



The Law Society

Response of the Law Society of England and Wales to the
Department for Environment, Food & Rural Affairs
consultation on developing environmental principles and
accountability

August 2018



Preface

The Law Society of England and Wales (“The Society”) is the professional body for the solicitors’ profession in England and Wales, representing around 170,000 registered legal practitioners. The Society represents the profession to Parliament and the Assembly, governments and regulatory bodies and has a public interest in the reform of law

The Society welcomes the opportunity to respond to the Department for Environment, Food and Rural Affairs (DEFRA) consultation.

This response has been prepared by the Society’s Planning and Environmental Law Committee (PELC). Its members engage with keeping under review, and actively promoting improvements in planning and environmental law. It replies by answering the questions below in the order published having regard to the fact that the answers may overlap to some degree. As a general point, the Law Society believe that many of the options proposed in the consultation are a positive and practical way forward to addressing the question of environmental law post-Brexit.

Response

Part 1: Environmental Principles

Q1: Which environmental principles do you consider as the most important to underpin future policy-making?

1 The Law Society regards the principles in Annex A as a positive basis for incorporating those principles and norms into UK law. Moreover, it recognises that these principles are reflected in s.16 of the EU (Withdrawal) Act 2018 (EUWA 2018) and that the policy statement referred to in the provisions provides the opportunity for more detailed definitions of the principles.

2 The Law Society believes that it will be important to publish the Draft Bill (referred to in s.16) for consultation, such that a final list of principles can be settled. Moreover, a draft policy statement (discussed in question 2) should be published

alongside the draft Bill to properly understand how the principles will be defined, their scope and nature and how it will be applied.

3 Finally, the Law Society notes that s.16(2) EUWA 2018 lists the same principles as the consultation paper with the addition of:

- (g) public access to environmental information
- (h) public participation in environmental decision making; and
- (i) access to justice in relation to environmental matters

These added “principles” derive from the Aarhus Convention 1998. The Law Society’s PELC suggests that the information, participation and access to justice principles may more properly be described as rights conferred upon all citizens in the UK. The policy statement should clarify this and ensure that the rights already available to UK citizens continue.

Q2: Do you agree with these proposals for a statutory policy statement on environmental principles?

4 The Law Society notes that the requirement for a statutory policy statement clarifying the environmental principles is provided for in s.16(1)(b) EUWA 2018. The statement should define and apply the principles - as noted above, the Law Society supports the provision of a draft statutory policy statement for consultation alongside the proposed draft Bill. The statement will be critical in applying the principles in policy and practice.

Q3: Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1), or should the principles only be set out in the policy statement (Option 2)?

5 The Law Society notes that the response to question 3 has broadly been overtaken by the enactment of s.16 EUWA 2018 and refers to its answers to questions 1 and 2 regarding the need to consult and consider the principles further. The Law Society further notes that, consistent with Article 191(2) of the Treaty of the Functioning of the European Union, the principles must continue to provide a high

level of environmental protection. The Law Society further notes that such an approach is consistent with the recently published White Paper *'The future relationship between the United Kingdom and the European Union'* (Cm 9593) (July 2018).

Part 2: Accountability for the environment

Q4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?

6 It is apparent from the discussion in the consultation paper that current governance mechanisms implemented by bodies such as the European Commission (EC), the European Environment Agency, the European Parliament and the Court of Justice of the European Union will cease to apply as a result of leaving the EU. This highlights the justification for, and importance of, the proposed new independent environmental body.

7 As a starting point, this new body should effectively replicate the governance mechanisms of these European bodies. The stated aim of the government to strengthen protection for the environment on leaving the EU raises the question whether 'equivalence', which appears to be the extent of the current proposals and the minimum that should be required, is sufficient to meet the aim.

8 That said, the Law Society recognises that the gap in environmental law and regulation through the absence of these bodies has been addressed to some extent by the enactment of s.16 EUWA 2018, which provides for a new environmental body with enforcement functions. Providing the nature and scope of the new body's role is wide enough, this should ensure that (as with the remit of the EC) it covers all emanations of the state (public bodies).

