Environmental Principles and Governance after the UK leaves the EU

These comments in response to the above consultation paper are made in a wholly personal capacity and do not represent the views of any institution, organisation or group.

Prof Colin T Reid,
Professor of Environmental Law, University of Dundee

General

It is regrettable that on a topic where an integrated approach is so valuable, geographically and in terms of substance, the issues here are currently being addressed in such a fragmented way, with different lists of principles being included in the DEFRA consultation, the European Union (Withdrawal) Act and the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, all of which also suggest different timescales in terms of progress towards legislation on the matter. The existing legislative provisions impose constraints on the way forward, but a priority should be to try to ensure smooth collaboration (at least) between the different processes.

Specific questions:

1. This question has largely been superseded by the provisions in the Withdrawal Act (and Continuity Bill). In relation to the Act, there is a strong argument that those listed in s.16(2)(g)-(i) (access to information, public participation, access to justice) are in fact rights, under the Aarhus Convention and at present under EU law, so that treating them simply as principles represents a downgrading in their status.

2 and 3. Again, these are largely superseded by legislative developments. There are further candidates for inclusion, e.g. regard for Natural Capital, but there is a danger that the more principles that are added the less significant each becomes and that tensions between them complicate rather than assist the formulation and application of policy.

4. The removal of the EU layer leaves very significant gaps in the governance of environmental law, as identified in the table on pp.17-18 of the consultation paper and in greater detail in the report of the Scottish Government's Roundtable on Environment and Climate Change, available at http://www.gov.scot/Publications/2018/06/2221.
The consultation paper says too little about the role of EU institutions in developing standards (e.g. BAT) and issuing formal approvals and derogations in some circumstances, e.g. chemicals.

5. The objectives should include one of effectively calling the government to account for meeting its commitments and obligations in relation to the environment.

6 and 7. There is potentially some tension between the body's proposed advisory and enforcement roles, since each would lead to a different relationship with government. Some overlap is desirable, but the stronger the body's unavoidably confrontational enforcement role, the harder it is to reconcile with the ideally supportive advisory one. Other bodies, such as SEPA, have found this range of responsibilities awkward.

8. Complaints from the public are likely to provide a key means of identifying failures to live up to environmental commitments and obligations and should provide a potential trigger for action. But the body should produce (and the founding legislation require) a clear policy statement clarifying that it is not committed or required to investigate every complaint and setting out the criteria which will be used in identifying where it will take action (cf the statement by the Equality and Human Rights Commission on where it will focus its attention: to clarify the law, highlight priority issues and tackle significant disadvantage).

9. The carry-over of EU environmental law poses a novel problem for the law. The format of many significant EU measures is different from established obligations in domestic law. We are not accustomed to laws that impose specific "outcome duties" on the government, requiring defined targets or outcomes to be fully met (e.g. a prescribed standard of bathing water quality) as opposed to simply taking particular steps or making efforts towards a goal. The domestic legal system is deficient in mechanisms to enforce such obligations, as shown by the discussions over the enforcement of obligations under the Climate Change Act 2008 (e.g. Reid, 'A new sort of duty? The significance of "outcome" duties in the climate change and child poverty acts' [2012] *Public Law* 749).
The advisory notices proposed mirror the current position in administrative law, being analogous to declaratory judgments which are the most that can (generally) be provided against the Crown. Yet these are roughly equivalent merely to the reasoned opinion stage in proceedings before the CJEU, where experience has shown that the threat of stronger consequences has been necessary to ensure that governments do fulfil their obligations. Mirroring the CJEU's power to levy fines is problematic when the end result would simply be a shuffling of funds between different parts of the national accounts, but "naming and shaming" through an advisory notice may not be enough. It is probably too radical to consider direct sanctions against Ministers, e.g. disqualification from office, but to expect the oversight body's advisory notices to carry real weight in overcoming contrary pressures is placing a lot of trust on the body rapidly acquiring an aura of respect leading to effective government responses. Some more forceful form of order (requiring judicial confirmation as a check against inappropriate use) should be provided.
Of the specific proposals made, the ability to intervene in legal proceedings is essential and environmental undertakings make sense, although the fact that they are limited to situations where the government *has accepted* its failures emphasises the gap that exists where the government does not do so.

10. To the extent that many obligations carried over from EU law are placed on the national government, it makes sense for Ministers to be the focus of any action, and in all but exceptional cases they will have power of direction or default powers to ensure that other authorities play their part. Ministers should, however, be held responsible for the actual delivery of solutions, as opposed to merely instructing others to do so, including the provision of the necessary resources and other tools to achieve this.
In many cases, however, direct action against the other public authorities with "hands-on" responsibility for an issue, where ministerial oversight is normally distant, would be more efficient.

11. The proposed limitation matches the scope of domestically enforceable legal obligations at present, but it is a missed opportunity to provide a more meaningful way of ensuring that the weakness which afflicts the enforcement of international obligations is addressed. The qualified and imprecise nature of most international obligations means that the government should not fear this creating a tight constraint on their action.

12 and 13. Identifying a clear boundary between what is an “environmental” matter and one that falls within any of the other areas listed is impossible, and decisions in any of these fields may have decisive impacts on others. It is not appropriate to draw fixed boundaries, but the body’s general remit and its awareness of other mechanisms in specific fields should guide its discretion as to where to focus its activities.

14. The size and funding of the new body are essential issues which require fuller attention.
Above all, the unavoidable connectivity of environmental issues beyond a single nation’s boundaries calls for close collaboration between the authorities within the UK. It is unfortunate that the legislative processes at UK and Scottish levels are now out of step and that collaboration has been obstructed by the constitutional arguments over where powers are to lie and how common frameworks are to be developed. Every effort should be made to agree a more integrated approach across the UK which allows environmental problems to be addressed in an integrated way regardless of crossing geographical or devolved/reserved boundaries whilst respecting their importance.