the Cabinet Secretary agreed “that the integration of environmental policy into other policy is critical”, but also that “other policies have important contributions to make to protecting and enhancing the environment and achieving a net-zero economy”. She stated her view that the proposals achieve integration through the framing of the duty to have regard to the environment when developing policy across government.<sup>43</sup>

## **Additional principles - high level of environmental protection**

72. As indicated previously, the TFEU states that “Union policy on the environment shall aim at a high level of protection” and “a high level of environmental protection and improvement of the environment” is stated as one of the aims of the EU’s internal market. A number of written submissions suggested this should also be reflected on the face of the Bill.
73. Support for its inclusion in the Bill was also raised during oral evidence sessions. Professor Scotford argued the absence of a principle of high-level environment protection was a “glaring oversight”; she stated this was “particularly glaring” given

the statement at s9(2) that the principles derive from the TFEU, as the principle of high level of environment protection is also contained in the TFEU. She went on to argue that “the environmental principles are quite flexible and open-ended notions of environmental protection—they are policy ideas that can be applied in slightly stronger or slightly weaker ways—so there is a distinct advantage in setting an explicit commitment to a high level of environmental protection.”<sup>44</sup>

74. The Law Society of Scotland argued that including a principle of high-level environment protection may go some way to assuage concerns over the weakness of the duty ‘to have regard to’ the principles. These concerns are detailed later on in the report.<sup>45</sup>
75. When asked about this, the Cabinet Secretary drew the Committee’s attention to s12, which provides that the duty is to be applied with ‘a view to protecting and improving the environment and contributing to sustainable development’. She went on to state she “was not sure that legislating for that high-level policy goal as a principle would be very meaningful”. When pressed further on whether a high-level environment policy could be included in the Bill, the Cabinet Secretary argued “the high-level principle ... is what Government is doing on a daily basis, and the four principles that we are legislating for—the ones that the EU operates by—will deliver that”.<sup>46</sup>

## Other additional principles raised with the Committee

76. The principle of environmental equity was raised by the Faculty of Advocates in written evidence, who argued that—
- ” These principles make no mention of environmental equity (in a redistributive sense), and/or human rights. By contrast, the Treaty on the Functioning of the European Union, Title XX, Art.191(2) makes reference to both protection of human health (human rights) and worldwide environmental problems (equity). Given that the stated policy intention of the Bill is to ensure that, as far as possible, and within devolved competence, Scotland „keeps pace“ with EU law in this field, acknowledgement of such broader concerns might be considered to be more appropriate.<sup>47</sup>
77. When asked about this, Professor Scotford argued “it is not a strong principle in the EU with regard to how it has been constitutionalised”.<sup>48</sup>
78. Written submissions also raised the principle of the protection of human health. Professor Scotford highlighted that the EU precautionary principle includes human health, whereas the wording in the Bill applies the Scottish principle only in so far as it relates to the environment.<sup>49</sup> Dr Gravey, representing the Brexit and Environment Network, picked up this point too.
79. The Committee discussed possible additional environmental principles with the Cabinet Secretary. She emphasised the focus of the Bill was to provide for continuity and highlighted that there is “no clear consensus” [in the consultation

before the Bill was introduced] on the addition of individual principles. She added, however, that “there is no reason why other principles could not be considered” and added “beyond the four, there are at least another three or four potential additional principles.”<sup>50</sup>

80. **The Committee notes, and agrees with, the support for continuity of the EU environmental principles as set out in the Bill. The Committee welcomes a statutory footing for the four principles provided for in s9(1).**
81. **The Committee has considered representations made to it calling for additional principles to be included on the face of the Bill, especially the principle of a high level of environmental protection, the integration and environmental equity principles and the inclusion of human health in the precautionary principle. The Committee heard evidence from leading academics and from the third sector that the information on the integration of the principles across Scottish Government policy development was considered to be a weakness in the Bill and a high level of protection is a stated objective in the TFEU.**
82. **The Committee takes the view that, without statutory footing, the Scottish Government’s objective to achieve a high level of environmental protection is a statement of policy intention and does not necessarily provide legal continuity. The Committee believes there should be a high level principle included in the Bill, reflecting the Treaty on the Functioning of the European Union (TFEU), setting a high level of environmental protection. The Committee recommends the Scottish Government bring forward amendments to this effect at Stage 2.**
83. **The Committee believes that, in light of the green recovery and current climate and ecological emergency, it is critical that environmental issues are integrated across all government policy and legislation. To be most effective, the Committee believes this must have a legislative basis and that the integration principle should be included in the Bill. The Committee recommends the Scottish Government bring forward amendments to this effect at Stage 2.**
84. **The Committee also recommends the Bill be amended to include the additional principle of environmental equity and extend the precautionary principle to include human health. The Committee recommends the Scottish Government bring forward amendments to this effect at Stage 2.**
85. **The Committee also notes the questions raised with it relating to the broader issue of replicating some, but not all, EU principles into Scots law within the constitutional structures of the UK. The operation of the principles within the EU context, including the way they are referenced by institutions, and notably by the Court of Justice of the European Union (CJEU), cannot be directly replicated. The impact of these principles in practice in Scotland is not something the Committee has had the opportunity to explore in sufficient depth, given the timescale it has been working to as a secondary committee in an already truncated Stage 1. The**



**Committee is mindful, however, that it may be helpful to the Parliament’s consideration of this Bill if there was clarity on this issue.**

86. **The Committee recommends the Scottish Government provide further information about how the principles would sit in the broader constitutional and legal context, and the impact this may have on how the principles can be applied, in advance of Stage 2.**
87. **Referring back to the Committee’s conclusions in relation to the impact of the proposed UK internal market on Part 1 of the Bill, the Committee also raises a question around its impact on the environmental principles. The Committee considers there is a strong likelihood that the UK internal market could influence Scottish Ministers’ ability to act on the environmental principles, where that also would lead to significant policy divergence. The Committee seeks further information on this point from the Scottish Government in advance of the Stage 1 debate.**

## **Guidance on the environmental principles (s13)**

88. Section 13 requires that the guidance must include provision on a number of points, including the interpretation of the principles and how the principles relate to each and other environmental duties (s13(2)(a)-(c)). A number of witnesses stressed the importance of the guidance to understanding how the principles “are to be balanced and interpreted alongside the wide range of other matters, including other principles and existing substantive law and duties in relation to, for example, climate change, biodiversity and so on”.<sup>51</sup>
89. NatureScot also raised the importance of guidance in supporting how the principles would be used by reference to the existing duty to have regard to biodiversity, as set out in the Nature Conservation (Scotland) Act 2004. NatureScot argued the biodiversity duty “has not delivered the recognition of biodiversity that we would have liked to have seen in how that duty has been discharged” and that, “fundamentally, the trick here is to ensure that those principles are transferred into clearer guidance on how public bodies and all relevant public authorities need to take that duty on board and discharge it”.<sup>52</sup>
90. The Cabinet Secretary said she was committed to consulting “extremely broadly” on the guidance.<sup>53</sup>

91. **The Committee notes the importance of guidance in cementing the environmental principles within policy development structures and legislation. The Committee welcomes the Cabinet Secretary’s commitment to consult extremely broadly on the guidance and welcomes the requirement for draft guidance to be laid before the Scottish Parliament. The Committee would welcome an early indication of the issues the**

