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Environment Bill: briefing for Commons Committee

November 2020

Environmental principles and protection (Clauses 16 to 20)

The Environment Bill enshrines five important environmental principles in law: integration, prevention, precaution, rectification and 'polluter pays'. These must function as important guiding principles for the government. The integration principle should require environmental protection requirements to be built into policy development, including at early stages, leading to more holistic policy making. The precautionary principle must require policy makers to assess environmental risk through a science based approach and to take appropriate action depending on the level of uncertainty. Rectification requires environmental damage to be addressed at source to reduce the impact of damage by delaying remediation, while prevention requires action to avoid environmental damage before it occurs. Finally, the principle that the polluter must pay should ensure that policy makers factor pollution costs into their thinking. The bill does not yet provide an adequate route to ensuring that these important legal principles fully function to achieve these aims.

Why the Environment Bill will weaken the legal effect of the principles

The clauses on environmental principles are largely unchanged from the draft Environment (Principles and Governance) Bill, despite very clear evidence that emerged during pre-legislative scrutiny, including from leading academic experts, on the need for these clauses to be strengthened. These experts concluded that the bill does not maintain the legal status of environmental principles as they have come to apply through EU law and that the "almost total relegation of the role of environmental principles to the Policy Statement ... undermines their legal influence to the greatest extent possible ... To fail to articulate their legal effect in any substantive way in the draft Bill is to fail to give environmental principles the kind of overarching legal role [that they currently have]".

Despite listing the principles on its face, the bill constitutes a significant weakening of the current legal effect of the principles because there is no duty on government ministers to apply the principles, only a duty to have "due regard" to an, as yet, unpublished policy statement. A duty to apply would ensure that the principles are actively incorporated into policy and decision making, as they are currently. Instead, the proposed "due regard" duty explicitly allows the government to redefine these principles through policy and to choose to introduce specific legislation which does not apply relevant principles, with the justification that due consideration had been given to the policy statement. We are concerned that the bill is, therefore, relegating these vitally important legal principles to little more than creatures of policy.

Up to this point, environmental principles have been binding on all public authorities including in individual administrative decisions. This legal obligation on all public authorities to apply the principles, whenever relevant, will be undermined through the bill.

Clause 16 requires the Secretary of State to prepare a policy statement on environmental principles. Only ministers, not public authorities, must have "due regard" to this statement when making policy and the requirement does not apply to decision making and is subject to wide ranging exemptions in Clause 18(2) and (3). These seem to absolve HM Treasury, the Ministry of Defence and, indeed, those "spending…resources within government" from considering the principles at all.

The bill also states that the policy statement need only be applied "proportionately" when making policy. This may allow the government to trade off environmental principles against socio economic considerations, thus weakening environmental protections.

The Aarhus rights

We note that the three Aarhus rights (public access to environmental information, public participation in environmental decision making and access to justice in relation to environmental matters) were removed from the list of principles that was set out in the draft bill. While we agree that these rights should not be included in a list of environmental principles, we think that **the government should use the bill as an opportunity to restate the importance of these rights and the need to ensure they are respected, protected and fulfilled.**

Environmental principles across the UK

It is not clear how environmental principles will inform environmental policy across the UK in the future. This briefing explains the current state of play on environmental principles in each of the four countries. The Scottish government undertook a consultation on environmental principles and governance and has subsequently included legislative proposals in its Continuity Bill, currently being considered by the Scottish Parliament. This bill would introduce the EU environmental principles into Scots law. The Welsh government undertook a consultation in 2019 and the environment committee of Senedd Cymru has called for legislation. While the Welsh government had indicated that it would bring forward environmental principles legislation, no time was made for this in the legislative programme for the period until the Senedd elections in May 2021. In Northern Ireland, there is no published timetable for the development of a policy statement on environmental principles.

Policy statement on environmental principles

In relation to the process for drafting, reviewing and approving the policy statement, the provisions in the Environment Bill are weaker than those in the Planning Act 2008 regarding the role of parliament in relation to national policy statements. There is a half-hearted attempt to provide for parliamentary scrutiny of the principles policy statement in Clause 17 but no formal role for parliament in approving the statement in the way that other policy statements, such as those on national energy policy, must be approved by a resolution of the House of Commons following a debate.

