

**The Environment, Climate Change and Land Reform Committee**  
**UK Withdrawal from The European Union (Continuity) (Scotland) Bill**  
**Submission From Faculty of Advocates**

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**Please respond by giving your views within the following headings—**

**Part 1: Alignment with EU Law**

*The Faculty does not offer comment on Part 1, which is largely concerned with policy on which we do not take a position. We would however say this. After the end of the transition period, some areas previously subject to EU regulation will continue to require regulation at the domestic level, in the interests of good government. Within those areas, the subject-matter may pertain to an area within devolved competence. A power to adopt EU measures appears to us to offer a vehicle for such necessary regulation of those areas in future.*

**Part 2 Environment: Chapter 1 - Environmental principles**

*Sections 9 to 14, Environmental Principles*

**Overview**

*The four principles stated in s.9 of the Bill (precaution, prevention, rectification at source, and polluter liability) are, in themselves, sound and laudable. That said, they do not reflect a broader environmental approach as found elsewhere in environmental jurisprudence. In a sense, these four principles are **tactical principles** i.e. indicative of measures for deployment towards some larger **environmental strategy** or purpose.*

*Furthermore, where purpose is stated in s.12 (environmental protection, improvement and sustainability), its consequential secondary status could detract from the overall impact of the Bill.*

*These principles make no mention of environmental equity (in a redistributive sense), and/or human rights. By contrast, the Treaty on the Functioning of the European Union, Title XX, Art.191(2) makes reference to both protection of human health (human rights) and worldwide environmental problems (equity). Given that the stated policy intention of the Bill is to ensure that, as far as possible, and within devolved competence, Scotland 'keeps*

pace' with EU law in this field, acknowledgment of such broader concerns might be considered to be more appropriate.

Moreover, the principles are weakened by the ministerial power stated in s.10 to limit their effect, in particular by their exclusion from delegated decision-making on financial policy matters (s.10(3)(b)).

### **Suggestions for Improvement to Bill**

Given that the Bill's overarching strategy and purpose includes environmental protection, improvement and sustainability it would give more force to that intent if mention of this were made in the Preamble, and likewise if it were made an additional principle in and of itself.

Further expansion of the principles to include human rights and worldwide concerns would also render them more powerful and accessible to the general public as a potential means for challenging public decision-making that endangers the environment.

We also note that the s.10 duties only require the relevant Ministers to 'have regard to' the 'guiding principles'. To ensure that the Bill's overarching strategy and purpose is not further limited by the provisions of s.10(3)(b), we recommend that s 10(3)(b) is deleted, or at least that its scope is strictly specified, in order to strengthen the "guiding principles" and their legal effect.

## **Part 2 Environment: Chapter 2 - Environmental governance**

Sections 15 to 41, Environmental Standards Scotland (ESS)

### **Observations**

There may be an imbalance between: (a) the ESS's remedy for enforcing an Information Notice in the Court of Session (s.21), or by means of judicial review at the same forum (s.34) in certain situations, on one hand; and, on the other, (b) a subject public authority's remedy for challenging a Compliance Notice in the sheriff court (s.32). It is not immediately apparent why remedies would require to be sought in different fora, particularly given the significantly greater cost of litigating in the Court of Session than in the sheriff court.

Broadly, the establishment of the ESS is commendable. We observe, however, that its area of activity is potentially substantial and its level of funding will need to be commensurate with that extent if it is to be able effectively to achieve its objectives, and to utilise the legal remedies open to it to do so.

### **General**

We have no further comments.