



Law Society
of Scotland

Consultation response

Guiding principles on the environment: draft statutory guidance

February 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law Sub-committee welcomes the opportunity to respond to Scottish Government's consultation on *Guiding principles on the environment: draft statutory guidance*¹. We have the following comments to put forward for consideration.

General comments

We have previously supported the introduction of statutory guidance in relation to the interpretation and application of the duties relating to environmental principles. We highlighted that:

“There must be clear guidance available as to the significance and weight to be attached to the environmental principles as compared to other legal principles and direction on the interaction of the principles with substantive legal rules.”²

We note the importance of the principles being considered at early stage by those covered by the duties to ensure that they are given due consideration.

¹ <https://consult.gov.scot/environment-forestry/guiding-principles-statutory-guidance/>

² <https://www.lawscot.org.uk/media/362627/19-05-11-env-consultation-sg-environmental-principles-and-governance.pdf>

Consultation questions

Question 1 Do you think that the draft guidance is clear and has the right content to support the implementation of the duties in the Continuity Act? How could it be improved?

We consider that the draft guidance is clear, but we note that the content is general and there are some aspects of the language which are vague – for example, more detail on what is meant by “protecting the environment” would be merited and we suggest that alternative language to the use of “where possible” (paragraph 5.3) is used in the document. We consider that the effectiveness of the principles is at risk if vague or ambiguous language is used.

Although accurately reflecting that the environmental principles do not take priority, the language at the start of section 5 risks giving more emphasis to the factors weighing against their application and too little emphasis is given to the obligation under section 16 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (Continuity Act) to “comply with the duties with a view to (a) protecting and improving the environment, and (b) contributing to sustainable development”. The environmental purpose risks being overshadowed.

The wording in paragraphs 2.8 and 2.9 risks some confusion over the main duty to “have due regard” to the principles themselves and the further one to “have regard” to the statutory guidance.

Some further clarity should be provided with respect to when the duties require to be considered if there is already an established policy in place. The guidance currently suggests that this is only necessary where there is the risk of potential significant impact on the environment which should be seen as making or amending existing policy. That will be a difficult thing to ascertain and there is no further guidance or explanation as to the sort of situation where it is envisaged that this will be relevant. In addition, this is further complicated by the fact that the principles have to be balanced with other duties and considerations. It would be helpful to have some practical examples of when the risk of potential significant impact on the environment might be seen as amending existing policy – i.e. how is significant impact defined in this context?

In addition, we consider that the guidance provides an opportunity to restate the commitment given in several fora that the exclusion of finance and budget matters under section 14(3)(b) of the Continuity Act will be restrictively applied and should not be used as a means to avoid consideration of the principles whenever there are financial implications.

Question 2 Do you think that the draft guidance provides useful explanation of the meaning of the guiding principles? How could this be improved?

In relation to the ‘polluter pays’ principle, we note that the document discusses the direct meaning that a polluter should pay for environmental damage, however, many interpretations of the principle are wider than this, being that the potential polluter should contribute to the costs of preventative or avoidance measures, for example, contributing to the costs of regulation. While we recognise that the costs may need to be balanced

against the potential impacts, we suggest that this wider interpretation of the principle ought to at least be being considered; indeed the wider meaning is reflected in the decommissioning example in Figure 9. We note that there is some overlap in this regard with the preventative principle.

In relation to the 'precautionary' principle, we suggest that more detail should be provided as there is a strong potential for misinterpretation. We would expect to see more detail on the relevant case law within the guidance – the current draft content does not appear to be in line with the way that the case law has developed in relation to this principle.

Question 3 Do you think the draft guidance provides a good explanation of how the guiding principles will be used during the development of policies and other significant decisions? How can this be improved?

We consider that detail could usefully be provided in the guidance as to how authorities might balance the competing principles with other existing duties, for example, in relation to equalities, human rights, and islands matters. Without such guidance, we consider that the effectiveness of the principles is at risk.

Question 4 Do you think the draft guidance adequately supports recording and documenting compliance with the duties?

In relation to recording and documenting compliance, we note that there is a question about the quality of what is recorded and how this is overseen. We recognise it may be difficult to resolve these matters without burdensome monitoring. While a 'pro forma' could be useful tool to ensure that the relevant information is being recorded, we recognise that this can create difficulties and potentially give rise to a 'tick-box' culture.

The examples and case studies within the guidance are a way of bringing it to life and applying these to as wide a scope of situations as possible (see our comments at Q5) may assist in showing how one should comply with the requirements. It would be helpful if details about a recording and decision document could be built into a case study within the guidance.

Question 5 Do you think that there is appropriate use of examples and case studies in the draft guidance? Can you suggest any additional examples or case studies to illustrate the guiding principles?

The examples in the draft guidance are broadly cases where environmental issues are likely to be considered in any event. We suggest that the guidance should show how environmental principles are relevant in areas where policy making is being done and decisions made where environmental matters are relevant but are not likely to be 'core' consider, for example, in education, health, housing, and planning. We consider that the current examples are inadequate to show how the principles are to be effectively applied.

We consider that the water recycling example at figure 5 would merit clarification.

Question 6 Do you have any further comments or views on the draft guidance that you would like to share?

No comment.

For further information, please contact:

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