9 Section 16(1)(d) EUWA 2018 provides that the new environmental body will have the power to take enforcement action, including legal proceedings if necessary. The Law Society notes that s.16(1)(d) appears to focus on non-compliance of a Minister, whereas at present the function of the EC covers non-compliance by all public

bodies. The Law Society believes that the new body should cover all public bodies, as is presently the case with the EC.

Q5: Do you agree with the proposed objectives for the establishment of the new environmental body?

10 The Law Society broadly agrees with the proposed objectives for the new environmental body, provided for in the consultation paper and s.16(1) EUWA 2018. However, the way in which they are expressed are weaker than might be expected, given the stated aims of government.

In particular:

- The role of a ‘voice’ for environmental protection and enhancement carries little meaning, preferable alternatives (if even they go far enough) might be ‘advocate’ or ‘representative’ to reflect the role of the new body in strengthening domestic environmental governance.
- The acknowledgement of the need to balance the environmental protection against other priorities as one of the enshrined objectives of the new body seems to dilute its environmental purpose, function and focus, the public interest will always involve balance and the additional words indicate a dilution in the specific environmental protection and enhancement role of the new body.

11 Moreover, the Law Society considers that there may be some key objectives absent from the consultation paper. Section 16(1) EUWA 2018 now does appear to plug the enforcement gap. It is proposed that further consultation on the draft Bill and statutory policy statement can consider and address any gaps in the objectives, in the light of s.16 EUWA 2018.

Q6: Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?

12 The Law Society notes that it is important that the scrutiny and advice role applies to the implementation of new and future environmental law, as well as extant laws. However, the scrutiny role of the new body needs to be clearly understood. It is to scrutinise and advise on the *implementation* of environmental law, the role of developing and making that law is one for Parliament. This role is not directly comparable with the current role of the EC, which scrutinises the way in which Member States implement Directives into their own national laws and it is not clear what the involvement of the new body will be as a new law is developed. It will clearly need to fully understand the intentions of the legislation to be able to scrutinise whether implementation has been effective but must retain its independence from government.

13 In summary, the Law Society does not consider that the new body's advice to government should extend to generally advising on matters; there could be potential conflicts of interest or duplication of work with other existing departments.

Q7: Should the body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environmental Plan?

14 A key function to the new body holding government to account on the delivery of its environmental policies is the independent, transparent and public assessment, measurement and reporting of progress against major environmental policies such as the 25 Year Environmental Plan. To be effective, the means by which the government is to be held to account for non-compliance or deficiency needs to be sufficiently meaningful that instances of non-compliance or deficiency are the exception, rather than the rule.

Q8: Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?

15 The Law Society supports the notion that the new body should consider and, if appropriate, investigate complaints from the public. The environment does not have its own voice. One of the most successful aspects of environmental governance to emerge from the EU is the investigation of the environmental breaches of deficiencies of Member States as a result of public complaint, in circumstances where private and civil interests alone would not result in such scrutiny or investigation. Depending on the remit of the new body, investigations could extend beyond government failure to the failure of other public and private bodies where those bodies are carrying out public law environmental responsibilities.

Q9: Do you think any other mechanisms should be included in the framework for the new body to enforce government deliver of environmental law beyond advisory notices?

16 The Law Society submits that to effectively develop the provisions of s.16(1) EUWA 2018, the new body should have a range of compliance and enforcement options, which should not be limited to issuing advisory notices. Any enforcement mechanism can only be as effective as its sanctions. While it is to be hoped that advisory notices requesting compliance will result in satisfactory resolution of issues, to be effective, the new body needs to have a suite of enforcement tools it is able to rely on, especially if its remit is to be wider than the scrutiny of central government alone. The indicative mechanisms outlined in the consultation paper are useful additions but a more comprehensive set of sanctions, including the ability to refer matters for determination by an independent court or tribunal should ensure that the new body could be empowered to be properly effective in pursuing the government's primary purposes relation to the environment.

Q10: The new body will hold national governance directly to account. Should any other authorities be directly or indirectly in the scope of the new body?

17 As indicated in previous answers, it is considered that the remit of the new body should be wider than central government alone. Other public and private bodies

should be subject to the same levels of environmental governance and scrutiny, especially where the only current mode of sanction is likely to be the less than satisfactory recourse to judicial review. This will be separate from operational activities that are already subject to direct regulation and will focus more on the effectiveness of implementation, rather than the direct control of activities and should be focused on environmental issues rather than being a matter of overall accountability.