**Scottish Government would intend to include in the guidance in advance of the Stage 1 debate.**

92. **The Committee considers that there should be a wide public consultation on the draft guidance and should include all public bodies to ensure the views of those whose decisions can affect environmental protection are identified and fully considered.**
93. **The Committee encourages the Scottish Government to commence the consultation at the earliest opportunity and intends to give (and recommends its successor committee gives) detailed consideration to the guidance when it is laid, including consideration of the list of consultees and their responses.**

## **Duty to “have regard to” the principles (s10(1) and 11(1))**

94. The duty to have regard to the environmental principles was raised in evidence by a number of stakeholders. Many expressed concerns that ‘to have regard to’ was too weak a requirement and would not sufficiently ensure that the environmental principles were at the heart of the decision-making process. SE LINK argued for the wording to be strengthened.<sup>54</sup> The Law Society of Scotland commented that “you could ‘have regard to’ something but attach little or no weight to it. The phrase is, by its nature, limited in scope.”<sup>55</sup> Alternative wording was put forward by a number of witnesses, including to ‘have due regard to’ (as the duty in the UK Environment Bill was amended to) or ‘to act in accordance with’.
95. In evidence to the Committee, Scottish Government officials argued the wording is a proportionate response, as the “four guiding principles are very important, but they should not dominate other factors in decision making”.<sup>56</sup>
96. When asked about this, Professor Scotford argued that the “bill could be stronger—if you really wanted to embed the principles in policy making”.<sup>57</sup>
97. The Committee sought SEPA and NatureScot’s view on this point. SEPA stated it was “not sure that which particular form of words is used will have a huge impact. What is important is that a phrase of that sort is included in the Bill.” SEPA went on to stress the importance that effective relationships were in place; stating that “a duty might help with that to some degree, but I do not think that it will be the key thing. It is the relationships and the strategic alignment that are critical”.<sup>58</sup>
98. During her evidence to the Committee, the Cabinet Secretary set out her reasons why the duty to have regard was appropriate, stating that the principles are “guides to decision making” and it is necessary they do not “conflict” with the other statutory duties. She stated—

” The stronger formulation of the duty could constrain ministers’ ability to take other legitimate considerations into account when they are developing policy. The same concern would apply to public authorities. If the duty was made even tighter, it could lead to perverse effects or even hold up decision making, which we would want to avoid. ... If we make a particular duty gazump everything else because we cannot make that necessary balancing decision, we will run into difficulties.<sup>59</sup>

99. **The Committee notes the concerns raised with it that the duty to ‘have regard to’ may not be sufficient to ensure environmental considerations are given appropriate weight within the policy development process. The Committee also notes the Cabinet Secretary’s view that there are a range of statutory duties and Scottish Ministers, and responsible authorities, need to balance these when reaching a decision.**
100. **The Committee understands that the duty to ‘have regard to’ and to ‘have due regard to’ was debated extensively during consideration of the draft UK Environment Bill and the duty was enhanced to ‘have due regard to’. Having considered both bills, it appears to the Committee that what is currently being proposed in the Bill is a weaker formulation of that which is proposed in the UK Environment Bill.**
101. **The Committee is also aware the TFEU provides that union policy on the environment ‘shall be based on’ the four principles. The Committee considers this also to be a much stronger formulation than ‘have regard to’ as is currently proposed in the Bill.**
102. **The Committee recognises the importance of effective relationships and strategic alignment, but has concerns in relation to the current implementation of other sustainability duties in different contexts, such as the biodiversity duty. This would seem to re-enforce the need for a strong formulation in the Bill.**
103. **The Committee considers that the principles must have a meaningful role in shaping all future policy development. The Committee also believes that the principles should have the same status in regard to decision-making processes in order to maintain continuity with the principles as they currently apply via EU membership and in the transition period. The Committee, therefore, recommends the Scottish Government brings forward amendments at Stage 2 to strengthen the wording in relation to the duty to have regard to the principles. The Committee highlights the suggestions made to it which includes a duty to ‘have due regard to’ or to ‘act in accordance with’.**
104. **The Committee considers that action is needed to ensure that the duty is effective and recommends that the Scottish Government identify what action it proposes to take to ensure this. Given the weaknesses revealed in securing the effective implementation of other environmental duties, the Committee also requests an update on the Scottish Government action in response to the recommendations in the Public Audit and Post-legislative**

**Committee 2018 report, considering biodiversity and biodiversity reporting duties.**

105. **The Committee recognises the importance of the guidance in providing the context for how the principles are interpreted and inform policy development. When considering the draft guidance, the Committee will (and recommends its successor committee should) give detailed consideration as to how the guidance will inform the duty to have regard to the principles.**

## **Exclusions from the duty ‘to have regard to’ the principles (s10(3))**

106. This section provides that the duty on Scottish Ministers and responsible authorities to have regard to the environmental principles would not apply on policy or proposals relating to national defence/civil emergency or finance/budgets. Scottish Ministers are also given a power to make further provision about matters or circumstances in relation to which the duties do not apply (s10(4)).
107. The Committee explored the exclusion in relation to national defence and civil emergency. NatureScot stated its “hope that the Ministry of Defence will be cognisant of the principles, certainly on the land that it manages, as far as it is able to do so in discharging its functions”.<sup>60</sup>
108. When asked about the purpose of the exclusion in relation to finance and budgets, Scottish Government officials stated the provisions reflect the Environmental Assessment (Scotland) Act 2005 and Strategic Environmental Assessment Directive (2001/42/EC). They stated it “is not to exclude from consideration the wider issues of how much resource should be applied to environmental issues or goals; it is about the specific processes for budgets and finance, which we see as not being within the purview of the new duty to have regard to the principles”.<sup>61</sup>
109. A number of submissions and oral evidence, however, suggested a need for greater clarity in relation to the exclusions set out in s10(3). The Law Society of Scotland stated—
- ” In the bill, there appears to be a blanket exclusion in relation to financial and budgetary matters. My understanding from the Scottish Government is that the intention is that that will apply only to matters that are exclusively financial or budgetary, but we need further clarification on that. ... while we recognise the underlying reasons for this, we note that there appears to be a disconnect between discussion about the importance of a green economy, and in particular green recovery from the impacts of Covid-19 and the blanket exclusion of finance and budget matters.”<sup>62</sup>
110. The Faculty of Advocates also raised concerns that the principles would be weakened by the provision at s10 to limit their effect, in particular by their exclusion

from delegated decision-making on financial policy matters (s10(3)(b)). The Faculty considered that environmental protection, improvement and were included as additional principle and recommended that s10(3)(b) is deleted, or the scope strictly specified, to strengthen the “guiding principles” and their legal effect and avoid limiting the Bill’s overarching strategy and purpose.<sup>63</sup>

111. Dr Gravey, representing the Brexit and Environment Network, referred to this exclusion as a “big equity issue” and that “in terms of building back better, the green recovery and all those important debates, the bill does not help”.<sup>64</sup>
112. When asked about the reasons for this exclusion, the Cabinet Secretary stated it was to “remove the purely financial and budgetary processes from the scope of the duty [otherwise] ... the process will become extremely complex”. She confirmed the intention was not to exclude environmental policies with financial consequences and that the concern raised with the Committee was based on a misunderstanding of the purpose of the provision.<sup>65</sup>

**113. The Committee notes the concerns raised with it regarding the exemption of policies relating to finance or budget (s10(3)(b)) from the duty to have regard to the environmental principles when developing policy (s10). The Committee also notes the Cabinet Secretary’s clarification that the intention is to remove the purely financial and budgetary processes and not to exclude environmental policies with financial consequences.**

**114. The Committee believes that all decisions involving fiscal measures and capital expenditure can have a significant environmental impact and must, therefore, be guided by the s9 environmental principles. The Committee considers that in order to provide clarity on this point there may be a requirement for amendments to the Bill.**

## **Requirement for responsible authorities to consider the principles (s11)**

115. Some written submissions raised concerns that the principles would only apply to responsible authorities (as defined in the Environmental Assessment (Scotland) Act 2005) as part of the Strategic Environmental Assessment (SEA) process, rather than applying to their decision-making processes more broadly.
116. During her evidence, Professor Scotford said the link to the 2005 Act was “neat and elegant” and that extending the principles more broadly to public authorities would be an option, “as EU principles tend to work in that way and it would ensure that very large planning applications, for example, would be captured”, although acknowledged that would lead to complexity.<sup>66</sup>
117. NatureScot supported the extension of the duty to all public bodies, arguing it would “help us to deliver the nature-rich future that we envisage”.<sup>67</sup>

118. SEPA stated in its submission that “applying the four EU level principles to the exercise of SEPA’s individual regulatory decision-making functions is not required and would both duplicate and add complexity to our decision-making framework”.<sup>68</sup> SEPA set out some of the background to the different duties and considerations it has to take into account when making decisions at the governance round-table in January.<sup>69</sup>
119. During her evidence to the Committee, the Cabinet Secretary referred to the specific purpose of the Bill to provide continuity with EU law and stated the Bill sought to replicate the role of the principles on decision making within the EU. She told the Committee—
- ” In the EU, laws are made that reflect the environmental principles, and those laws drive the design of regulatory schemes. ... I think that I am right in saying that the EU principles at that level had no direct effect on individual regulatory decisions in Scotland. The principles guide the policy making, and then, out of the policy, you design the regulatory system that has to apply.”<sup>70</sup>
120. Stakeholders disagreed with that position and considered it to be a misunderstanding of the role of environmental principles in current EU law. The Committee received evidence from stakeholders, including from Client Earth, who said that this was too narrow and Eloise Scotford discussed the legal role of principles as ‘systemic’ and not just about policy-making.

121. **The Committee notes the concerns raised relating to responsible authorities’ duty to have regard to the environmental principles only in regard to the Strategic Environmental Assessment (SEA) process (s11(1)). The Committee also notes the Cabinet Secretary’s position that, in the context of this Bill’s specific purpose to provide continuity, extending the duty more widely to responsible authorities would take this provision beyond the current position with EU law.**
122. **The Committee considers that there are important questions within the scope of the Bill about whether principles should be applied systematically across policy and decision-making or applied in a much more limited way . The Committee understands, for example, that the precautionary principle has been applied within the EU and has featured in legal challenges of individual planning cases.**
123. **The Committee has concerns about the limited application of the principles applying to responsible authorities only as part of the SEA process, rather than applying to their decision-making processes more broadly. The Committee requests clarification from the Scottish Government on the current role of EU environmental principles in relation to policy and decision making by Government and responsible authorities and to the courts in reviewing such decisions, for example in relation to planning decisions, in advance of consideration of the Bill at stage 2.**

## Definition of ‘environment’ (s12(2))

124. Queries were raised in relation to the definition of ‘environment’ provided at s12(2) in both written and oral evidence. Further information on this part of the Committee’s inquiry is set out in next section of the report.

## Part 2, chapter 2 – Environmental Standards Scotland

125. The Policy Memorandum sets out the purpose of Part 2, chapter 2 of the Bill to “establish a new Scottish public authority which will take on governance functions in connection with compliance by the Scottish Ministers and public authorities in Scotland, other than reserved bodies, with environmental law” to replace the existing governance arrangements the UK is part of as an EU member state. It goes on to state that “the Bill confers a set of powers on the new governance body to—
- investigate when Ministers and other public authorities have failed to comply with environmental law;
  - take enforcement action to support Ministers and public authorities remedying any failure to comply with environmental law; and
  - take steps to improve the effectiveness of delivery of actions relating to environmental law.”<sup>71</sup>
126. Section 15 establishes a new public body called Environmental Standards Scotland (ESS) and its functions are set out in s16. Scottish Ministers are given the power to modify ESS’s functions, subject to parliamentary approval, under s17. ESS must prepare and publish a strategy, and exercise its functions in line with the strategy, under s18; ESS must lay the draft strategy in the Scottish Parliament, which will have 40 days to consider it.

**127. The ESS is variously described in the bill itself as a ‘body corporate’ and in the papers accompanying the Bill as a ‘public body, ‘non-ministerial department’ and a ‘non-ministerial office’; Scottish Government officials subsequently confirmed ESS would be a non-ministerial office, not department. The Committee uses the term ‘non-ministerial office’ throughout its report and recommends the Bill and accompanying documents be amended to reflect this.**

### Continuity in environmental governance

128. The Policy Memorandum accompanying the Bill states the purpose of ESS would be to “continue the role and functions of the European institutions in ensuring the complete and effective implementation of environmental law”.<sup>72</sup>
129. In her comments to the Committee, the Cabinet Secretary elaborated on this, stating that “the Bill that we are discussing is about what happens in the short term. It is about getting us through the exit from transition and into the new world with a system that, as far as possible, mirrors what we currently have.”<sup>73</sup>
130. The Committee pursued the issue of continuity of arrangements with witnesses.



131. Campbell Gemmell thought the “main proposal is a good step, but it is flawed in a number of ways”. He went on to elaborate—
- ” I would say no—the proposals are not an adequate or fully sufficient substitute for the current arrangements. ... it is essential that we view the existing arrangements as a fairly complex system of checks and balances and components. The proposals in the bill focus on the European Commission-type element of the system, without seeking to do anything either through existing governance in other parts of the system or through the inclusion of a dedicated environment court. Even in focusing on the Commission element specifically, the bill does not have the required robustness. For example, it does not pursue matters at the level of an individual case; it looks only at the more general and strategic aspects. That is a very big gap.<sup>74</sup>
132. Dr Gravey, argued it would not be possible for ESS to provide fully for continuity in environmental governance because the European Commission and the Court of Justice of the European Union (CJEU) are “general regulators that cover the whole remit of public policy and all EU competence”. Dr Gravey argued this meant the Commission and CJEU might investigate cases in which the environment is an element but not the core of the matter, and ESS will not necessarily be able to pick those up.<sup>75</sup>
133. However, Professor James Harrison also noted that—
- ” In some ways, the proposal in the bill goes beyond what the Commission could do. The Commission’s procedures apply to compliance with EU environmental law, whereas the proposal in the bill would apply to any Scottish environmental law. It is to be welcomed that we will finally be getting robust compliance mechanisms that do not rely on judicial review in order to ensure that our public authorities comply with all forms of environmental law.<sup>76</sup>

## Functions and powers

134. At the start of its evidence taking, the Committee asked Scottish Government officials to explain – using as an example the current complaint about the unlicensed use of acoustic deterrent devices – how ESS would operate. Officials explained—

” We would expect, in line with the bill, that ESS would request information from Marine Scotland on its decision-making processes, the background to that, the way that it conducts its business and issues licences, and the criteria that it uses. We would then expect ESS to come to a view on whether there was a problem. There are clearly two broad possibilities. The first is that the way that Marine Scotland was acting was somehow in conflict with the law as stated. ... In that case, ESS could start to move towards a compliance notice. We would expect it to discuss its concerns and issues with Marine Scotland and try to resolve them first, but that would be the route.

On the other hand, if the concern was more that the law was not properly taking account of the issue or that the balance between nature conservation objectives and regulation of the activity was somehow not in the optimal place, ESS could start to move towards discussions about whether the law should be improved. That would take it towards the improvement report end of the process.

