

UK ENVIRONMENTAL PRINCIPLES AND GOVERNANCE:

Response to Consultation by the UK Government Department for Environment
Farming and Rural Affairs

24 July 2018

1. Royal Town Planning Institute

The Royal Town Planning Institute champions the power of planning in creating prosperous places and vibrant communities. We have over 25,000 members in the private, public, academic and voluntary sectors. Using our expertise and research we bring evidence and thought leadership to shape planning policies and thinking, putting the profession at the heart of society's big debates.

2. Background

A large part of environmental law in the nations of the UK derives from European environmental directives which are “transposed” into secondary legislation in each UK Nation. In constitutional terms these are secondary legislation emanating from the principal European Communities Act 1972. When this is repealed, the EU Withdrawal Bill currently before the UK Parliament will save all the secondary legislation at one stroke. So regulations such as the Habitats Regulations will remain law.

However the role of the EU goes beyond the regulations we have transposed. There are principles which form the preamble the Directives which have no equivalent as yet in much English law, partly for long standing historic reasons (which may not apply equally in Scottish law).

In addition through the Commission the EU monitors performance of the Directives and enforces against Member States which fail to implement them. This enforcement action is backed up by the European Court of Justice and can result in imposing substantial fines on Member States.

3. Jurisdiction

On leaving the EU it is widely agreed that the UK will need both overarching environmental principles and a corresponding body. However the UK Government (UKG) has commenced a consultation only for England.

In its evidence¹ to the Public Administration and Constitutional Affairs Committee of the UK Parliament in October 2017 the RTPI stated:

- 1) There should be a transnational framework on environmental matters which applies across all nations in the UK and it should be supervised by a single body
- 2) Establishing the framework and the body should arise from agreement by unanimity between the 4 nations

¹ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/devolution-and-exiting-the-eu/written/74392.html>

It is therefore unfortunate that the UK Government has pressed on with this consultation unilaterally. It would have been preferable for the three sitting governments to have jointly come to an agreement on how they wish to replace the European Commission and then consulted their peoples accordingly. Whilst understanding the rights and needs of individual nations to set environmental policy separately (as they do now - in the EU) the absence of any common principles and a common enforcement body across the whole of the UK would be most regrettable.

There needs to be a common framework on environmental matters across the whole of the UK for several reasons:

- Environmental matters transcend national boundaries within the UK
- The continued trade relationship with the EU may depend on demonstrating sound principles of environmental governance. The EU will wish to see that these are satisfactory in all UK nations (with particular reference to Northern Ireland) and the easiest way to demonstrate this is having a common framework (agreed by unanimity between Nations)
- From a citizens' rights (and an environmental) perspective what replaces the EU should be of equal value to what we have now, which crosses boundaries
- Structures which are set by individual national parliaments/assemblies would be much easier to alter with changes of government in any of those forums: structures agreed across the UK would endure much as those agreed across the EU have. And a "watchdog" needs to be able to hold any government to account and not be effectively the "pet" of any one of them.

The Royal Town Planning Institute is therefore responding to the detailed questions in the DEFRA consultation questions with the caveat that we need a common framework which is transnational and set up by unanimous agreement by the four nations. Any other approach would hardly meet the objectives set by the UK Prime Minister for the watchdog for example that it be "a new world-leading independent statutory body which would hold government to account and give the environment a voice".

We note that Section 16 of the EU Withdrawal Act requires the Secretary of State to establish a body. We do not accept that the Act precludes the establishment of a single *transnational* body.

4. Environmental principles

Not only do individual EU Directives contain *purposes* as well as operational arrangements, but there are also principles hard-wired at the highest level e.g. the Treaty on the Functioning of the EU Article 191(2) which requires EU environmental policy to be based on the precautionary principle. Leaving the EU will mean UK nations lose all of this unless it is replaced deliberately. What principles should be installed? The consultation paper provides some examples in Annex A :

- Sustainable development
- Precautionary principle
- Prevention principle
- Polluter pays
- Rectification at source
- Integration principle

We also note the EU Withdrawal Act sets out in primary legislation the principles which should be followed. These include all of the above plus:

- Public access to environmental information
- Public participation in environmental decision making
- Access to justice

Response

All of the principles in Section 16 of the Withdrawal act should be established.

5. “Watchdog”

5.1 Principles

The UK Government proposes the following principles of operation for the watchdog:

- Independent of Government and capable of holding it to account
- Durable and statutory
- Clear remit
- Sufficient powers and resources
- “Proportionate” [meaning balancing other “interests” against the environment]

Response:

It is important that the watchdog is set up to be able to survive critical events which have hobbled similar bodies such as the Sustainable Development Commission and the Royal Commission on Pollution. The body need to be able to survive a change in Secretary of State, Government, *and its own chair*. (But a far better way to achieve the principles (of durability especially) would simply be to have a UK-wide body.)

Regarding a watchdog as “proportionate” is wholly unacceptable. The frameworks and policies it policies will be derived from a political process which is the point at which proportionality applies. It is not acceptable then for further “balance” to be introduced.

5.2 Scrutiny

The watchdog could advise government on law to be introduced and on the implementation of the UK Government’s 25-Year Environment Plan

Response: Agreed

5.3 Complaints

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

Response: Agreed. But it is not only “law” which is a matter for concern. The EU Directives go further to establish purpose. Unless UK citizens have an equivalent ability to challenge policy as well as law their rights have been reduced.

5.4 Enforcement

What powers should the body have? The Commission can issue fines. The UK Government is not proposing the watchdog does any more than issue advisory notices. Yet DEFRA is claiming that it will be “a new world-leading independent statutory body which would hold government to account and give the environment a voice”. This is not consistent.

Response: The watchdog should be able to impose fines on the UK Government. This has proved during the UK’s membership of the EU one of the powerful levers to secure action from governments.

5.5 Scope: other bodies

Should the body be able to take action against bodies other than the UKG, such as local authorities?

Response: No. the Commission does not do this and if the body is enabled to do this there is a risk the UKG will evade its responsibilities by arguing that other bodies have failed to act.

5.6 Scope: definition

Response: Agreed that the body should not cover international obligations but should be confined to domestic and EU Retained law.

The UKG asks whether it is necessary for the body to cover climate change given the role of the Climate Change Committee. The answer is yes given that the CCC has no powers of enforcement.

5.7 Scope: spatial planning

The UKG asks if the body should be able to hold the government to account in the design of (but not individual cases within) the planning system. The Commission did actually do this in 2005 when it ruled that the UKG had failed to apply the Habitats Directive to plan making (all UK jurisdictions incidentally). It could furthermore advise on new planning policy.

Response: Agreed