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UK Withdrawal from the European Union (Continuity) (Scotland) Bill - Stage 3 briefing on Part 2 (Environment)

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This briefing reviews the progress of Part 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill which includes provisions on post EU-exit environmental principles and governance. The briefing looks at the scrutiny of the Bill in the Environment, Climate Change and Land Reform Committee at Stage 1, issues raised in the Committee report, and at subsequent amendments lodged at Stage 2.



15 December 2020
SB 20-84

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Key dates and documents

The Scottish Government introduced the UK Withdrawal from the European Union (Continuity) (Scotland) Bill ('the Bill') on 18 June 2020. The [Bill as amended at Stage 2](#) can be accessed on the Scottish Parliament website [together with related documents](#).

This briefing summarises the consideration of Part 2 of the Bill in the Parliament in advance of Stage 3. Part 2 of the Bill covers environmental principles and environmental governance post EU exit. A SPICe briefing on amendments made to Part 1 of the Bill will be published later this week.

SPICe has published [a Bill briefing on Part 2 of the Bill](#) and [a Bill briefing on Parts 1 and 3 of the Bill](#).

The Environment, Climate Change and Land Reform (ECCLR) Committee is a secondary Committee on the Bill and focused on the environmental policy aspects of the Bill i.e. largely Part 2 of the Bill and also environmental aspects of the 'keeping pace' power in Part 1.

The ECCLR Committee [published its Stage 1 report on 22 September 2020](#). The Cabinet Secretary for Environment, Climate Change and Land Reform [responded to the ECCLR Committee's Stage 1 report on 27 October 2020](#).

The [Finance and Constitution Committee](#) is the lead Committee for the Bill and [published its Stage 1 report on 07 October 2020](#).

The [Stage 1 debate on the Bill](#) was held on 29 October 2020 where the Parliament agreed to the general principles of the Bill.

Stage 2 proceedings on Part 2 of the Bill were held in the ECCLR Committee on 24 November 2020 and [can be reviewed in the Official Report](#).

The Delegated Powers and Law Reform Committee published [a Stage 2 briefing on 11 December 2020](#).

Stage 3 proceedings are currently expected to take place on 22 December 2020. The deadline for amendments is 12 noon on 15 December 2020. This information is kept up to date [on the Bill page on the Scottish Parliament website](#).

Background and purpose of the Bill

Part 1 of the Bill provides for the introduction of a power to enable Scottish Ministers to continue to keep devolved law aligned with EU law following the end of the implementation period (31 December 2020), known as a 'keeping pace' power.

Part 2 of the Scottish Bill provides for:

- the introduction of guiding environmental principles into Scots law, and
- the formation of a new environmental governance body, Environmental Standards Scotland (ESS), and its functions and powers.

SPICe has also produced briefings on [Environmental Governance in Scotland after EU Exit](#) and a set of [Frequently Asked Questions on Brexit](#) which may provide further helpful background.

Stage 1 scrutiny

The ECCLR Committee is a secondary Committee on the Bill and focused its Stage 1 scrutiny on Part 2 of the Bill on environmental principles and governance. The Committee's Stage 1 inquiry also included Part 1 of the Bill, in so far as it could impact on environmental policy.

The ECCLR Committee [issued a call for views on 25 June 2020](#) and [written evidence received](#) can be found on the Committee's web page. The Committee took [evidence from Scottish Government officials on 11 August 2020](#), from stakeholders [on 18 August 2020](#) and [on 25 August 2020](#) and finally from the Cabinet Secretary for Environment, Land Reform and Climate Change and Cabinet Secretary for the Constitution, Europe and External Affairs [on 01 September 2020](#).

In its [Stage 1 report published on 22 September 2020](#), the Committee agreed the general principles of Part 2 of the Bill. The Committee, however, identified a number of serious concerns - including around the role of environmental principles and the functions, powers and independence of the new 'watchdog' Environmental Standards Scotland (ESS).

- **Guiding principles on the environment**

The Committee recommended in relation to the Bill's provisions on bringing EU environmental principles into Scottish law that:

- In addition to the guiding principles already in the Bill, the objective set in [the Treaty on the Functioning of the European Union](#) (TFEU) of achieving a 'high level of environmental protection' should also be put on a statutory footing.
- The 'integration' principle should also be included in the Bill - in order that environmental issues are integrated across all government policy and legislation.
- The principle of environmental equity should also be included and the precautionary principle should be expanded to include human health.
- The principles must play a meaningful role in future policy development, therefore the duty to 'have regard to' the principles should be strengthened, suggesting a duty to 'have due regard to' or to 'act in accordance with' the principles.
- Amendments should be considered to ensure that all decisions involving fiscal measures and capital expenditure must be guided by the environmental principles, given such decisions can have serious environmental implications.