The compliance notice is for narrower circumstances where the public authority is not working in accordance with the law. The improvement report route is for situations in which the law or the broader strategy is somehow not working to the overall advantage of the environment, or the correct balance between the environment and the activities.<sup>77</sup>

135. During her evidence to the Committee, Professor Scotford gave her view that the distinction between circumstances warranting either a compliance notice or an improvement report may not be as clear cut. She said—

” The evidence from Government officials to the committee last week indicated that the improvement report route would apply only where the law needed to be improved. In fact, it would also apply to compliance, where there was a failure to meet environmental law. If the improvement report route was chosen, the compliance notice route would be knocked out. ... I worry that, on complex questions of compliance with environmental standards, cases might go down the improvement report route and would therefore not be fully resolved.<sup>78</sup>

**136. The Committee is of the view that it is important to consider overall whether the arrangements in the Bill adequately provide for continuity of governance. The Committee notes that stakeholders have generally suggested that the proposed arrangements do not provide equivalence with the EU.**

**137. The Committee notes that the Bill focuses on the European Commission elements of governance and, from the evidence provided, it appears that there are gaps, for example, in relation to the ability to pursue matters at the level of an individual case, in relation to the investigation of cases in which the environment is an element but not the core of the matter and in relation to climate governance.**

**138. The Committee notes the concerns about the possibility that the proposals are not an adequate or fully sufficient substitute for the current**

arrangements and notes the possibility that cases may not be fully resolved. In relation to improvement reports and plans there is no set provision in relation to monitoring, reviewing and monitoring progress in implementing the plan; instead these are to be detailed in the plan itself (s26(2)). The Committee understands that a degree of flexibility is appropriate in view of the range of circumstances which may be covered. Under the proposed system an element of governance that was previously fulfilled by the European Commission is now ultimately going to end up in Parliament via the lodging of an improvement report. The Committee considers that this will provide some safeguard, as the Parliament has the option to reject an improvement plan.

139. The Committee also notes that this process will impact parliamentary committees and there remain questions in relation to the capacity, and access to expertise, of committees to consider such reports.
140. The Committee generally welcomes the compliance routes open to ESS as it discharges its functions. While some specific issues about the relationship between these and other bodies and processes are raised later, the Committee would, however, welcome a response from the Scottish Government in advance of consideration of the Bill at Stage 2 to the following questions—
- The Committee is not convinced of the need to restrict ESS to either the compliance notice route or the improvement report route, in all cases. Given ESS's focus on strategic and systemic issues of environmental law, the Committee can envisage situations where there is a mix of non-compliance with the existing law and the need for the law to be improved. The Committee, therefore, requests the Scottish Government to set out its rationale for the restriction on ESS choosing to take both routes in relation to issues that merit a dual approach;
  - In relation to improvement reports, the Committee recommends a maximum period should be set for monitoring and follow up; and
  - In relation to ESS's strategy, the Committee asks what consideration has been given to widening the other public bodies with whom ESS's functions may overlap, such as the Information Commissioner or Audit Scotland?

## Functions and powers – individual cases

141. A number of witnesses raised the issue that the ESS would not be able to take enforcement action on individual cases. The Law Society of Scotland and SE LINK argued that, in this respect, the Bill would not be entirely in line with the current provisions under EU arrangements. SE LINK went on to argue the “exemption of individual decisions overlooks the critical role that individual decisions have played

in setting precedents in the past” and argued the Bill should be amended to address this. <sup>79</sup>

142. When asked about this, SEPA highlighted the existing processes for breaches of environmental law and argued “it will not help anyone if that line is blurred strongly”. SEPA reiterated its view that ESS’s role should be focused at the strategic level; NatureScot agreed, stating “our plea is that ESS remains strategic and focuses its energies on the underlying issues that seem to crop up time and again”. <sup>80</sup>
143. In correspondence to the Committee, the Scottish Government clarified the position, stating—

” the limitation is only on the use of the enforcement powers with respect to individual regulatory decisions of public authorities, such as decisions on an individual permit or permissions... It is the Scottish Government’s intention that it should be possible for regulatory decisions to be taken, and deemed to be final, without the new body having to take a view on every occasion.

144. **The Committee recognises that stakeholders have emphasised the importance of EU functions in relation to investigating and challenging individual cases and the ability for precedents to be set via those cases. The Committee considers that restricting the remit of the ESS to strategic issues (in relation to improvement and compliance reports) could be unduly restrictive and have unintended consequences.**
145. **The Committee requests clarification from the Scottish Government, in advance of Stage 2, about how an individual would be able to pursue a complaint about a breach of environmental law post-EU exit – and whether the new mechanism would be more or less burdensome than the process which is in place at the moment. The Committee also requests an explanation of how the Scottish Government will ensure that the ESS is not precluded from taking action because a particular regulatory decision has exposed an area of general and strategic concern.**
146. **The Committee also requests further information on the compatibility of this part of the Bill with obligations in the Aarhus Convention, in particular the obligations to ensure citizens have access to justice on environmental matters. The Committee asks the Scottish Government to provide this ahead of consideration of the Bill at Stage 2.**

## Functions and powers – exclusion of climate change targets

147. Concerns were also raised with the Committee that the definition of “environmental law”, set out in s39(1) does not include Parts 1 to 3 of the Climate Change (Scotland) Act 2009; this excludes climate change targets from the remit of ESS.

148. When asked about this, officials stated the Scottish Government’s “deliberate intent to remove the strategic level of policy making on climate change emissions reduction, mainly because it already has a complex and well-developed governance and policy development issue of its own”.<sup>81</sup>
149. Dr Gravey argued the exclusion would be “problematic” and it would be “extremely odd” for climate change to be part of the OEP’s [Office for Environmental Protection] remit but not ESS’s.<sup>82</sup>
150. When asked about this, the Cabinet Secretary said the Scottish Government’s “decision was not entirely or solely based on the UK Committee on Climate Change’s advice”. The Cabinet Secretary stated—
- ” I am not sure that there is any need for an additional institutional voice in that process, nor do I think that it will be effective or even proportionate for the new body to have to gain expertise in that area of policy. The exclusion would not apply to the regulation of individual measures in environmental law in pursuit of emissions reduction targets. ... Therefore, there is perhaps not as much of a gap there as people might imagine.<sup>83</sup>
151. The Committee raised this with Chris Stark of the UK CCC when he gave evidence to the Committee on 15 September 2020. Chris Stark noted that Parts 1 to 3 of the Climate Change (Scotland) Act 2009, dealing with emissions reductions, were excluded from the definition of environmental law in the Bill and Part 5, dealing with climate change adaptation, was included within the definition (and, therefore, subject to enforcement by the ESS). He noted this potentially creates a gap and questioned whether it is Scottish Ministers’ intention that the enforcement of climate change adaptation practices should sit with ESS. Chris Stark also highlighted the Bill does not provide for ESS’s relationship with the CCC stating -
- ” there is nothing in the Scottish Bill that lays out a basis for strong co-operation between ESS and the CCC. Legislation could be a way to get that co-operation; I would welcome the new body in Scotland being charged with co-operating well with the CCC, so that we get that well-rounded, integrated approach to the environment overall.<sup>84</sup>
152. He also highlighted the Bill does not provide for ESS’s relationship with the OEP and that, “again, that would need to be planned and thought through.

