



Response to consultation on environmental principles and governance in Scotland

Response made online 10 May 2019

Section 1: Environmental principles

1. **Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?**

- Not Answered

Please explain your answer:

- No comment

2. **Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?**

- Not Answered

Please explain your answer. :

- No comment

3. **Do you agree that a new duty should be focused on the four EU environmental principles?**

- Not Answered

If not, which other principles should be included and why?:

- No comment

4. **Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?**

- Not Answered

Please explain your answer:

- No comment

Section 2: Environmental governance arrangements

5. What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

As Scottish Information Commissioner, I regulate the Environmental Information (Scotland) Regulations 2004 (the EIRs) as well as the Freedom of Information (Scotland) Act 2002 (FOISA).

The EIRs implement Directive 2003/4/EC on public access to environmental information which, in turn, implements the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention, a UNECE Treaty signed by the UK Government in 2005).

The EIRs imposes two main duties on Scottish public authorities:

- (a) the duty to make environmental information available in response to a request (regulation 5) and
- (b) the duty to actively disseminate environmental information (regulation 4).

The duty to actively disseminate environmental information is also set out in Article 5 of the Aarhus Convention, meaning that, even if the EIRs were to be amended post-Brexit, any amending or replacement legislation will also need to require public authorities to actively disseminate information.

6. What key issues would you wish a review of reporting and monitoring requirements to cover?

- No comment

7. Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

- Not Answered

Please explain your answer:

- No comment

8. How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

This question was discussed in some detail at the round-table on 1 May. There are a number of ways in which bodies can scrutinise or regulate performance. However, I suggest it would be appropriate to ensure that any scrutiny body set up was independent of government and had powers to taken enforcement action rather than simply the power to make recommendations. This would fit in best with the current role of the European Commission which will be lost post-Brexit.

Paragraph 70 of the consultation paper notes that the roundtable identified the possible need for a body to have “own initiative” powers, for example to instigate its own reports and require the provision of information. I agree that this would be helpful. What is suggested is similar to my own powers, which not only include issuing decisions on appeals made to me but acting on my own initiative where a public authority’s practice is, or may be, breaching FOISA/the EIRs or falling short of good practice.

9. **Which policy areas should be included within the scope of any scrutiny arrangements?**

One of the options which has been considered is the creation of a new independent body to undertake scrutiny functions.

If such a body is created, it is very important that its remit is set out clearly in legislation, and that this remit does not overlap with any of the duties already placed on, or jurisdictions already exercised by, other statutory bodies in Scotland, including those of the Scottish Information Commissioner.

My office has issued over 3,000 enforceable decisions under the EIRs and FOISA since 2005. We have a wealth of experience and expertise when dealing with information requests, in a system which has high levels of public awareness and which is well used. (In 2017/18, there were a reported 77,528 requests for information made to Scottish public authorities, of which 8,701 were EIRS requests.)

Appeals against my decisions are appealable to the Court of Session.

Any overlap of responsibility in the regulation of access to environmental information would, in my opinion, be to the detriment of requesters and the key tenet recognised in the Directive 2003/4/EC that improved public access to environmental information contributes to greater awareness, free exchange of views, more effective participation in decision-making, and eventually to a better environment.

Requesters under the current system do not necessarily consider whether the information they are seeking is environmental or not – they simply want the information. Splitting the enforcement role for access to information would serve to cause confusion in requesters. This in turn could result in appeals being sent to the wrong regulator, risking additional delay, frustration and mistrust in the system, and ultimately a deficit in access to information.

In addition, the expertise built up by my office since 2005 would take a considerable time to develop in any new organisation. There would be other practical difficulties, such as joint requests for environmental information and non-environmental information having to be split up and dealt with by two separate bodies. There may also be disagreements between the bodies as to which body is responsible for carrying out investigations.

Even if the independent body were only given some powers in relation to the EIRs, this would still lead to confusion for public authorities as well as for members of the public, with a risk that what should be a simple process would be unnecessarily complicated, with a consequential reduction in access to environmental information.

10. **What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?**

- No comment

11. **Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?**

- Not Answered

Please explain your answer:

- No comment

12. **What do you think the impact will be in Scotland of the loss of EU enforcement powers?**
- No comment
13. **What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?**
- No comment

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