- **Environmental Standards Scotland**

The Committee recommended in relation to ESS that:

- The exclusion of climate change strategic targets from its remit should be removed, and the ESS and UK Climate Change Committee (CCC) should form a strong working relationship with a clear division of responsibility.
- The new body's strategy should be required to set out how it expects to work with the UK CCC in relation to climate targets, the Scottish Information Commissioner in relation to environmental information and Audit Scotland on finance.

- The rationale for establishing ESS as a non-ministerial office rather than a parliamentary commission should be further detailed ahead of Stage 2, particularly from the perspective of ensuring the body has sufficient autonomy from Government.
- Parliament should be involved from an early stage of appointments to the new body and for this to be reflected in the statutory process.
- The new body should receive a five-year indicative budget, ring-fenced within any given Spending Review, and this should be put on a statutory footing.
- The definition of 'environment' should be amended in particular to ensure that species and habitats are covered by the definition.
- Clarification was needed on how any governance gaps will be avoided between the UK Office for Environmental Protection and ESS, particularly where Scottish Ministers exercise executive devolved powers, or where UK Ministers act in devolved areas e.g. using powers in the [UK Environment Bill](#) with Scottish Government consent.

The Committee also raised concerns about ESS's remit being restricted to strategic issues (in relation to improvement and compliance reports), given the importance of EU functions in relation to investigating and challenging individual cases.

- **Broader environmental governance issues (e.g. environmental courts)**

The Committee noted that the scope of the Bill is largely limited to addressing governance gaps from losing the functions of the European Commission, and has not addressed other parts of the system, in particular judicial routes for environmental justice. The Committee considered that a wider debate is required on the desirability of an environmental court and how legal issues and appeals are determined on environmental issues.

- **Use of keeping pace powers**

The ECCLR Committee supports the Scottish Government's policy commitment to maintain or exceed EU environmental law to ensure continuation of high environmental standards in Scotland. However it recognised that the 'keeping pace' power allows a flexible approach to be taken - i.e. it does not require alignment as a power rather than a duty - to ensure the best policy decisions for Scottish interests are made in response to changes in EU law.

The Committee considered however that the Bill could be strengthened by the inclusion of a mechanism to support Parliamentary scrutiny of to what extent Scotland remains aligned with EU environmental law. It suggested that there should be a requirement for the Scottish Government to report to Parliament (annually or every two years) on developments in EU environmental law, with a statement as to how this has been or will be matched in Scotland, or if it is not to be, an explanation for why not.

- **Interplay with UK Internal Market Bill**

The Committee also considered the interplay between the keeping pace power in the Bill and proposals in the [UK Internal Market Bill](#), raising concerns that the UK Bill would have clear implications for Scottish Ministers' ability to exercise their powers effectively – both in relation to the keeping pace power, and more widely within devolved competence. The Committee considered this could impact on the Scottish Government's ambition to align with EU environmental law. A [SPICe briefing on the UK Internal Market Bill](#) is available.

Stage 2 amendments

Stage 2 proceedings on Part 2 of the Bill were held in the ECCLR Committee on 24 November 2020 and [can be reviewed in the Official Report](#).

The [Bill as amended at Stage 2](#) can be accessed on the Scottish Parliament website.

The sections below describe how the Bill was amended at Stage 2.

Environmental principles

- **Addition of the integration principle**

A new section 9 (1) (za) was added to the Bill meaning that guiding principles on the environment now also include "the principle that protecting the environment should be integrated into the making of policies".

The integration principle is set out in [Article 37 of the Charter of Fundamental Rights of the European Union](#) which states: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Similar working is found in Article 11 of [the TFEU](#).

The Cabinet Secretary for Environment, Climate Change and Land Reform supported this amendment, despite saying the Government did not believe it was necessary as integration was already achieved in the framing of the duty, as the duty to have regard to environmental principles applies to all policy development, subject to limited exceptions, not just to policies on the environment.

- **Removal of regulation-making powers in relation to the principles**

An amendment introduced by the Cabinet Secretary was agreed which has the effect of removing from Scottish Ministers the power to make regulations to exclude further matters from the duty to have regard to the guiding principles (existing exclusions are policies and proposals relating to national defence or civil emergency, finance or budgets).

The Cabinet Secretary said that on consideration of comments about the proposed power, including from the Delegated Powers and Law Reform Committee at Stage 1, she concluded that that power cannot be justified, and in any case ministers have no intention of taking further matters out of the scope of the principles.

- **Definition of the environment**

An amendment introduced by the Cabinet Secretary was passed which expands the definition of 'environment' in section 12 of the Bill (which relates to fulfilment of duties regarding the guiding principles) to include "wild animal and plant life and the habitats of wild animal and plant life". The term "animal and plant life" is further defined as including any living organisms.

This was triggered by concerns raised by the statutory wildlife agency NatureScot during Stage 1, that it was not clear if natural habitats were encompassed by the definition of environment in the Bill as introduced. The Cabinet Secretary said that Government officials

had consulted with NatureScot to assist them in drawing up this Stage 2 amendment. The definition of environment is amended in the same way in Chapter 2 of Part 2 of the Bill on environmental governance.

Environmental Standards Scotland

- **Definition of the environment**

A new section 40 (3) (b) was added to the Bill to expand the definition of environment in Chapter 2 of Part 2 of the Bill (on environmental governance) to include wild animal and plant life and the habitats of wild animal and plant life. This mirrors the amendment made to the definition of the environment as it relates to the guiding principles on the environment in Chapter 1 of Part 2 of the Bill described above.

The amendment was introduced by the Cabinet Secretary. During Stage 1 scrutiny of the Bill, [NatureScot raised concerns](#) that omitting habitats and species from the definition of "the environment" in this section may restrict how the governance body ESS could ensure compliance with, for example, the Birds and Habitats Directives and associated domestic regulations. The Cabinet Secretary [said during Stage 1](#) that her view was that ESS would clearly fulfil a governance role in relation to such regulations, but lodged this amendment at Stage 2 to "put it beyond doubt".

- **Confidentiality of ESS proceedings and disclosure of information**

Amendments were made to provisions in relation to disclosure of information by ESS (section 36), simplifying the confidentiality provisions and removing a restriction on the disclosure of information by third parties. The amendments were lodged by the Cabinet Secretary in response to [concerns raised by the Scottish Information Commissioner](#) about interactions of the Bill with the Environmental Information (Scotland) Regulations 2004 and the Freedom of Information (Scotland) Act 2002.

- **Appointment of members to ESS - expertise required**

Schedule 1, paragraph 2 (2A) was added to the Bill via an amendment by Angus MacDonald MSP. This requires that in appointing members to ESS, the Scottish Ministers must have regard, among other things, to the desirability of ensuring that the membership of ESS as a whole has expertise or experience in: law (including international law) relating to the natural environment, environmental science, environmental policy, and investigatory and enforcement proceedings.

The Member stated that the amendment followed a precedent set in the [Land Reform \(Scotland\) Act 2016](#) by setting out the desired type of experience for members of a public body, and also mirrors the approach taken in the [UK Environment Bill](#) in relation to appointments to the Office for Environmental Protection in England. The Cabinet Secretary supported the amendment and asked the Committee to agree to it.

- **Removal of appointed members - requirement to consult chair of ESS**

Schedule 1, paragraph (5) (2A) was added to the Bill via an amendment from Alex Rowley MSP, requiring that where Scottish Ministers propose to give a member of ESS, other than the chair, notice that they are to be removed, they must first consult with the chair of ESS. The Member said this would provide an additional layer of scrutiny and "help to ensure that

the Scottish ministers' actions are open and transparent". The Cabinet Secretary agreed that such a process would constitute best practice and advised the Committee to support the amendment.

- **ESS functions in relation to international law**

The Bill tasks ESS with, amongst other things, monitoring the "effectiveness of environmental law". Amendments were made to the Bill, introduced by the Cabinet Secretary, to expand the definition of this term to explicitly include the contribution of environmental law to "the implementation of any international obligation of the United Kingdom relating to environmental protection" (see section 39(9)(b) of the Bill as amended).