- 153. The Committee notes the concerns raised with it in relation to climate change targets being excluded from the ESS’s remit. The Committee also notes the Cabinet Secretary’s view that there is no need for “an additional institutional voice” in relation to setting and monitoring climate change targets. The Committee considers that there is an issue of credibility, and a significant reputational risk to ESS, for its remit not to cover the core public policy targets driving Scotland’s response to the climate crisis. The Committee notes the alternative approach taken by the UK Environment Bill, where the Office for Environmental Protection (OEP) is required to set out in its strategy how it “intends to avoid any overlap between the**

**exercise of its functions and the exercise by the UK Committee on Climate Change (UK CCC) of that Committee’s functions”.**

154. **In considering whether the Bill provides for continuity (as far as possible) with current EU arrangements, the Committee notes that climate change is not excluded from the remit of the European Commission because the UK has a climate change advisory body. The Committee also notes that the European Commission could still uphold a complaint or bring infraction proceedings if it considers that actions by the Scottish Government (as part of the UK) do not comply with European law on climate change.**
155. **The Committee recognises the invaluable role played by the UK CCC in providing evidence and advice on climate change policy; however, the Committee notes that it does not have either a compliance role or enforcement powers, as does the European Commission or as is proposed for the ESS. The Committee has written to the UK CCC to seek its view and will aim to publish its response before the Stage 1 debate. However, the Committee concludes that, based on the Bill as currently drafted and the information available to it, there may be a governance gap in relation to climate change.**
156. **In advance of consideration of the Bill at Stage 2, the Committee asks the Scottish Government to provide additional information on what it means by “the particular relationship between the Scottish Government and the Parliament in setting and monitoring climate change targets” and why those are considered to provide equivalence with current EU governance arrangements.**
157. **The Committee notes the UK Environment Bill was amended to include climate issues and that this is a responsibility of the proposed OEP. The Committee highlights the seriousness of the climate emergency and the need to ensure that climate governance is robust. Having considered this issue and the available evidence, the Committee recommends the exemptions in relation to climate change are removed and that this forms part of the responsibility of the ESS. The Committee recommends the Scottish Government bring forward any necessary amendments at Stage 2.**
158. **The Committee also recommends the ESS and UK CCC form a strong working relationship with a clear division of responsibility.**

## **Functions and powers – exclusion of finance or budgets**

159. **Section 39(2) excludes from the definition of ‘environmental law’ a number of policy areas, including “finance or budgets”.**

160. **The Committee understands that the exclusion of “finance or budgets” from the definition of environmental law results in these issues falling outwith the remit of ESS.**
161. **The Committee’s consideration of this issue mirrors to some extent its consideration of exclusions from the duty ‘to have regard to’ the principles (s10(3)). The Committee seeks clarity from the Scottish Government as to whether it is the Cabinet Secretary’s intention to remove the purely financial and budgetary processes from ESS’s remit and not, for example, consideration of what financial resources would be needed for a public body’s compliance with environmental law. The Committee would welcome a response from the Scottish Government ahead of consideration of the Bill at Stage 2.**

## Functions and powers – relationships with other bodies

162. The Bill requires the ESS to prepare a strategy that, among other things, sets out how it is to exercise its functions “in a way that respects an avoids overlap” with the functions of the Scottish Public Services Ombudsman or the Commissioner for Ethical Standards in Public Life (Schedule 2 paragraph 1(1)(d)).
163. The Committee asked both NatureScot and SEPA for their expectations about how they would work alongside the ESS. NatureScot argued that this would depend on “where ESS’s focus will be, how it is set up and the types of cases that it will explore”.<sup>85</sup> NatureScot stated—
- ” We need to be reassured that we do not end up with a wide-ranging environmental watchdog that is not clear as to what type of cases it will investigate. We are keen to ensure that, when we talk to ESS, it will operate proportionately and will focus on some of the key issues, which we know are systemic, rather than operating on a case-by-case basis.<sup>86</sup>
164. SEPA stated that the strategic focus, as opposed to early intervention, was “promising” and would “allow us to do our regulatory-role work”.<sup>87</sup>

165. **The Committee notes that the work of ESS in relation to compliance with environmental law and the improvement of its effectiveness may interact with the functions of other bodies that also exercise an oversight role. Such bodies include those active in areas specifically excluded from the competence of ESS in relation to climate targets (the UK CCC as noted above), environmental information (the Scottish Information Commissioner) and finance (Audit Scotland). The Committee considers that relations with these bodies should also be included in the Strategy and in Schedule 2 of the bill. The Committee asks the Scottish Government to bring forward the necessary amendments at Stage 2.**

166. **The relationship between ESS and both NatureScot and SEPA will be critical to the oversight of environmental law in Scotland. The Committee requests further information from the Scottish Government in advance of Stage 2 setting out Scottish Ministers' expectations for the relationship between ESS and both NatureScot and SEPA.**

## Independence from the Scottish Government

167. Evidence to the Committee highlighted concerns about whether the proposed body would be at a sufficient 'arm's length' from government. In his written submission, Campbell Gemmell argued that "the direct involvement of the government of the day in recruitment, reporting and operation as well as setting budgets and priorities is inappropriate and weakens the body and its likely value and impact".<sup>88</sup> SE LINK highlighted the research it commissioned from Campbell Gemmell in 2019 which recommended a parliamentary commission for environmental governance.<sup>89</sup>
168. The Policy Memorandum recognises the call for a parliamentary commission but states that Scottish Ministers took the view that the new model "needed to be established separate from any existing body and function, complementing the established roles of the Scottish Parliament and the Scottish courts".<sup>90</sup>
169. SE LINK called for the Bill to be amended to strengthen the independence of ESS, particularly around the appointments process.<sup>91</sup> The Law Society of Scotland called for fixed term membership of ESS and for consultation before a member may be removed.<sup>92</sup> Scottish Land and Estates called for the employment of rapporteurs who could assist in the recruitment process and highlighted the importance of ESS having the "teeth to do its job" and adequate resourcing.<sup>93</sup>
170. In response, Scottish Government officials stated that the "non-ministerial department is a strong model of independence" and that "the Bill guarantees the independence of the new body", especially the provisions which require ESS's board appointments and strategy to be approved by the Scottish Parliament.<sup>94</sup> (Scottish Government officials subsequently confirmed ESS would be a non-ministerial office, not department.)
171. In particular, a number of submissions and witnesses pointed to the provision set out in schedule 1, paragraph 1(2) of the Bill. Paragraph 1(2) provides that the provision that ESS would not be under the "direction or control of any member of the Scottish Government" would be "subject to any contrary provision in this or any other enactment". In evidence, Scottish Government officials gave the reason for this provision for the sake of "tidiness and legal efficiency" as it would give Scottish Ministers the power to amend the functions by secondary, rather than primary, legislation<sup>95</sup>; officials later confirmed paragraph 1(2) is not a regulatory making power.<sup>96</sup>



172. When the Cabinet Secretary was asked to respond to the concerns raised regarding ESS's independence from the Scottish Government, she explained—
- ” The model that we have chosen has been proven to work already in respect of some other things that we have done, and that gives us the confidence that it will be independent. Believe you me, I have no interest whatsoever in getting involved in the decision making that this body would have to be involved in. I cannot imagine that anybody would, at any Government level.<sup>97</sup>
173. The Cabinet Secretary subsequently stated that the provision at schedule 1, paragraph 1(2) is “just a standard provision that goes into a lot of legislation”. The Cabinet Secretary also highlighted that the provisions in relation to ESS would be subject to parliamentary approval and, therefore, independence from government would be achieved in that way.<sup>98</sup>
174. The Committee considered the range of options for the governance arrangements.<sup>99</sup>