Q11: Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?

18 There is no obvious reason why the government's implementation of international agreements should be excluded from the remit of the new body. It has, as an objective, the capability of holding government to account on environmental issues. The Law Society believes that this capability will be diluted if there are 'red line' or 'no go' areas. International agreements will have, to a greater or lesser extent, their own governance and control mechanisms, which should not be duplicated, but the government's performance in complying with its international environmental obligations is just as important as compliance with domestic obligations. The environment knows no boundaries and the government wishes to hold itself out as a world-leading environmental government.

Q12: Do you agree with our assessment of the nature of the body's role in the areas outlined?

19 As mentioned in answer to question 11, the ability of the new body to function effectively will be diluted if there are 'red line' or 'no go' areas. In particular, climate change is probably the biggest environmental challenge facing the planet, and for the new environmental body to have no involvement in scrutinising government in relation to this issue would undermine its credibility. Given the necessary width of the definition of the environment, for the purposes of the new body, it has already been identified that there will be areas of overlap with other public and private bodies and that duplication should be avoided, if practicable. However, it is not considered that climate change is so comprehensively addressed through the Climate Change Act

2008 and the UN Framework Convention on Climate Change that the issue should be outside the remit of the new body.

20 Similarly, while agricultural, fisheries and marine environment issues are included within the 25 Year Environment Plan, as topic areas they are considerably wider than the management and sustainability issues raised in the Plan and the government's proper implementation of environmental law and policy, as well as that of other public and private law bodies falling within the remit of the new body, should probably fall to be scrutinised/regulated by the new body.

21 In summary, the Law Society does not agree with the assessment at paragraphs 125-132 of the consultation paper as the nature of the new body's role; it is too limited.

Q13: Should the body be able to advise on planning policy?

22 The Law Society notes that the environment is central to the principle of sustainable development, which is something that the land use planning system is seeking to deliver. As a body intended to act as a "strong, objective, impartial and well-evidenced voice for environmental protection and enhancement" (as to which see the comments on question 5 above), it would appear to be appropriate for the new body to act in the traditional 'consultee' role in the planning policy process. The 'consultee' role should be sufficiently separate from the decision-making process that no conflict of interest would arise were the new body to be required to scrutinise the effectiveness of the implementation of environmental policy through the planning process.

Form, structure, status and funding of the new environmental body

23 The Law Society notes that paragraphs 137-143 of the consultation paper refer to the possible form, structure, status and funding of the new environmental body. The points that are otherwise not considered above, are considered briefly below.

24 The Law Society supports the proposal for an independent body that reports to Parliament with reference to the standards set out in 'Managing Public Money' to ensure financial transparency, accountability and appropriate oversight. It also supports the notion that the new body will need to operate in a clear, transparent way in the public interest. It should be able to receive complaints from the public with the power to investigate these as appropriate. Finally, the Law Society agrees that the new body is likely to need a range of legal, technical, scientific and economic skills and that these will need to be properly resourced in order to maintain its work effectively.

Q14: Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?

25 As noted above, the Law Society supports the power conferred upon the new body under s.16(1)(d) EUWA 2018 to take legal proceedings if necessary. However, it is essential that the new body has the ability to refer matters to an independent court or tribunal that can determine matters in a fair, equitable, timely and cost-efficient manner. With a mix of tribunals and courts currently dealing with environmental matters, the most likely options are to:

- (1) expand the role of the First Tier Environment Tribunal to cover enforcement mechanisms for the new body and appeals against the new body's decision; or
- (2) develop the role of the High Court (e.g. the Planning Court), to cover these matters.

26 The possible orders the court may make should reflect the sanctions available under s.31(1) of the Senior Courts Act 1981 i.e. a mandatory, prohibiting or quashing order, a declaration or an injunction and the options to impose a fine, award damages if appropriate. There would also be the need to be able to allow any appeal by the public authority under scrutiny, such that an advisory or compliance notice is

set aside.

27 Importantly, the scope and the remit of the new body should not be limited by restricting access to the courts and or limiting the scope of judicial remedy available.

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