This was triggered by concerns raised during Stage 1 that there was not sufficient provision for ESS to clearly address how well Scotland is meeting its international commitments. The Cabinet Secretary said that the amendments "will allow consideration of the effectiveness of the law in meeting our commitments under agreements, such as the Ramsar convention, in a proportionate manner."

- **ESS strategy and overlap of functions with other bodies**

The Bill requires ESS to publish a strategy, and Schedule 2 requires that strategy to set out how ESS will exercise its functions in a way that respects and avoids any overlap with other specified bodies. The Bill was amended at Stage 2 to add the Scottish Information Commissioner, Audit Scotland and the Climate Change Committee to this list of specified bodies (see Schedule 2, paragraph 1 (d) (ii)). Other bodies already specified in the Bill as introduced are the Scottish Public Services Ombudsman and the Commissioner for Ethical Standards in Public Life in Scotland. The amendment was lodged by Angus MacDonald MSP.

Amendments withdrawn based on agreement for further work before Stage 3

The following amendments were not moved or withdrawn by Members, based on agreement for follow up actions or discussions with the Scottish Government in advance of Stage 3.

- **Environmental policy strategy**

Claudia Beamish MSP withdrew an amendment to the Bill which would require Scottish Ministers to prepare and publish an environmental policy strategy within six months from the date when the proposed section came into force. She said this would create a clear mechanism for scrutinising the Government's progress on the environment.

The Cabinet Secretary said that she "can see that there is a case for providing for an environmental strategy in the bill" but raised issues with the form of the amendment, including the feasibility of the timescale proposed. The Cabinet Secretary offered to work with Claudia Beamish MSP to design an amendment that sets out an obligation on ministers to continue the work on an environmental strategy. The amendment was withdrawn on that basis.

- **Strength of duty to 'have regard to' the environmental principles**

Finlay Carson MSP withdrew an amendment to require Scottish Ministers to 'have due regard to' the guiding principles on the environment when making policies including proposals for legislation, stating that this strengthening was required in order to ensure that the principles are applied in a manner as consistent as possible with current EU application. The Bill currently requires Scottish Ministers to 'have regard to' the guiding principles.

The Cabinet Secretary said that the Government remains of the view that a duty to 'have regard to' the principles is effective and proportionate and will work well with other duties and functions of ministers and public bodies, without dominating other duties and objectives. However the Cabinet Secretary offered to discuss "the framing of those duties ahead of stage 3". On that basis, the amendment was withdrawn.

- **ESS - provision of adequate funding**

Mark Ruskell MSP withdrew amendments relating to the funding of ESS. The amendments would require Scottish Ministers to pay to ESS "such sums as they consider are reasonably sufficient to enable it to carry out its functions". They would also require ESS to include an assessment of whether it received sufficient sums to carry out its functions in its annual report. The Member said that the independence of ESS will depend, in part, on the adequacy of its funding, and that the amendments were also modelled on provisions in the [UK Environment Bill](#).

The Cabinet Secretary said that these amendments would place more structure around the funding arrangements for ESS which would be helpful, but there were technical issues regarding a clash of the proposed amendments with existing processes of resource allocation through the budget bill. The Cabinet Secretary offered to work with the Member on "revised amendments for stage 3 that take the spirit of the adequacy of funding on

board without stepping on general budgetary rules". On that basis amendments were not moved or were withdrawn.

- **ESS - functions in relation to climate change**

Concerns were raised during Stage 1 scrutiny that the definition of "environmental law", set out in section 39 of the Bill, which in effect determines the statutory remit of ESS, excludes Parts 1 to 3 of the [Climate Change \(Scotland\) Act 2009](#). Part 1 of this Act covers the setting of climate change targets, Part 2 makes provisions on advisory functions, and Part 3 covers reporting and monitoring duties including the requirement for the Climate Change Plan. Amendments by Claudia Beamish MSP and Mark Ruskell MSP sought to remove those exclusions.

[Scottish Government officials said during Stage 1](#) that there was "a 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" and said it could be confusing to add a new body to the process given existing arrangements with the CCC.

[Claudia Beamish MSP said during Stage 2 proceedings](#) that given the CCC performs an advisory role only, enforcement powers to take action on any failure to comply, or on misapplication of environmental law as it relates to climate change targets was still required - and that this would also provide continuity in respect of the European Commission's role. The Member also raised that the proposed functions of the UK Office for Environmental Protection under the [UK Environment Bill](#) include enforcement on climate change.