- 175. The Committee considers the independence of ESS is fundamental to its role as arbiter on environmental governance in Scotland following exit from the EU. The Committee recognises, and has closely followed, the ongoing debate since the EU referendum about what institutional arrangements should be adopted in Scotland. A strong voice in that debate called for a parliamentary commission; the Scottish Government has chosen to establish a non-ministerial office.**
- 176. The Committee also recognises that stakeholders have questioned the degree of independence a non-ministerial office has from the Scottish Government. The focus of the Committee's discussion with the Scottish Government has been on the appointments process, safeguards around the membership of the board, the functions of ESS and the resources to carry out its job.**
- 177. The Committee is not yet convinced that a non-ministerial office would provide ESS with sufficient distance and autonomy from the Scottish Government. The Committee asks the Scottish Government to provide further information about what it sees to be the advantages of a non-ministerial office over a parliamentary commission ahead of consideration of the bill at Stage 2.**
- 178. Notwithstanding the above recommendation, the Committee notes its concern that the process of interim appointments is currently underway, with no engagement of the Parliament to date. The Committee is concerned that in practice, if the ESS is constituted as a non-ministerial office there may be little scope for genuine parliamentary influence. The Committee, therefore, recommends parliamentary involvement begins at the start of the appointments process and that this is reflected in the statutory process. The Committee comments further on interim appointments later in the report.**

179. **The Committee recognises the power to modify ESS’s functions (s17) is limited, being only for the purpose of implementing an international obligation agreed between the UK and the EU post-exit and would be subject to parliamentary approval.**
180. **The Committee notes that the provision at schedule 1, paragraph 1(2), that allows exceptions to the ban on ministerial directions affecting the work of ESS, adopts a formulation used in other enactments. To provide assurance, the Committee requests the Scottish Government provide a list of the purpose and effect of all existing enactments which would provide Ministers with any power or direction over ESS (i.e. enactments with provisions that would fall under Schedule 1, para 1(2)).<sup>100</sup> The Committee expects parliamentary scrutiny of future enactments would include consideration of their impact on ESS.**

## **Remit and definition of “the environment” and “environmental law”**

181. The definitions for Part 2, chapter 2 are set out in s37-41. Section 40(3) defines “the environment” as “all, or any, of the air, water and land (including the earth’s crust), and ‘air’ includes the air within buildings and the air within other natural or man-made structures above or below ground”. The reciprocal definition in the UK Environment Bill is on the “natural environment” and is “(a) plants, wild animals and other living organisms, (b) their habitats, (c) land (except buildings or other structures), air and water, and (for each of (a) to (c)) the natural systems, cycles and processes through which they interact”.<sup>101</sup>
182. As highlighted in relation to the environmental principles, concerns were raised with the Committee about the definition of ‘environment’ at s40(3). In its written submission, NatureScot stressed its concern that the Bill’s definition of “the environment” omits habitats and species and may, therefore, restrict how ESS could ensure compliance with the Birds and Habitats Directives and associated domestic regulations; it was also unsure whether “landscape matters” are included within the definitions of the Bill. NatureScot suggested the same definition as set out in the Environmental Information (Scotland) Regulations 2004 should be adopted.<sup>102</sup>
183. Scottish Government officials confirmed that it was not the Government’s intention to exclude the birds and habitats directive. The Cabinet Secretary stated that too many people were looking at the definition in isolation and that “it is part of a much wider set of definitions, which include environmental law, environmental protection and environmental harm. They are comprehensive when one reads them all together.” The Cabinet Secretary confirmed her view that the definition in the bill encompasses the protection of species and habitats.<sup>103</sup>

**184. The Committee considers it unhelpful that the definition of ‘environment’ in the Bill caused confusion amongst a number of stakeholders. The Committee welcomes the Cabinet Secretary’s confirmation that species and habitats are within the scope of the Bill but recommends that, for the sake of clarity, the definition is amended at Stage 2 to reflect the definition set out in the Environmental Information (Scotland) Regulations 2004.**

185. Concerns were also raised around the definition of ‘environmental law’ at s39, and particularly the exemption at s39(2)(a) of the disclosure or, or access to, information.

186. Dr Gravey, representing the Brexit and Environment Network, highlighted the removal of environmental information from the remit of the final arbiter role as a weakness of the functions and powers for ESS. She argued that, “for a continuity bill that claims to build on the EU approach, that is completely against the EU approach. Access to environmental information and justice is not only in the Aarhus convention; it is part of the EU acquis.”<sup>104</sup>

187. The Cabinet Secretary responded to questions on this by committing her officials to write to the Committee with a more detailed response.

**188. The Committee considers that access to environmental information is crucial and is concerned about the removal of environmental information from the remit of the final arbiter role of ESS. The Committee welcomes the Cabinet Secretary’s commitment to provide further information about the exemption at s39(2)(a) of environmental information and requests this in advance of Stage 2.**

## International obligations and developments in international law

189. While international obligations themselves do not fall within the Bill's definition of environmental law, the Bill provides ESS with the functions to “keep under review implementation of any international obligation of the United Kingdom relating to environmental protection” (s16(2)(e)) and “have regard to developments in, and information on the effectiveness of, international environmental protection legislation” (s16(2)(f)). Section 17(1) would enable the Scottish Government, by regulations, to give the ESS a new function for the purpose of implementing an international obligation agreed between the UK and EU post-exit.

190. In relation to international obligations that the UK has signed up to, NatureScot’s written evidence states that the functions of ESS as currently described would “rule out oversight of obligations set out in international conventions, such as the Ramsar Convention and the Bern Convention”.<sup>105</sup>

191. The Cabinet Secretary was asked whether ESS’s role will include monitoring developments in environmental law internationally and in the EU. The Cabinet Secretary stated—

” ESS will be able to consider examples of EU law and look at implementation in member states to inform a judgment on how effective Scottish environmental law is. I anticipate that that is what it will be interested in doing. However, more generally, it is the Government as a whole that will monitor developments in EU law. <sup>106</sup>

192. **The Committee notes the Cabinet Secretary’s view that routine monitoring of developments in international law best sits with the government as a whole. However, the Committee recommends the Scottish Government provide further information about the role of ESS in terms of the oversight of international obligations to which the UK is a signatory, such as the Ramsar Convention and the Bern Convention. The Committee would welcome a response in advance of consideration of the Bill at Stage 2; the Committee will reflect on this response with a view to considering whether the Bill should be amended.**

193. **The Committee notes the UK Environment Bill requires regular reporting on changes at the EU level. The Committee has already recommended that an equivalent report should be laid before the Scottish Parliament.**

## Courts

194. SEPA’s written evidence outlines its concern that the Sheriff Courts would not have the expertise to deal with an appeal against a compliance notice issued by the ESS and suggested that “there may be a lack of proportionality in relation to the appeal forums for the information and compliance notices”. <sup>107</sup> SEPA was asked whether appeals and judicial enforcement of compliance notices should be heard in a specialist judicial forum, such as the Scottish Land Court (as an alternative as this has already been given some wider environmental responsibilities) as opposed to the Sheriff Court. SEPA stressed the importance that “the case is heard by people with the expertise and experience to be equipped to deal with it”. <sup>108</sup>

195. The Law Society of Scotland stated—

” At present there is inconsistency and fragmentation in the appeal mechanisms for environmental matters. It is important that there is necessary expertise to deal with these matters, particularly appeals. We would welcome action being taken to rationalise, in a consistent manner, how legal issues and appeals are determined across regulatory frameworks affecting environmental issues. <sup>109</sup>

196. Campbell Gemmell stated the proposals in the bill focus on the European Commission-type element of the system, without seeking to do anything either through existing governance in other parts of the system or through the inclusion of a dedicated environmental court.

