

## Briefing on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

### Summary

- LINK members take note of the introduction of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (hereafter the Bill). From an environmental outcomes perspective, we agree with the position of the Scottish Government, that the process of the UK exiting the EU would be most effectively achieved through the European Union (Withdrawal) Bill, if an agreement can be reached between all UK governments.
- LINK members would like to take the opportunity to comment on some critical provisions of the Continuity Bill which relate to issues raised in previous submissions to the Scottish Parliament as part of the Committees' work on implications of UK exit from the EU for Scotland, as well as scrutiny of the UK Withdrawal Bill for the purposes of legislative consent.
- LINK members welcome the Bill's provisions with respect to retaining the Charter of Fundamental Rights which clearly acknowledges the importance of environmental protection. Similarly, the provisions regarding the recitals and enhanced scrutiny afforded by the Bill are also welcomed.
- However, LINK members also note that:
  - (1) The Bill does not explicitly retain EU environment and animal welfare principles despite retaining the Charter of Fundamental Rights which does reference environmental protection
  - (2) The Bill does not seek to address the environmental governance gap emanating from the UK's exit from the EU and the loss of critical functions currently performed by EU bodies
- For the Bill to meet its avowed goal of "providing for continuity of law including environmental protections in EU law" those two critical points need to be urgently addressed through amendments to the Bill.
- LINK members call on Members of the Scottish Parliament to support amendments that seek to address these two key issues.

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

**This briefing outlines LINK member concerns with respect to the provisions of the Continuity Bill:**

### **1) EU environmental and animal welfare principles must be retained through the Continuity Bill**

LINK members have been consistently vocal about the need for overarching EU environmental principles as well as the recognition that animals are sentient beings to be retained in domestic law. EU environmental principles are enshrined in Article 191(2)<sup>1</sup> of the Treaty of the Functioning of the EU (TFEU) while provisions about animal sentience were introduced in 2009 by the Lisbon Treaty and are now included in Article 13 of the TFEU<sup>2</sup>.

---

<sup>1</sup> Article 191(2) of the TFEU defines environmental principles : "*Union policy on the environment shall aim at 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*"

<sup>2</sup> Article 13 of Title II of the TFEU states that: "*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay* LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

**If the Bill is to deliver on “providing for continuity of law including environmental protections in EU law”, as stated in the Bill’s Policy Statement, EU environmental and animal welfare principles need to be explicitly referenced in its provisions<sup>3</sup>.**

The absence of provisions to bring those principles over into domestic law following the UK’s exit from the EU is a critical gap which LINK members, as well as academics, have identified in the context of the UK Withdrawal Bill<sup>4</sup>. More recently, the Environment, Climate Change and Land Reform Committee of the Scottish Parliament launched an inquiry on this issue highlighting its importance<sup>5</sup>.

Given the critical nature of this issue, LINK members welcomed the statements by Roseanna Cunningham, Cabinet Secretary for the Environment, Climate Change and Land Reform, that Scottish Government would do everything in its power “to maintain, protect and enhance our environment” and that “these [environmental] principles sit at the heart of Scotland’s approach to environmental policy in the future”; “without them, 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”<sup>6</sup>.

Regrettably, the Bill falls short of translating these commitments into legislation. While the Continuity Bill seeks to maintain the general principles of EU law and retains the EU Charter of Fundamental Rights insofar as devolved competencies are concerned, the same certainty is not extended to EU environmental and animal welfare principles. This gap is rendered even more striking when considering that the Charter explicitly mentions environmental protection as a core human right under Article 37 which reads:

*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.*<sup>7</sup>

It is therefore unfortunate that the EU environmental principles which would enable the Scottish Government to fully meet the provisions of the Charter have been left out of the Continuity Bill.

**LINK members urge Members of the Scottish Parliament to support amendments to the Continuity Bill that would explicitly retain EU environmental and animal welfare principles in domestic law.**

### **About the EU environmental principles**

Today, in Scotland, as a result of the UK’s membership of the EU, environmental principles, such as the precautionary principle and the polluter pays principle, can be applied by courts, businesses and government in their decision-making. They form an essential component of environmental law, which necessarily must be able to look ahead to the long-term and be flexible in its application.

As they are key to the interpretation of EU law, they should therefore be key to the interpretation of all retained EU law whether it is defined in the Continuity Bill as EU derived domestic legislation or devolved direct EU legislation as it becomes domestic law. Environmental principles need to be a part of domestic law on day one of

---

*full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”*

<sup>3</sup> Page 16, point 85 of the Policy Statement available [here](#).

<sup>4</sup> See submissions from RSPB Scotland and Scottish Environment LINK to the Finance and Constitution Committee [here](#) as well as references in the Committee’s interim report on a Legislative Consent Motion [here](#). Further information is available in Scottish Environment LINK’s submission to the Environment, Climate Change and Land Reform Committee [here](#).

<sup>5</sup> More information on the inquiry is available [here](#).

<sup>6</sup> Roseanna Cunningham full speech at the European Environmental Bureau Conference, November 2017: [http://www.eebconference.eu/wp-content/uploads/2017/11/European-Environmental-Bureau-Speech-6-November\\_Roseanna-Cunningham.pdf](http://www.eebconference.eu/wp-content/uploads/2017/11/European-Environmental-Bureau-Speech-6-November_Roseanna-Cunningham.pdf)

<sup>7</sup> [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

Registered HQ office: 13 Marshall Place, Perth PH2 8AH tel 01738 630804 email [information@scotlink.org](mailto:information@scotlink.org)

Advocacy office: Dolphin House, Hunter Square, Edinburgh, EH1 1QW tel 0131 225 4345 email [advocacy@scotlink.org](mailto:advocacy@scotlink.org)

the UK's exit from the EU and the public should be able to rely on them, the courts apply them, and public bodies follow them, at the very least in respect to all retained EU law.