The Cabinet Secretary said that specific measures within environmental law to deliver emissions reductions would be within the scope of ESS functions, but to bring cross-economy emissions targets and strategic planning into the scope of ESS would duplicate "current strong arrangements for oversight, advice and enforcement", and it would not be clear how those functions would be achieved in practice.

The Cabinet Secretary said however that following UK Government amendments, although it is expected that the OEP will have no advisory role with respect to climate targets, it is now expected to have a role in enforcement, therefore she was "prepared to explore that further, so that we can get a better understanding of the difference". The amendments were not moved based on agreement for those further discussions.

- **Duty to consult on further improvements to environmental governance**

An amendment was withdrawn by Liz Smith MSP which would require Scottish Ministers to, within 12 months of the Bill receiving Royal Assent, consult on:

- whether the provisions in the Bill have ensured effective environmental governance
- whether the law on access to justice on environmental matters in Scotland is effective and sufficient, and
- whether and in what form an environmental court should be established to enhance governance arrangements.

In moving the amendment, the Member said that the loss of access to the European Court of Justice will present issues for environmental cases and that access to a court process is

an important fallback. The Cabinet Secretary raised concerns about the timeframe for the required consultation given the Bill allows ESS a year from being legally established to prepare and lay a strategy before the Parliament for approval. The Cabinet Secretary said that if the amendment were to be modified to provide a longer timescale, that "might support the on-going scrutiny of our approach to environmental protection and access to justice, following our departure from the European Union", whilst allowing ESS to become fully established and operational first.

The Cabinet Secretary also said that questions surrounding the potential creation of a dedicated environmental court are broader than the the bill, and that in 2017, the Scottish Government committed to keeping these issues under consideration, and expects that successor committees will wish to explore these issues in the following parliamentary session. The Cabinet Secretary said she was willing to work with Liz Smith MSP and ministerial colleagues on justice with a view to developing an appropriate amendment for consideration at stage 3. On that basis the amendment was withdrawn.

Background information on access to environmental justice issues can be found in the [SPICe briefing: Human rights and the environment](#).

Appointments to an interim 'shadow' ESS

The Cabinet Secretary for the Environment, Climate Change and Land Reform [wrote to the ECCLR Committee on 12 November 2020](#) to provide information on work undertaken to establish ESS on a non-statutory “shadow” basis from 1 January 2021.

The letter states:

“ The UK Government’s refusal to negotiate an extension to the transition period after the UK left the EU, despite the disruption caused by the Covid-19 pandemic, means that there will be a period next year when Scotland will be outwith the EU legal and governance framework, before the statutory governance arrangements can come into effect. Providing a credible interim governance system to bridge the gap until these statutory arrangements can come into effect will minimise the potential risk to the environment caused by the UK Government’s approach.”

The Scottish Government expects the body to operate on a shadow basis for at least the first half of 2021, and states that it will be open to the Scottish Parliament to seek information from the shadow body.

Regarding appointments, the Government has undertaken a process to identify a chair and members of the shadow body. The Government states that the first round of appointments to ESS could not be a regulated public appointments process, because the passage of the Bill was not sufficiently advanced to allow for that. However, it states that every effort was made to follow the spirit of the regulated process, following The Code of Practice for Ministerial Appointments to Public Bodies in Scotland and through seeking advice from the Ethical Standards Commissioner’s team, appointments advisors in the Scottish Parliament, and the Scottish Government’s Public Appointments Team and Public Bodies Unit.

The letter also states that the Government’s intention is to seek approval of the formation of a shadow body, and of named appointees as chair and members, through a Parliamentary motion in December 2020. The Bill provides, at Schedule 1 paragraph 13, for members appointed to a non-statutory ESS to become members of the statutory body as it assumes its full statutory status. The Scottish Government’s intention is to use this provision to ensure continuity in leadership of the body but said that future appointments, including reappointments, will be subject to Parliamentary approval and Committee involvement from an early stage.

The [ECCLR Committee heard from the initial nominees to the Board](#) of the interim ESS on 8 December 2020 to discuss their suitability for the roles and vision for the new body. They are Jim Martin, Paul McAleavey, Richard Dixon, Marie Fallon and Annalisa Savaresi.

Stage 3

Stage 3 proceedings are currently expected to take place on 22 December 2020.

The deadline for amendments is 12 noon on 15 December 2020.

This information is kept up to date [on the Bill page on the Scottish Parliament website](#).

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