197. SE LINK called for a dedicated environmental court in Scotland to work alongside ESS to address issues of “access to justice and the fact that the judicial review process can only take a narrow procedural perspective, rather than looking at a merits-based argument, as the European Court of Justice is able to do”.<sup>110</sup>
198. When asked about this issue, the Cabinet Secretary thought it was not relevant to the Bill. She said “given that the continuity bill is about fixing a problem that we face imminently—that of Brexit—that level of decision about what court might be involved need not be a big concern here. We are replicating what we currently do.”<sup>111</sup>

199. **The Committee notes that there is a longstanding debate about the need for an environmental court in Scotland, which is relevant to issues of Aarhus compliance and also to human rights issues, such as the proposed right to a healthy environment. The Committee notes that the scope of this Bill has been limited to addressing governance gaps largely due to losing the functions fulfilled by the European Commission, and the Bill has not addressed other parts of the system, including judicial routes.**
200. **The Committee notes the concerns about the appropriateness of the Sheriff Court as the forum for appeals against compliance notices, and the broader issues raised. The Committee considers that a wider debate is required on both the issues of inconsistency and fragmentation and the issues of the desirability of a dedicated environmental court. The Committee considers that there is a need to rationalise how legal issues and appeals are determined across regulatory frameworks affecting environmental issues. The Committee asks the Scottish Government to provide further detail on its plans with regard to this ahead of consideration of the Bill at Stage 2.**
201. **The Committee shares the concerns of the Law Society of Scotland in relation to the inconsistency and fragmentation of appeal routes. The Committee also agrees with SEPA that there is a need for compliance appeal cases to be heard by people with the expertise and experience in environmental law matters.**
202. **The Committee requests the Scottish Government set out plans to build and consolidate environmental law expertise across the judiciary in tandem with the setting up of ESS in advance of consideration of the Bill at Stage 2.**
203. **The Committee also asks the Scottish Government to provide further explanation of its choice of the Sheriff Court as the appeal forum for compliance notices.**

## **Governance gaps between the Office for Environmental Protection and the ESS**

204. Over the course of the Committee’s consideration of both this Bill and the legislative consent memorandum for the UK Environment Bill, members have explored

whether any ‘governance gaps’ would remain whereby either UK or Scottish Ministers’ actions would not be caught within the remit of either the ESS or the OEP. As the role of ESS is limited to matters within the competence of the Scottish Parliament, and the Scottish Ministers are excluded from the oversight exercised by the OEP under the Environment Bill, there appears to be a gap where Scottish Ministers exercise executive powers in reserved areas under “executive devolution”.

205. The Law Society of Scotland referred to this as a “potential lacuna in environmental governance”.<sup>112</sup>
206. Scottish Government officials argued there would not be any “significant” governance gaps between the OEP and ESS and that the “key thing will be for the new governance bodies to work closely together in order to provide effective oversight of schemes that work at the UK and GB level”.<sup>113</sup>
207. When asked about this, the Cabinet Secretary was clear that, “where the Scottish Ministers consent to actions or regulations by UK ministers in areas that are within the legislative competence of the Scottish Parliament, those matters nevertheless remain within the scope of ESS's governance role”.<sup>114</sup>
208. The Committee explored the potential gap where Scottish Ministers act in areas that are ‘executively devolved’ such as some offshore decision-making. In response the Cabinet Secretary stated—

” This committee of all committees knows that the boundary between reserved and devolved responsibilities can be extremely complex, not least in instances of executive devolution. I have said repeatedly this morning that the bill can provide only for matters that are within the competence of the Parliament. I am clear that it would be inappropriate for the Scottish Ministers to be under the oversight of a UK governance body, as that would cut across the lines of devolved competence and out accountability to this Parliament.<sup>115</sup>

209. The Cabinet Secretary further stated—

” there might be a need for some additional measures to clarify responsibilities and ensure that there are no governance gaps once the UK and Scottish Government systems are in place, but I think that we need the frameworks to be in place before we can actually take those measures.<sup>116</sup>

210. A number of witnesses highlighted that, related to this issue and others, an effective relationship between the OEP and ESS would be essential to ensure full continuity and effective governance. As Professor Harrison stated, “we would not want to make the system too complicated to operate from a layperson’s perspective”.<sup>117</sup> The Brexit and Environment Network also referred to ‘transboundary’ issues; “if we end up in a position in which the action of a public authority in Scotland would have a negative environmental impact in England, or vice versa, we will need to make sure that there is good communications between the two regulators so that such transboundary harm is mitigated”.<sup>118</sup>

211. **The Committee notes the concerns raised by the Law Society of Scotland around a “potential lacuna in environmental governance” between the OEP and ESS, particularly in relation to when Scottish Ministers exercise executively devolved powers.**
212. **The Committee notes the Cabinet Secretary’s recognition that there “might be a need for some additional measures to clarify responsibilities” and seeks clarification from the Scottish Government as to whether it considered seeking an Order in Council under Section 30 of the Scotland Act 1998 to allow for ESS’s remit to cover executively devolved powers. The Committee asks the Scottish Government to provide this information in advance of consideration of the Bill at Stage 2. The Committee recommends the Cabinet Secretary set a timescale for clarifying the position where accountability may be indirect, e.g. where UK Ministers act in devolved areas (e.g. using powers in the UK Environment Bill with Scottish Government consent) and where there are potential gaps, notably where Scottish Ministers act in reserved areas that are ‘executively devolved’. The Committee asks the Scottish Government to provide information about this timescale for clarifying responsibilities, as well as regular updates on discussions with the UK Government and between ESS and the OEP in this regard.**

## **Costs and ESS budget**

213. The Financial Memorandum sets out the anticipated running costs for ESS as £1.5m a year from 2021-22, based on the budgets of similar bodies, such as the Office of the Information Commissioner and the Scottish Fiscal Commission. A staff complement of approximately 20 is provided for. In addition, costs of between £200,000 and £300,000 are estimated for 2020-21 for the transitional arrangements and setting up ESS. <sup>119</sup>
214. NatureScot referred to its expectation that ESS would consider “only a handful of cases annually, where there is high-profile, significant environmental risk”. <sup>120</sup>
215. Scottish Government officials expressed their view that the existing EU environmental governance system is effective “due to its deterrent effect, as people did not want to get into trouble for non-compliance”. They argued that, “if the system here is set up effectively” ESS would operate “on a smaller number of exceptional issues with quite a light touch and not impose huge resource costs”. <sup>121</sup>
216. **The Committee notes the anticipated running costs for ESS set out in the Financial Memorandum.**
217. **The Committee has seen evidence over previous years, and in the course of its financial scrutiny, of the impact of reduced budgets on the capacity of non-ministerial offices (such as NatureScot) and the Committee is aware that ESS may be subject to the same budgetary pressures. The Committee**

**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.**

218. **The Committee is aware that the UK Government has committed to providing the OEP with a five-year indicative budget, ring fenced by HM Treasury within any given Spending Review. The Committee recommends this level of commitment as a minimum to ESS and asks the Scottish Government to consider putting this on a statutory footing. The Committee requests the view of the Scottish Government on this in advance of consideration of the Bill at Stage 2.**

## Interim arrangements

219. Written submissions identified some concerns around the interim arrangements whilst the Bill is going through the Scottish Parliament and, especially, around the appointment process for the interim board.
220. When asked about this, officials stated that they were “going through as robust and as close to a full public appointments process as we can”. Officials confirmed they hope to be able to have ESS and its board operating under a statutory basis in summer 2021.<sup>122</sup>
221. The Committee raised the issue about the Parliament’s role in the appointments to the interim board with the Cabinet Secretary. She stated the Scottish Government’s intention to seek parliamentary approval for appointments to the shadow body through a motion and committed to officials exploring the best options for the involvement of the Committee prior to that motion. The Cabinet Secretary went on to say that she didn’t want to “second guess” what the arrangements would be when the interim body became the statutory body, but that the intention was that all members of the interim board would need to re-apply and that the Committee and Parliament would be involved in the process.<sup>123</sup>

222. **The Committee notes the Scottish Government’s intention to appoint the interim board with a public appointments process closely based on that proposed in the Bill. The Committee also notes the Cabinet Secretary’s commitment to involve the Committee before the motion seeking parliamentary approval of the appointments is lodged. The Committee notes that the Bill requires Parliamentary approval of appointments to the Board.**
223. **The Committee considers it is important that the process for both the interim body, and the statutory body when constituted, are fully open and transparent. The Committee understands the Cabinet Secretary’s reluctance to “second guess” the appointments process when the interim body transfers to a statutory footing but notes that the Bill already sets out**



**some of the appointments process, in particular, that members of the non-statutory ESS are taken to be appointed as members of the statutory ESS. The Committee would therefore welcome further information in advance of Stage 2 on the Cabinet Secretary’s intention for board members to reapply before joining the statutory board.**

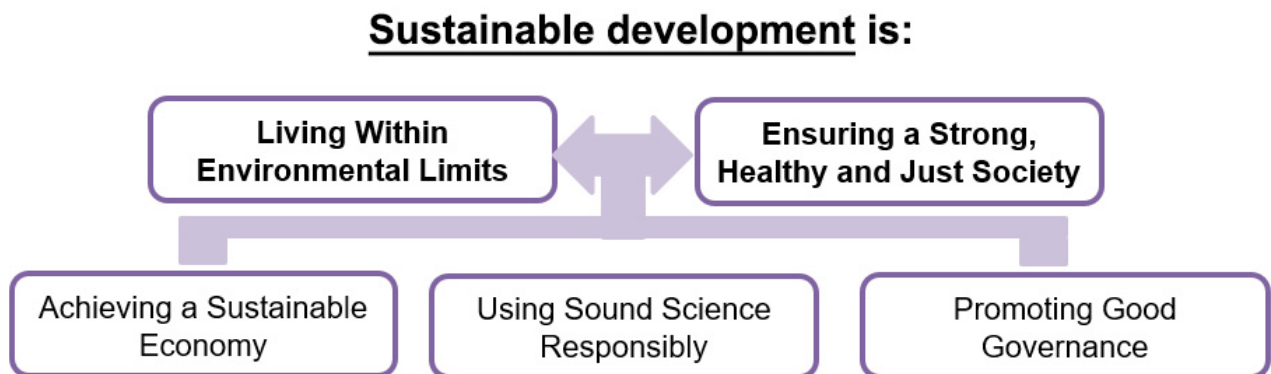
## **Section 36 (Confidentiality of proceedings)**

224. The Scottish Information Commissioner (SIC) wrote to the Committee to highlight concerns about the interplay between s36 and the Environmental Information (Scotland) Regulations 2004, which are enforced by the SIC.<sup>124</sup> Section 36 provides that ESS must not disclose information gathered in relation to s19 (co-operation with public bodies), s20 (power to require information) and correspondence relating to an information or compliance notice and improvement report.
225. The SIC claimed that “s36 appears to introduce prohibitions on disclosure of information” and that these, if enacted, would “prevent non-environmental information being disclosed in response to a request under the Freedom of Information (Scotland) Act 2002”. The SIC goes on to highlight the 2004 Regulations which provide that, with restricted exceptions: “any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply”. The SIC asked the Committee to consider how section 36 of the Bill and the 2004 Regulations would work in practice.
226. **The Committee notes the possible tension, highlighted by the Scottish Information Commissioner, between section 36 of the Bill and the Environmental Information (Scotland) Regulations 2004. The Committee was unable to explore this with the Cabinet Secretary as the issue was highlighted after the Committee’s evidence taking had concluded. The Committee does, however, refer this issue to the Scottish Government and requests a detailed response on this point in advance of the Stage 1 debate.**

# Sustainable development

227. The Policy Memorandum accompanying bills must include a statement on ‘sustainable development’. The Policy Memorandum must also include statements on equal opportunities, human rights, island communities and local government.

228. The Committee has, in other work, used the following model in its assessment of what the concept of sustainable development should encompass—



229. Effectively this framework allows for consideration of social, environmental and economic aspects of a bill, or policy area. This concept links to the achievement of the UN Sustainable Development Goals (SDGs), which themselves align to the Scottish Government’s own National Performance Framework.

230. The Policy Memorandum to this Bill states the “Scottish Government is satisfied that the bill will have no negative impact on sustainable development”. Largely the Policy Memorandum reflects that the Bill is largely drafted to allow for the environmental standards to continue to align with EU environmental law, should the power be used. It also reflects that environmental principles and governance proposals are similar to those in place under EU law and jurisdiction.

231. The Committee has found that the principles proposed in the bill could be strengthened, and that the Committee would see that as fitting more with the existing principles at EU level. It follows that any assessment against sustainable development would expect to have included an assessment of the impact, or not, of including principles additional to those proposed in the Bill.

232. On the proposed governance arrangements, the Committee has identified governance and policy gaps, principally in relation to climate change – and considers that the Bill as drafted may well have a detrimental impact on sustainable development – certainly related to the environment, but to society and the economy as well.

233. Related, the statement on ‘sustainable development’ makes no reference to the aspects of sustainable development which relate to Scottish society, or to a sustainable economy – both of which must exist within environmental limits.

234. **It would have been helpful to the Committee to understand how the issues highlighted in this section regarding sustainable development were considered as the Bill was drafted, and it recommends that this information is provided by the Scottish Government before the Stage 1 debate. The committee further notes that this kind of information is of use more generally when making an assessment as to how a Bill has a negative, or positive, impact on sustainable development, and recommends the Scottish Government include such information in accompanying documents for future bills**

## Recommendations on the general principles

235. **The Committee has outlined in this report a number of areas within the Bill where it believes further information and action is required before Parliament can consider the Bill at Stage 2.**
236. **The Committee's Stage 1 inquiry has included, to some extent, Part 1 of the Bill, in so far as it could impact on environmental policy. The Committee is, however, mindful of the Finance and Constitution Committee's more detailed scrutiny of these provisions. The Committee does not, therefore, take a view on the general principles set out in Part 1 of the Bill.**
237. **The Committee has, however, previously highlighted its serious concerns about Scottish Ministers' ability, within the devolution settlement, to exercise their powers in devolved environmental competence following EU exit.<sup>125</sup> The Committee believes this Bill, and especially its interplay with the UK Internal Market Bill, raises further questions around the broad and lasting consequences of EU exit. The Committee wishes to draw this issue to the Parliament's attention.**
238. **The Committee agrees the general principles of Part 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill, in so far as it is the Bill's objective to provide legal recognition for environmental principles and oversight of the implementation of, and compliance with, environmental law following EU exit. The Committee has, however, identified a number of serious concerns - including around the role of environmental principles and the functions, powers and independence of ESS - and members are clear that the Bill's progress through Parliament depends on a satisfactory response to the issues raised within this report. The Committee requests the Scottish Government respond to these issues as a matter of urgency.**

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