The Continuity Bill does not retain the three key roles of the environmental principles: in interpreting the law, in guiding future decision-making, and as a basis for legal challenge in court.

What is more, the environmental principles are not unique to EU law – they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, Scotland gives effect to these obligations to the international community through the UK's EU membership, and in particular the appearance of these principles within the TFEU.

A further limitation imposed by the Continuity Bill is that reliance on existing case law to interpret these principles would limit their scope. In a recent analysis, Professor of Environmental Law at UCL, Richard Macrory, noted that “when it comes to, say, the Habitats Regulations the UK courts will still be obliged to apply the interpretation of the precautionary principle as contained in Waddenzee”. But this emphatically does not mean that the precautionary principle will necessarily apply more broadly, as it currently does.

## **2) Provisions regarding the need to address the governance gap need to be enshrined in the Bill**

Laws are only effective when they have strong institutions and mechanisms to support and implement them in practice. Laws on paper are not self-executing, and governments often do not fully implement measures they have agreed to. Furthermore, robust enforcement mechanisms are needed for when environmental requirements and standards are not being met.

Therefore, to maintain the same level of environmental standards in Scotland, following the UK's exit from the EU, it will be important to address the governance gap created by the loss of the functions currently performed by EU bodies.

On leaving the EU, Scotland and the rest of the UK will lose the oversight and enforcement roles of the Commission, European Court of Justice and other EU bodies. These institutions currently perform key functions such as reviewing monitoring and reporting on the state of the environment; reviewing the implementation and performance of environmental legislation; investigating potential breaches of environment and; ensuring enforcement and applying sanctions in cases of non-compliance.

These functions provide a freely accessible mechanism for civil society and individuals to raise and seek to address potential breaches of environmental law. This mechanism has played an invaluable role in giving a voice to the public on environmental matters and holding governments to account. At the moment, this mechanism is not replicated anywhere in Scotland or within the UK.

To ensure that retained EU law has the same practical impact, domestic governance mechanisms are needed to take on the functions of existing EU bodies. This may require the creation of a new body or new bodies to ensure the governance gap is addressed. Similarly, existing bodies may need to have some functions expanded or strengthened to compensate for functions currently performed by EU bodies. Any such body or institution must have (i) adequate resources, (ii) be independent of government, (iii) have relevant expertise and (iv) have sufficient legal powers to enforce the law and hold the various governments to account.

LINK members welcome the Scottish Government's commitment to “considering the nature of potential gaps in existing domestic monitoring, scrutiny and enforcement powers that would need to be addressed to ensure Scotland maintains its current high standards of environmental protection and accountability” and the request it

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

Registered HQ office: 13 Marshall Place, Perth PH2 8AH tel 01738 630804 email [information@scotlink.org](mailto:information@scotlink.org)  
Advocacy office: Dolphin House, Hunter Square, Edinburgh, EH1 1QW tel 0131 225 4345 email [advocacy@scotlink.org](mailto:advocacy@scotlink.org)

has made to the “Roundtable on the Environment and Climate Change to provide advice to Ministers on future environmental governance arrangements in Scotland following the UK’s Exit from the EU”<sup>8</sup>.

However, it is important that the ‘governance gap’ issue is also addressed by the Continuity Bill, as the Bill’s primary aim is to deliver a functioning statute book for Scotland following the UK’s exit from the EU. Securing a commitment regarding the timeframe for addressing the ‘governance gap’ by bringing forward primary legislation as well as seeking to distill how the different functions carried out by EU institutions will be taken forward at the domestic level is necessary.

Requiring the Scottish Government to establish a publicly accessible register of environmental governance functions and powers exercised by EU institutions, and to make regulations that ensure that all relevant environmental powers and functions are continued will be a useful mechanism for ensuring that the governance gap is minimised. This would also ensure transparency about the functions that need to be replicated or replaced. The register would also enable the public to monitor and hold the government to account on its plans for ensuring that robust arrangements will be in place on exit day to deliver its ambition for a world-leading environmental justice system.

**LINK members urge Members of the Scottish Parliament to support amendments to the Continuity Bill that would provide for a forward process for addressing the ‘governance gap’ in a transparent manner while ensuring that existing functions are fully replicated at the domestic level.**

*This LINK Parliamentary Briefing was developed by LINK’s Brexit Subgroup and is supported by the following member organisations:*

**Marine Conservation Society**  
**Nourish Scotland**  
**Ramblers Scotland**  
**RSPB Scotland**  
**Scottish Wildlife Trust**  
**Whale and Dolphin Conservation**  
**Woodland Trust Scotland**  
**WWF Scotland**

**For more information contact:**

Daphne Vlastari, LINK Advocacy Manager  
E-mail: [daphne@scotlink.org](mailto:daphne@scotlink.org) | Tel: 0131 225 4345

[www.scotlink.org](http://www.scotlink.org)  
[www.savescottishseas.org](http://www.savescottishseas.org)  
[www.scotlink.org/local](http://www.scotlink.org/local)

---

<sup>8</sup> Written Answer to Parliamentary Question S5W-13447

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.