In drafting the policy statement, Clause 17(2) requires the secretary of state to "…consult such persons as the Secretary of State considers appropriate…". This should be replaced by a more general obligation to consult to reflect that environmental principles will have different manifestations and implications in different regulatory areas.

The draft statement should have been available for public and parliamentary scrutiny at an earlier stage of the bill's parliamentary passage, and must be published urgently, bearing in mind it was first promised in 2018. The government should clarify and set out on the face of the bill the timescales and processes for drafting, consulting on, publishing and reviewing the policy statement. Without this, there is a risk that timings could further slip.

The delay in progressing the policy statement on environmental principles is of serious concern as it means the statement will not be ready by the end of the transition period.

How will the government ensure that environmental principles underpin government policy making in the interregnum until the policy statement has been approved? **The consultation should be fast tracked**, with a cross Whitehall engagement programme completed within three months of the bill achieving Royal Assent. HM Treasury should clarify that it will include environmental principles within the Green Book. **The UK and devolved governments should publish a joint high level statement setting out how they intend to uphold environmental principles. This should be laid in each parliament before the end of the transition period.**

New Clause 22: a duty to apply environmental principles

We support **New Clause 22** which would require public authorities to apply the environmental principles rather than to have "due regard" to an as yet unpublished policy statement. We note that Clause 10 of the Scottish Continuity Bill will require Scottish ministers to have regard to the guiding principles on the environment in developing policies, including proposals for legislation. **UK government ministers must therefore explain why they believe their proposed legislation is fit for purpose.**

Clause 16 (Amendments 91 + 92)

The bill states that the policy statement need only be applied "proportionately" when making policy. This may allow the government to trade off environmental principles against socio economic considerations, thus weakening environmental protections. We support **amendments 91 and 92** which would remove ministerial estimates of proportionality as a limitation on the policy statement on environmental principles.

Clause 18 (Amendments 114 + 93, 94)

Clause 16 requires the Secretary of State to prepare a policy statement on environmental principles. Only ministers, not public authorities, must have "due regard" to this statement when making policy but the requirement does not apply decision making, whether in relation to individual cases, the awarding of financial assistance or entering into contracts. The government should confirm that "making policy" includes "proposals for legislation" and include this clarification on the face of the bill, which we note the Scottish government has decided to make explicit in Section 10(1) of its Continuity Bill. The duty is also subject to wide ranging exemptions in Clause 18(2) and (3). These seem to absolve HM Treasury, the Ministry of Defence and, indeed, those "spending…resources within government" from considering the principles at all.

Clause 18(3)(a) relates to policies relating to the armed forces, defence or national security. While this may be reasonable were it to be confined to decisions relating to urgent military matters, it is not drafted as such and appears to offer a blanket exclusion for the Ministry of Defence, the Defence Infrastructure Organisation and the Armed Forces. Given the highly sensitive environments in which a number of military training areas and exercises are located and the associated policy processes (for example, byelaw reviews, planning applications, contract and procurement decisions and applications for live firing and use of heavy artillery), this clause needs to be tightened considerably.

Similarly, Clause 18(3)(b) appears to offer a blanket exclusion for HM Treasury or any matter which might entail government spending or resource allocation. This must also be tightened considerably.

We support **amendments 114, 93 and 94** which would remove the exceptions for armed forces, defence and tax, spending and resources from the requirement to have due regard to the policy statement on environmental principles.

Environmental protection and reports (clauses 19 and 20)

Clause 19

Clause 19 requires ministers to publish a statement before the second reading of any bill, which contains environmental law provisions, to state that, in the minister's view, the bill will not have the effect of reducing the level of environmental protection provided by any existing environmental law. At first glance, this measure appears to be common sense and part of good administration. However, we are concerned that it may be mistaken for a legal commitment not to regress from current environmental standards, which it is not. We are also concerned that restricting this clause to bills only containing environmental law provisions risks excluding legislation and policy which could have significant environmental impacts.

Without a binding commitment to maintaining standards, there is no doubt that environmental law will come under sustained deregulatory pressure, including from those seeking to strike trade deals, for example with the US. A non-regression provision is a key part of modern environmental law, as contained in a recent update to French Law and the draft IUCN Global Pact for the Environment.

