

Environmental ambition in UK Law and the role of the OEP

Professor Eloise Scotford

www.ucl.ac.uk



Outline

- Is some level of UK environmental ambition legally required?
- If so, to what extent do we need common environmental governance across the UK?
- Against this background, what is the actual legal picture emerging?
 - Environmental ambition in the Environment Bill
 - Legal fragmentation in two dimensions: pre/post-Brexit law, devolution
 - Higher environmental ambition in Scotland?
- Role of OEP in this context
 - Monitoring/advising
 - Enforcement

Legal obligations for UK environmental ambition?



HM Government

Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom

19 October 2019

Environment Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department for Environment, Food and Rural Affairs, have been ordered to be published as HL Bill 16 – EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord Goldsmith of Richmond Park has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Environment Bill are compatible with the Convention rights.

Status: This is the original version (as it was originally enacted).



UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021
2021 asp 4

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd December 2020 and received Royal Assent on 29th January 2021



Department for Environment, Food & Rural Affairs

a with
ilar to
United
and to
licies;
onities
aw in
cation

Draft Environmental Principles Policy Statement

10 March 2021



TRADE AND COOPERATION AGREEMENT

between the European Union and the European Atomic Energy Community, of the United Kingdom of Great Britain and Northern Ireland, of the other

PROTOCOL ON IRELAND/NORTHERN IRELAND

The Union and the United Kingdom,

HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom,

Legal obligations for environmental ambition?

1. *Keeping pace with EU standards?*

- No obligation (2019 Political Declaration; TCA art 391.1); cf UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (SCA) s 1

2. *Taking account of EU/other international standards*

- Environment Bill, cl 22; cf SCA s 13(2)-(3)

3. *Non-regression*

- UK or EU shall not ‘weaken or reduce, **in a manner affecting trade or investment between the Parties**, its environmental levels of protection or its climate level of protection’ (TCA art 391.2)
- Environment Bill (cl 21)?

4. *Future ambition*

- ‘Each Party commits to respecting the internationally recognized environmental principles **to which it has committed...**’ (TCA art 393.1)
- Environment Bill!

Do we need (some) common UK environmental governance?

- Devolved competence
- EU/UK Trade and Cooperation Agreement
- Multilateral environmental agreements
 - eg Aarhus Convention, CLRTAP, Berne Convention
- Internal Market Act 2020 and Common Frameworks Analysis
 - Shifting picture: ‘active framework policy areas’ ➤ ‘no further action’ (‘shared understanding that no further action is required to create frameworks in several areas’)
 - No further action proposed: natural environment and biodiversity, water quality, land use (implementation of EIA and SEA Directives), GMO marketing and cultivation
- Northern Ireland Protocol: exceptional status for NI

Environment Bill: environmental ambition

- Level of ambition
 - **No clear overarching objective** related to human health, high level of protection generally
 - **Environmental improvement plans**
 - aim for ‘significant improvement’ of natural environment during plan period
 - **Environmental principles via EPPS**
 - proportionate application, no action disproportionate to benefit – should inform new target setting
 - **OEP’s** principal objective
- Regression risk
 - Mechanism for **lowering standards** if economic costs disproportionate to benefits
 - **Repeal** (express or implied) of retained EU standards possible
 - Replacing existing standards with more stringent targets (eg PM_{2.5}) may be less binding in terms of **enforcement**

Emerging UK picture: legal fragmentation

First layer of fragmentation: pre- vs post-Brexit law in England

- Retained EU law
 - E.g. strong binding obligations of result, interpreted by reference to environmental principles in retained EU case law, driven by a 'high level of protection' objective
- New policymaking, targets and regimes under Environment Bill
 - Weaker framing of obligations if targets set under the Bill not met (cl 7)
 - Legal influence of environmental principles limited

Second layer of fragmentation: devolution

- Alignment with EU environmental law: Scottish aspiration (note UK reserved matters) and NI Protocol
- Non-alignment: England vs Wales, but for different reasons

Higher ambition of Scottish environmental governance?

- Narrower governance provisions but...
- Environmental principles
 - Tied to EU environmental principles, no policy statement on environmental principles, wider scope of public policymaking within scope of due regard duty
- ESS functions and powers set out more clearly, wider than OEP?
- Stronger enforcement powers
 - Independent investigation powers, for effectiveness of environmental law generally, role of improvement reports
 - ‘failure to comply with environmental law’ – wider funnel to enforcement
 - Force of compliance notices in Scotland (cf English decision notices), no need for complex environmental review

OEP: monitoring/advising on environmental law

- Important OEP role in tracking this landscape
- Cl 30: monitoring and reporting on environmental law
 - Reporting on how environmental laws (retained, pre-existing, new) are working as a coherent body of law to support environmental protection and improving the natural environment
- Cl 31: advising on changes to environmental law
 - Discretionary advice to Minister on ‘any changes to environmental law proposed by a Minister’

OEP: enforcement functions

- Apply to all ‘environmental law’, but only if there is a *failure to comply with environmental law* and failure is ‘serious’
- Precise construction of that underlying law will be critical: note different kinds of environmental regulation
 - Obligations on private operators
 - Obligations on Ministers and public authorities: to regulate private operators, to achieve outcomes, to take into account considerations in decision-making, to undertake a process → **concern of OEP**
- Enforcement as a process under the Bill
 - Complaints, investigations, information notices, decision notices, urgent judicial reviews, environmental review
- Environmental review as the big stick?

Failure to comply with environmental law: cl 32

32 Failure of public authorities to comply with environmental law

- (1) Sections 33 to 42 make provision about functions of the OEP in relation to failures by public authorities to comply with environmental law.**
- (2) For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority –**
 - (a) unlawfully failing to take proper account of environmental law when exercising its functions;**
 - (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.**

Underlying legal obligations: enforcement of targets

- Basic legal duty on SoS to ensure targets are met (cl 6)
 - Note duty in relation to interim targets (cl 6(4))
 - Role of OEP will be critical if targets not met/not looking likely to be met
- ‘Reporting duties’ (cl 7)
 - On the reporting date (when target due to be met), SoS must report whether target met ➤ if not met, SoS must report including steps to ‘ensure the standards is achieved **as soon as reasonably practicable**’
 - Differential substantive obligations for retained vs post-Brexit environmental targets