Dear Gillian

ENVIRONMENTAL PRINCIPLES AND GOVERNANCE

I would like to give the ECCLR Committee an update on progress in developments for future environmental principles and governance. You will recall that we consulted in the spring on measures that could be needed following an EU exit from the UK. This consultation responded to the amendments made to the Continuity Bill. As you will appreciate, the future picture on exit from the EU remains deeply uncertain. We now have to consider the impact of the change of Prime Minister in the UK Government and a commitment to leave the EU on October 31 “come what may” with or without a deal. The Scottish Government is totally opposed to a no deal outcome because of the severe damage it will cause.

For the present, I have had to carry forward the development of policy both for longer-term arrangements, assuming a timescale based on an orderly exit, and for interim arrangements in the event of a chaotic no deal exit. These are necessary steps to ensure the protection of our environment, and to advance our ambitions for the natural environment in the face of the global climate and biodiversity crises. I remain firmly of the view that the best arrangements would be provided by Scotland remaining within the EU.

We have recently published the responses to our consultation paper issued earlier this year, and an analysis of the responses. There was a good response to the consultation, with almost one hundred substantive responses and over 12,000 responses following a Scottish Environment LINK campaign. There was general agreement with the proposals that we set out for environmental principles, and a broad consensus that something should be done to fill a governance gap in the event of EU exit. Within the responses, there was a richness of detail and expert comment, as well as significant ambition for additional measures, particularly from the environmental membership organisations.
There was general support for the introduction of a duty and a policy statement to guide the interpretation and application of a duty. There were a range of opinions, accompanied by substantial discussion, about to whom the duty should apply, how it should be expressed and which principles should be included within the duty. Most respondents believed that there will be significant governance gaps on leaving the EU with respect to scrutiny and assessment of the effectiveness of environmental policy.

Responses also expressed concern that the loss of EU complaints function and EU enforcement powers would have a negative impact. It was generally agreed that new function is required to receive complaints and a range of roles and models were suggested to fulfil such a role. A range of institutional models was suggested, with support for a body to oversee complaints, provide scrutiny of the effectiveness of environmental policy and delivery, and provide oversight for environmental monitoring and reporting.

You will be aware that the Programme for Government set out that measures on environmental principles and future environmental governance would be included in the forthcoming new Continuity Bill. I am working to finalise proposals for inclusion in this Bill, although this plan may be disrupted if there is not an orderly EU exit.

The development of proposals for environmental principles has been complicated by a new understanding that Scottish principles will apply to UK Government Ministers designing policies in reserved areas covering Scotland. While this will not constrain our discretion over the correct environmental principles for Scotland, I have agreed to consider ways in which the four UK administrations can work to provide for coherent sets of principles.

In developing new environmental principles, we must remember the influence on decision making of international obligations that will continue, such as under the Convention for Biodiversity Diversity. We should also remember that the work to put in place measures to implement the First Minister’s Commission on Human Rights will be carried forward, with consequences for environmental policy.

I am considering a range of institutional models for a future governance function. I am also considering how the governance function can be carried out constructively, to seek remedy and agreement to environmental improvements. This must ultimately be backed by some form of sanctions, which while rarely taken provide an incentive for public bodies to correctly apply environmental law and engage with governance where failings are under consideration. While we cannot recreate the enforcement role of the European Court of Justice in a domestic setting, the governance function must have a range of actions it can take that are proportional and fit with the existing roles of the Scottish Parliament and Courts.

As set out in the consultation paper, I am also considering interim governance measures should the UK Government take us out of the EU without a withdrawal agreement. In this no-deal scenario, there would be no transition period, and the loss of oversight from the EU institutions would be immediate. There would be no time to put in place a replacement statutory arrangement. An interim arrangement would fill the immediate governance gap and would only consider small number of cases in any depth, in line with the current practice of the European Commission. We would be fortunate to enter a period following a no deal exit with strong regulatory institutions, and a set of environmental regulations that have been prepared so they will still function following exit. While we must remain vigilant, I am confident that our system of environmental regulation is strong and will remain strong.
I remain committed to doing everything in the Scottish Government's power to ensure that leaving the EU does not in any way jeopardise our ambitions for Scotland’s environment, and look forward to working with the Committee to ensure appropriate arrangements are put in place.

Yours

ROSEANNA CUNNINGHAM