The bill must, therefore, be amended to include a binding commitment so that standards cannot be weakened or watered down in the future.

An updated version of clause 19 could serve a useful purpose alongside this. But it should be modelled more closely on the Human Rights Act, on which it appears to be loosely based. That legislation involves a more rigorous process in which the Joint Committee on Human Rights scrutinises every government bill for its compatibility with human rights. A new Joint Committee on Environmental Standards could be established to undertake a similar role, or it could be undertaken by one of the existing environmental select committees. The statement should be published before the bill is introduced or as part of any consultation on the proposed legislation and accompanied by an oral statement to the House.

These matters are all the more important because the governance structure which sits behind statements of compatibility under the Human Rights Act (namely that fundamental rights are enforceable by the courts) does not obviously apply to primary legislation related to environmental protection.

Regression is unlikely to emanate very often from primary legislation. Instead, regressive changes will probably be tucked away in the small print of trade agreements, secondary legislation or detailed policies. The scope of this provision should, therefore, be extended to cover international treaties, secondary legislation, policy and guidance.

The government should also clarify why the statement is only to be published before second reading, given that the amending stages of bills come after second reading. How will the statement take account of subsequent amendments that would have the effect of reducing the level of environmental protection, as we have seen on this bill in relation to the government's amendments on the Office for Environmental Protection?

Clause 20 (amendments 95 + 97, 195 + 196 + 197)

Clause 20 requires the Secretary of State to report biennially to parliament on those developments in environmental protection legislation from other jurisdictions which appear to the Secretary of State to be significant. We would welcome clarification from the government on what value it considers this would add to the new environmental governance system, given that the government should be keeping track of such developments as a matter of good administration.

We are concerned that the assessment of what is a significant development in international environmental protection does not entail public consultation or engagement with experts and is instead left entirely to the discretion of the Secretary of State. Additionally, no government action is required under Clause 20, aside from publishing a report. This dramatically curtails the possible practical impact of such an assessment.

We suggest that, instead, the Secretary of State should be tasked with commissioning and publishing an independent assessment of developments in international environmental protection legislation and be required to report to parliament on what action the government intends to take in response. This should be in the form of an oral statement to the House, as well as a written report. These changes would help to increase transparency and accountability.

However, the simple truth remains that, if the government is serious about its repeated verbal commitments to maintaining, and indeed enhancing, environmental standards, then it will wish to see this legacy enshrined in law through a straightforward commitment to non-regression of environmental standards set out in black and white in this flagship bill.

Amendments 95 and **97** are a welcome attempt to seek to improve the UK's compliance with the Aarhus Convention and to require the government to take steps in that regard. UK implementation of the Aarhus Convention, which ensures transparency and democracy in environmental decision making, is currently poor in many areas. The convention is not fully implemented either via retained EU law nor by the existing domestic system. This is negative not only for the UK, where a lack of access to environmental justice impacts upon the wellbeing and health of citizens, but also on a global level. For the UK to show global environmental leadership it must model best practice in relation to the inclusion of civil society in decision making on the use of environmental resources, and must fully commit to the protection of the rights of people exercising their environmental rights around the world.

Amendment 95 provides an explicit opportunity for the Secretary of State to consider, as part of the 2-yearly review of international good practice, how implementation of and compliance with Aarhus could be improved. **Amendment 97** would clarify that the Office for Environmental Protection should oversee the implementation of the Aarhus convention (to which the UK is a signatory), and not merely the implementation of domestic law that imperfectly transposes the content of the convention.

The UK is currently the subject of an Aarhus complaint submitted by Friends of the Earth for failing to correctly apply the UNECE convention in relation to public engagement around the environmental impacts of exit from the EU. Ensuring the Office for Environmental Protection is able to investigate such cases in the first instance would prevent the government from facing further lengthy international legal cases and allow for improvements in compliance to be led at a UK level.

We support **amendment 195** which would require the government to consult on what counts as "significant" for the purposes of this Clause, **amendment 196** which would require the report to include an independent assessment and the government's response to it and **amendment 197** which would require an oral statement to accompany the written report.

For more information, please contact:

Ruth Chambers, senior parliamentary affairs associate, Greener UK
e: rchambers@green-alliance.org.uk
t: 020 7630 4524

On behalf of Greener UK and Wildlife & Countryside Link

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