26 February 2019

Dear Mary,

UK GOVERNMENT’S DRAFT ENVIRONMENT (PRINCIPLES AND GOVERNANCE) BILL

Thank you for your letter of 4 February, inviting me to submit evidence to your Committee’s consideration of this Bill. I welcome this opportunity to set out our concerns about how the proposals in this Bill would interact with the devolution settlement.

As you will know, the Scottish Government continues to believe that staying in the EU is the best option for Scotland and the whole of the UK. However, as a responsible government, we have to prepare for all outcomes. The Scottish Government is committed to maintaining or exceeding EU environmental standards in any future outside the EU. I recently launched a consultation paper on Environmental Principles and Governance for Scotland, to work towards proportionate and effective measures to help us to achieve our environmental objectives. It is important that we design measures that fit with existing Scottish institutions and that ensure we can meet any existing or new international commitments, including those relating to a future relationship with the EU. The Scottish Government will continue to work with UK Government and the other devolved administrations to ensure that we have effective measures in this area across the UK.

Defra has kept my officials informed of its developing thinking on the measures in the Draft Environment Bill, and there has been engagement already on devolution issues. I have had the opportunity to set out, at a high level, these issues to Ministerial colleagues at the inter-ministerial group meetings with Defra and other devolved administrations on Brexit issues. I continue to have two areas of outstanding concern with respect to the interaction of the proposals in the Bill with the devolution settlement. The first of these relates to the geographical scope of the proposals on environmental principles. The second concern is about the intention and effect of the proposed powers of the Office for Environmental Protection’s role with respect to devolved public authorities.

St Andrew’s House, Regent Road, Edinburgh  EH1 3DG
www.gov.scot
Underlying both of these concerns is the UK Government’s intention for the Bill to provide for those aspects of environmental policy that are not devolved, as well as for England only functions. It would greatly help to resolve these matters if the UK Government could be more explicit about the nature of these reserved areas of environmental policy. As you will be aware, the UK Government has stated that it believes that there is no need for an LCM with respect to any of the measures in the draft clauses it has published.

Turning first to the environmental principles provisions, these are given a UK scope in the Bill, and are intended to cover the responsibilities of UK Ministers – which would extend to the development by UK Ministers of policy and legislation with respect to Scotland. The UK scope stands in contrast to other parts of the Bill where either provisions do not extend to Scotland or there has been an attempt to carve out devolved matters. In his letter to me of 18 December 2018, the UK Secretary of State stated that “the Devolved Administrations will, should they wish, be able to develop their own principles and legislative framework to replace those in the draft clauses in their own territory.” It follows that the UK Government accepts that it is within the competence of the Scottish Parliament to replace the set of principles given in the Bill, with respect to UK Ministers consideration of new policy and legislation as it affects Scotland. It is, therefore, difficult to understand why these provisions would not require the consent of the Scottish Parliament.

On the question of the powers of the Office for Environmental Protection (OEP) in relation to Scottish public authorities, the accompanying papers to the draft clauses say “this means that bodies in Northern Ireland, Scotland and Wales responsible for implementing environmental law will not be covered by the remit of the OEP in respect of devolved matters. If, however, they were responsible for implementing environmental law in respect of any reserved matters, they would fall under the definition of ‘public authority’ and therefore be within the remit of the OEP in respect of those reserved matters.” Environmental law is defined in the draft Bill as law primarily concerned with the protection of the environment. Any law that could be made by the Scottish Parliament is excluded. Given that the definition of environmental law in this Bill so closely matches the “purpose test” for judging whether a measure is devolved, it is difficult to understand the scope of these OEP powers. I think that it would be helpful if the UK Government could give examples of situations that these provisions would cover, and compare these new arrangements with what is currently in place.

I am copying this letter to Michael Russell, Cabinet Secretary for Government Business and Constitutional Relations.

[Signature]

ROSEANNA CUNNINGHAM

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
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