

SDG Network Scotland's written submission to the Scottish Government's consultation on environmental principles and governance in Scotland

[SDG Network Scotland](#) has been formed out of a demand to increase working together and partnership on the SDGs across Scotland and beyond. The coalition of 300+ people and organisations is here to build awareness and engagement across civil society and with business and government. Where possible, it will support the implementation of the SDGs in Scotland and aims to ensure that the voices of those committed to sustainability are heard by key decision makers.

This response was coordinated by Daphne Vlastari and developed collaboratively with members of SDG Network Scotland. **The response is supported by:**

- **Business in the Community Scotland**
- **EAUC**
- **Learning for Sustainability Scotland**
- **Scotland's International Development Alliance**
- **Scottish Council for Voluntary Organisations (SCVO)**
- **Scottish Environment LINK**
- **Transition Edinburgh**
- **United Nations Association Scotland**

For more information about this submission, please contact Daphne Vlastari at daphne@scotlink.org

For more information about Scotland's SDG Network, please contact Paul Bradley at paul.bradley@scvo.org.uk.

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Introductory remarks

The above signatories of the SDG Network Scotland welcome the opportunity to provide a response to the Scottish Government's consultation on environmental principles and governance in Scotland. We note that this consultation will largely determine the future of environmental protections in Scotland, if the UK exits the EU.

Maintaining existing protections stemming from EU law and building on those is critically important to achieving a more sustainable Scotland and meeting the UN Sustainable Development Goals (UN SDGs).

In particular, strong environmental laws are critical to achieving the UN Sustainable Development Goals by 2030. Several UN SDG Goals relate to the environment, including tackling biodiversity loss, climate disruption and excessive resource use.

In this respect, the above signatories of the SDG Network Scotland Network welcome the Scottish Government's commitment to 'maintain or enhance EU environmental standards' as well as intention to [explore legislative opportunities](#) to safeguard environmental standards.

Moreover, we support the recommendations of the First Minister's Advisory Group on Human Rights Leadership, particularly its support of a 'right to a healthy environment'. As [noted](#) by the UN Special Rapporteur Mr. John H. Knox, 'a healthy environment is necessary for the full enjoyment of many human rights, including the rights to life, health, food, water and development' and 'it is high time that the international community recognized the human right to a healthy environment'.

As such, the realisation of a right to a healthy environment also depends on strong environmental laws and institutions to uphold them.

We believe that proposals included in our response to the consultation should be legislated for. New legislation, such as a Scottish Environment Act should seek to retain existing standards and accountability mechanisms as well as set out future ambitions.

This is particularly important also in the context of the Scottish Government commitments to uphold the rights of children. According to the UN, [children are the most vulnerable group to environmental harm](#).

1. Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?

Yes.

EU environmental principles are enshrined in the [Treaty on the Functioning of the EU](#) and require that EU environmental policy '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'.

Many of these principles are reflected in international agreements from the 1992 [Rio Declaration on Environment and Development](#) to the more recent Paris Agreement on climate change.

Despite the fact that these principles are found in international law, their strength in determining environmental protections stems from the requirements set out in the EU treaties and EU laws.

As the Environment Secretary has stated not carrying through these principles 'means we risk lagging behind and diverging from the ambitions of our European allies as well as missing key tools that can help us to meet international ambitions such as the UN Sustainable Development Goals'.

However, we note that 'a duty to have regard' does not offer the same level of protection as currently enjoyed. We would encourage the Scottish Government to consider more robust wording for expressing this duty.

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

No.

The duty should extend to all public bodies insofar as decisions that impact our environment are concerned. This will be consistent with the scope of previous duties (such as the biodiversity duty) and help ensure consistent implementation of the duties throughout the policy cycle - from policy development to implementation and enforcement.

The policy statement (discussed in question 4) can guide the implementation of the duty and should therefore, provide guidance to Ministers and other public bodies on how to determine whether a policy, decision or other function is one that may impact on the environment.

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

Yes.

It is therefore critical that EU environmental principles are embedded in Scottish law as a means of safeguarding current EU environmental protections, keeping pace with our international commitments and our partners in Europe and across the globe as well as a key means for delivering a more environmentally sustainable Scotland.

There should be a duty for the four EU environmental principles, as discussed in previous questions. However, the SDG Network Scotland considers that the Scottish Government should review the need for further principles and duties, such as:

a. Sustainable Development:

The Scottish Government has signed up to the UN SDGs and support retaining the Charter of Fundamental rights which included provisions about sustainable development. The EU Treaties also specify that policies shall contribute to sustainable development. As such, it would be good to consider introducing a legally binding duty to achieve sustainable development. As it stands, the National Performance Framework does not include in its provisions such a duty nor does it explicitly mention sustainable development in its overarching purpose.

b. Integration:

The principle of integration is enshrined in [EU law and Treaties](#). It requires that that environmental protection is integrated into all other policy areas. This is a core principle for achieving sustainable development which requires that policies deliver towards economic, social and environmental sustainability.

c. Non-regression:

This is an established principle of international human rights law and increasingly incorporated in environmental treaties, such as the Paris Agreement. It requires that new policies and measures should not compromise existing standards for environmental protection.

In this respect we also note that those principles would contribute to the realisation of a right to a healthy environment. In its recommendations the First Minister's Advisory Group noted that this 'overall right will include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice'. It also specified that the 'content of this right will be outlined with reference to international standards, such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention'.

Given that no part of the UK currently fully implements the provisions of the Aarhus Convention, it will be important for Scottish Government to take forward this recommendation to ensure a coherent domestic framework of environmental law which gives citizens their full rights when it comes to environmental protection and enjoyment.

4. Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?

Yes.

We agree that such a statement is needed. The application of the principles should be strong and rigorous. A policy statement should support that.

There should be a requirement for Ministers and public bodies to implement their duty in line with the provisions of the policy statement. Such a requirement could be expressed in legislation setting out the duty itself. It would also be good to ensure that the statement is developed also with the input of stakeholders.

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

As indicated in the 'Environmental governance in Scotland after Brexit: report' compiled by the Roundtable on Environment and Climate Change at the request of the Environment Secretary, there are a number of implications such as:

- Being able to use EU systems to facilitate reporting and be part of developing methodologies.
- Ability to aggregate data at European level and assess Scottish/UK progress and contribution on a comparative basis.
- Access to wider expertise, systems and data and knowledge holdings.

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

We welcome a review of reporting and monitoring requirements but would urge Scottish Government to uphold existing reporting requirements and look to enhance those in a way that supports improved monitoring of the National Performance Framework (NPF) outcomes and UN SDGs. While the revised includes a number of new metrics, other monitoring and reporting requirements will be needed to complement to ensure robust policy-making.

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

Yes. As concluded by the Roundtable on Environment and Climate Change:

- EU mechanisms provide a strong external check on a Member State's performance in fulfilling environmental obligations.
- The UK [and Scotland] will no longer be subject to EU mechanisms scrutinising the transposition and proper implementation of EU law.

- Without a supranational structure, scrutiny will be for civil society and the Scottish Parliament.

Given the current remit and resources of domestic mechanisms, we will not be able to maintain the same level of scrutiny and assessment of performance in the event of an EU exit.

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

In line with the [recommendations of the Commission on Parliamentary Reform](#), there should be greater scrutiny of legislation, particularly in terms of post-legislative scrutiny.

In addition, it would be appropriate to consider how the functions of existing bodies could be extended to allow for greater scrutiny. However, since existing bodies such as SNH or SEPA are NDPBs and effectively report to Scottish Ministers, it would be appropriate to consider whether a new body which reports to Parliament should undertake these activities.

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

The lists provided in annex A of the consultation paper are a good start.

However, rather than seek to define “environmental policy”, it may be better to consider “policy that has the potential to affect the environment”. This is the approach adopted in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repeated in the Environmental Information (Scotland) Regulations 2004.

This would also be consistent with existing EU requirements which specify 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’ (TFEU, Article 11). What is more, Scottish Government already recognises the need for ‘a whole of government approach’ when it comes to environmental protection, as stated in its [discussion paper for developing an Environment Strategy for Scotland](#).

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

The impact will be grave. As the Roundtable report concludes ‘There is no current body charged explicitly with seeking to resolve issues of compliance and to pursue remedies in the way the European Commission currently does’.

To ensure the high level of environmental protection that benefits the whole of society and nature, domestic institutions need to be sufficiently resourced, independent, empowered and expert. Otherwise, environmental law will fail.

Therefore, we need to create a new body that will be able to check compliance with environmental law and policy, respond and act on complaints brought forward by citizens and civil society organisations as well as be able to apply appropriate remedies and enforce sanctions. Provisions to address this gap should be made through a Scottish Environment Act.

11. Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?

Yes.

As the Roundtable report highlighted ‘none of the existing bodies possess both the expertise and independence to consider complaints as to whether intended environmental outcomes are being achieved’.

The Roundtable report also added that ‘A new body could be created either to report to Parliament directly or to advise a body such as SPSO with an expanded remit. This body would also require powers to require a response or remedies from public sector bodies’.

Any such body or institution must have:

- adequate resources
- be independent of government
- have relevant expertise and
- have sufficient legal powers to enforce the law and hold governments to account.

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

As evidenced by the Roundtable report, there is a clear governance gap that emerges from the loss of EU enforcement mechanisms. By being supranational in nature but also possessing a number of formal and informal channels for ensuring the implementation of environmental law they have been an effective ‘backstop’.

Of particular concern is that the loss of these EU mechanisms reveals that there are no equivalent domestic mechanisms that could bridge this gap. There is a similar concern with respect to international agreements.

Scotland’s track record in implementing the Aarhus Convention which gives citizens important rights in terms of environmental decision-making highlights the striking difference between the power of EU enforcement mechanisms and the fact that many international

bodies lack the necessary 'teeth' to ensure implementation. Specifically, the [Aarhus Compliance Committee](#) has concluded that the UK and Scotland do not fully comply with its provisions and now a [separate complaint](#) has been lodged on the same issue.

13. What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed.

The Scottish Government should live up to its commitments made in the context of the Scottish Continuity Bill which required looking into appropriate governance arrangement which would "include functions equivalent to those carried out before exit day by the European Commission, the European Court and any other EU institution".

Given the importance of the functions currently carried out by EU bodies for ensuring environmental legislation is implemented, the Scottish Government should bring forward proposals for creating a new environmental watchdog which will be able to take forward the functions that cannot be performed by existing bodies.

When it comes to the scrutiny, complaints investigation and enforcement of environmental legislation, it is important to ensure that these are carried out by a body independent of government which enjoys the necessary resources.

An adequately empowered and independent watchdog should:

- be able to address / investigate citizens' complaints;
- have powers to require information;
- have powers to require remedies; and
- have powers to refer to Court (which, in turn, would be empowered to impose more stringent remedies).

This should be accompanied by Government proposals to ensure full compliance with the Aarhus Convention, also given this is stipulated as part of the recommendations of the First Minister's Advisory Group on Human Rights Leadership for a right to a healthy environment. This right will ensure that everyone can benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice.