



## **Bar Council response to the “Environmental Principles and Governance after the United Kingdom leaves the European Union” consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Environment, Food and Rural Affairs (DEFRA) consultation paper.<sup>1</sup>

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. On 10 May 2018 the Government through DEFRA published the above consultation document (the “EP & G”) which in short proposed the setting up of an independent body or “watchdog” post Brexit “to hold government to account on the environment” [44 of EP&G] as well as proposing a series of environmental principles to be reflected in legislation.

5. This proposal is now already reflected in the European Union (Withdrawal) Act 2018 (“the EUWA”) passed in June 2018 (see section 16), which itself sets out that there is to be a draft Bill within the next 6 months. The EP&G consultation paper confirms that this will be called the “*Environmental Principles and Governance Bill*”.

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<sup>1</sup> DEFRA (2018), “Environmental Principles and Governance after the United Kingdom leaves the European Union”.



6. The Bar Council's primary concern is to ensure that the provisions meet the Bar Council's overarching interests:

- (1) Promoting access to justice for all;
- (2) Clarity in legislative drafting;
- (3) Advising on matters related to the rule of law

7. Many of the consultation questions are specialist environmental law and practice matters, in which the Bar Council does not seek to duplicate or contradict the specialist opinion offered by such bodies as UKELA.

8. The approach the Bar Council has adopted therefore is to consider briefly the proposed watchdog and how its proposed role compares with the current role of the EU Commission which it is – in effect – supposed to replace.

9. This paper also considers the implications of the proposed list of principles in legislative form together with a duty to publish a statement of policy in relation to the application and interpretation of those principles and a duty "*which ensures that Ministers of the Crown must have regard*" to these principles in certain circumstances which themselves will be set out in legislation.

10. The questions are then listed and any appropriate responses which lie within the Bar Council's remit are briefly listed.

11. In general terms, the Bar Council supports the proposals to have a body that continues the supervisory role of the EU Commission and enforcement powers which may eventually lead to action before the CJEU, as well as continuity and maintenance of existing legal obligations and controls beyond Brexit. In relation to this consultation, the Bar Council considers that the maintenance of rights of access to environmental information and environmental justice set out exiting EU Directives and reflecting the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') are of specific importance.

12. Given that legislation was passed during the consultation itself which confirms that the two key matters the subject of the consultation will occur i.e. the creation of



some form of watchdog and that there will be a set of legal environmental principles published to which regard must be had, the Bar Council will focus its comments on those matters that are being left to subsequent legislation.

*Section 16 of the EUWA*

13. For completeness, s16 of the EUWA “Maintenance of environmental principles etc” provides as follows:

*(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—*

- (a) a set of environmental principles,*
- (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,*
- (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),*
- (d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and*
- (e) such other provisions as the Secretary of State considers appropriate.*

*(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of—*

- (a) the precautionary principle so far as relating to the environment,*
- (b) the principle of preventative action to avert environmental damage,*
- (c) the principle that environmental damage should as a priority be rectified at source,*
- (d) the polluter pays principle,*
- (e) the principle of sustainable development,*
- (f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
- (g) public access to environmental information,*
- (h) public participation in environmental decision-making, and*
- (i) access to justice in relation to environmental matters.”*



## **PART 1: Environmental principles**

**Question 1: Which environmental principles do you consider as the most important to underpin future policy-making?**

**Question 2: Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?**

**Question 3: 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)?**

14. In light of the above at s.16(2) the Bar Council has nothing to add in answer to Q1 & 2 other than to note the principles now include at (g) (h) and (i) a reflection of the Aarhus Convention albeit that upholding or according with a 'principle' as opposed to upholding and enforcing/claiming a 'right' might appear to be a weakening of the existing rights under the convention and the EU directives.

15. The Bar Council therefore strongly urges maintenance of the full force of such rights and urges clarity in the Bill as to the nature of these principles and the force which they will have.

16. With regard to the two options as to how the principles ought to be reflected in future in the Bill, it is the Bar Council's view – in accordance with the above comments – that some of these 'principles' are currently enforceable rights, meaning that option 1 is preferred, together with further clarity on the face of the legislation as to the full force of these principles. Clarifying the relevance, force and weight of any policy statements relating to the principles in any decision-making process will also be an important aspect of this future regime.

## **PART 2: Accountability for the environment**

### **QUESTIONS 4 – 14 (see below)**

#### **Proposed Environmental "Watchdog" compared with Commission**

17. In July 2017, the UK Environmental Law Association (UKELA) produced a briefing paper through the auspices of its Brexit Task Force entitled "*Brexit and Environmental Law – Enforcement and Political Accountability Issues*" (the UKELA



briefing paper'). At its heart was UKELA's recognition that, post-Brexit, the "environment is in a distinctive and potentially vulnerable position compared to other areas of law where there are more clearly defined legal and economic interests. The environment is often unowned, and environmental harms diffusely spread, placing a special responsibility on government and other public bodies to comply with their own obligations to ensure the protection of the environment".

18. This issue arises in particular (as noted in the EP & G consultation) as a consequence of the loss of the supervisory role of the EU Commission which employs distinctive enforcement powers which may eventually lead to action before the CJEU and can then impose financial penalties on Member States.

19. The UKELA briefing paper essentially highlighted that the Government's earlier stated intention – that legal accountability through existing national mechanisms, including judicial review, would suffice to ensure "the whole body of existing EU environmental law continues to have effect in UK law" as set out in the White Paper – failed to address or reflect the Commission's role.

#### *Commission's and EEA role in Environmental matters*

20. The Commission inter alia monitors the extent to which Member States comply with the commitments they have made under EU laws and can employ distinctive enforcement powers under Art 258 Treaty of the Functioning of the European Union (TFEU). This is achieved by means of a formal notice from the Commission that they consider the Member State is in breach of its obligations, followed by a Reasoned Opinion, and finally application to the Court of Justice of the European Union (CJEU). Since the Maastricht Treaty amendments, the CJEU has power to impose a financial penalty on a Member State that does not comply with its judgments, a power that was promoted by the British Government at the time.

21. As emphasised in the UKELA briefing paper and the EP&G, whilst these enforcement powers of the have applied to all areas of EU law, the Commission has been especially active in the environmental field – in 2015, the highest number of infringement actions were opened in the environmental field. This is said to be largely because, compared with other fields (such as competition law, employment rights, internal market), the environment is in a different position. The "environment" may be unowned, and while environmental organisations are committed to promote the general interest of the environment they vary in strength and coverage and cannot be expected to take on the role of systematic enforcement.



22. The distinctive nature of the environment means that in most jurisdictions, including UK public bodies (government departments, local authorities, specialised agencies), have a particular responsibility for environmental protection but often also face conflicting policy priorities and financial constraints. UKELA concluded this made it easy for their environmental obligations to be compromised or underrated.

23. The supervisory role of the Commission therefore was seen by UKELA as being especially important.

24. The Bar Council agrees with the views expressed by UKELA.

25. The Commission does not have any form of 'environmental inspectorate' in the environmental field but instead developed a citizens' complaint procedure under which anyone can alert the Commission of a potential breach without any cost.

26. The Commission also relies upon implementation reports sent by Member States, as well as its own studies and issues highlighted in MEPs' questions.

27. The Commission not only ensures national law fully reflects EU environmental law but also seeks to see that it is applied in practice. Many of its infringement proceedings have been concerned with instances where the formal law is in place but has not been effectively implemented, and its focus is on the Member State, be it a government department, local authority or other public body.

28. The Commission's procedures allow the resolution of many cases without initiating formal legal proceedings against Member States and – since 2008 – has deployed a scheme whereby citizens' complaints could be sent to Member States for resolution without formal registration by the Commission. If there is no satisfactory voluntary resolution to a complaint, the Commission may start infringement proceedings.

29. As well as the CJEU's role, there is the European Environment Agency ('the EEA') which is tasked with providing sound, independent information on the environment. Its work includes producing and publishing independent assessments of progress in the implementation of the EU's environmental action programmes, which are the guiding frameworks for EU environmental policy. In addition, EU citizens can petition the European Parliament over concerns about the application of EU law which affect them directly. The European Parliament cannot refer perceived



infringements to the CJEU, but it can ask the Commission to investigate petitions on its behalf.

*Watchdog's Proposed Powers and Function*

30. Post-Brexit, the Commission will no longer have any enforcement functions against the UK and the citizens' complaint procedure will disappear.

31. UKELA essentially concluded that the existing UK procedures concerning environmental accountability could not replicate the features of legal and political accountability which the Commission has brought to date in the environmental field and ensure the Rule of Law is upheld. It therefore proposed some form of new supervisory body be created to fill the institutional/supervisory gap and drew attention to the way other countries addressed this issue or created such a body.

32. The body the EP&G proposes other than being an independent body has three proposed functions:

- (i) General scrutiny and advice ('Role (i))
- (ii) Hear individual complaints ('Role (ii))
- (iii) Enforce government delivery of environmental law ('Role (iii))

[NB S.16(1)(c) EUWA itself appears only to reflect role (iii) and the taking of "*proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law*".]

33. In terms of Role (i), it seems akin to the Committee on Climate Change [81]. It is to be able to express an "*independent opinion*" [86]; lay reports before Parliament [86]; conduct and publish an annual assessment of national progress against the UK's 25 year environmental delivery plan [87] and the potential is there for Govt to commissions the body to provide advice (e.g. on enacting policies on the 25 Year Plan).

34. In terms of Role (ii), it would appear to be akin to that of an ombudsman [91-93]. It would consider all valid complaints but has a discretion as to appropriate action to take in each case [92]. At [94] the EP& G states "*the new environmental body would effectively be able to make a prominent declaration in cases where it found that an authority had failed to implement environmental law properly*". However, such declarations would not themselves be legally binding.



35. The suggestion is that it would serve as “a powerful driver for the government to change its approach or reconsider its decision”. In addition, it is suggested that such views “could also be relied upon in the context of any legal proceedings brought by a third party regarding the authority’s decision.

36. In terms of the enforcing Role (iii), it is said that the body would supervise the Government’s delivery of “environmental law” (to be defined in the Bill). This would be achieved through a power to issue “advisory notices”.

37. These appear to be in effect the main form of proposed enforcement.

38. As an alternative to advisory notice, the EP&G raises the suggestion that the “new body could be given the power to issue binding notices” [105] which “could require government to implement the corrective action specified in the notice, subject to a right of appeal to resolve any disputed matters”.

39. In addition, a further alternative option is to provide the body with the right to “intervene in legal proceedings brought by others in relation to the government bodies and subjects within its remit” (similar to the powers that have been provided to environmental ombudsmen in some other countries such as Austria and Hungary and/or similar to the EHRC’s role).

40. The power to agree environmental undertakings in the event that a government authority accepts that it has failed to meet its environmental responsibilities is also mooted (akin to the ICO’s role).

41. The question is raised whether the new body should have a role overseeing central Government only or also other public bodies.

### **Overall Commentary**

42. The Bar Council notes that the new body would not have comparable powers in respect of individual complaints as exists under the Commission. In particular, there is no proposed role or power to take the Government to Court.

43. Further it would not have a role in securing compliance with international environmental agreements [124] and “matters related to climate change” are specifically excluded [127].





44. To that end, the Bar Council considers that the new body – as currently proposed – would lack equivalent powers to those currently available to the Commission and other related legal bodies. It is therefore concerned that there is an absence of powers that have any real force or ‘teeth’.

**Question 4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?**

45. See above.

**Question 5: Do you agree with the proposed objectives for the establishment of the new environmental body?**

46. This is a matter the Bar Council considers this is best answered by specialist practitioners.

**Question 6: Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?**

47. This is a matter that the Bar Council considers, on balance, is best answered by specialist practitioners.

**Question 7: Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?**

48. This is a matter that the Bar Council considers, on balance, is best answered by specialist practitioners.

**Question 8: 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?**

49. In light of the assessment above of the existing powers and complaints procedure currently available through the commission and the stated aim of the Government to ensure consistency and maintenance of existing rights and laws, it is the Bar Council’s view that such a remit for the new body would help reflect the current rights.



**Question 9: Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?**

50. In accordance with the above, the Bar Council considers that greater powers and clearer mechanisms are required.

**Question 10: The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?**

51. The Bar Council notes the suggestion that Government will be held “directly to account.” If and to the extent that is what the new body’s powers achieve and achieve with any force, then the Bar Council considers that it would be appropriate for public authorities and statutory bodies to be under its scrutiny and remit.

52. In terms of the nature of any account or to which any authority is held post Brexit the Bar Council notes that it would be limited by the fact that paragraph 4 in Schedule 1 to the EUWA has abolished Francovich damages against the State.

**Question 11: 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?**

53. Whilst this is a question best addressed by specialist practitioners, the Bar Council considers that given that public authorities – and indeed the public – are affected by certain international agreements and conventions in respect of environmental law (e.g. the Aarhus Convention) the Bar Council considers such oversight is important.

**Question 12: Do you agree with our assessment of the nature of the body’s role in the areas outlined above?**

54. See above.

**Question 13: Should the body be able to advise on planning policy?**

55. This is a matter the Bar Council considers that is best answered by specialist practitioners.



**Question 14: Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?**

56. Any additional comments are set out within the above text.

**Bar Council<sup>2</sup>**  
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*For further information please contact  
Natalie Darby, Head of Policy; Regulatory Issues and Law Reform  
The General Council of the Bar of England and Wales  
289-293 High Holborn, London WC1V 7HZ  
Email: [NDarby@BarCouncil.org.uk](mailto:NDarby@BarCouncil.org.uk)  
Telephone number: 0207 611 1311*

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<sup>2</sup> Prepared for the Bar Council by the Law Reform Committee.