



Law Society  
of Scotland

# Written Evidence

## EU Environmental and Animal Welfare Principles

March 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 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 consider and respond to the Scottish Parliament's Environment, Climate Change and Land Reform Committee's call for evidence on EU Environmental and Animal Welfare Principles<sup>1</sup>. The Sub-committee has the following comments to put forward for consideration.

## Consultation

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### 1. How important are the EU principles of:

- **The precautionary principle**
- **Preventive action**
- **Environmental damage should as a priority be rectified at source**
- **The polluter should pay**
- **Animal sentience.**

We do not seek to make specific comment about the importance of the EU principles themselves. Our comments focus on how they are used.

<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/107915.aspx>

## **2. How and where have these principles had an impact on environmental and animal welfare policy in Scotland?**

Animal sentience aside, these principles have played a major role in shaping environmental law in past decades – indeed the idea of “polluter pays” is simply a variation of the fundamental legal principle of taking responsibility for harm caused. The precise application of these principles can often be controversial, especially the precautionary principle where there will often be argument over the correct balance between the gains of development and the environmental risk.

## **3. Views on the appropriateness of retaining/adopting/enshrining these EU principles in law or alternative principles/approaches that could be adopted.**

Our comments are restricted to the practice of enshrining principles in the law generally. We consider that there requires to be great hesitation in directly enshrining EU principles in legislation, although there may be some value in a limited role for these.

It is of central importance to the rule of law that legislation is clear and has specification. It is important that legislation gives individuals and organisations effective guidance as to the necessary standards of conduct. We are concerned that sufficient specification will not be achieved by enshrining EU principles as so called ‘black letter’ law. We consider that it is desirable to have a drafting policy which seeks to avoid situations where principle is disguised as substantive and directly applicable law.

The law must allow the public to have a reasonable level of certainty as to its requirements – ie what is, or is not, permitted. As an example, it might be a principle that all drivers should adhere to a safe speed when driving. This could result in varying requirements, perhaps based on time of day or location. Without certainty as to the legal requirements, individuals may be unable to modify actions and behaviour to meet the standards imposed by the law. In practice we set specific speed limits. We appreciate that not all conduct can be as precisely defined as the speed of a vehicle, but this example demonstrates a clear need for citizens to have a strong indication of the standard of behaviour expected by the law.

A ‘principle’ may be incapable of being legally enforced due to lack of certainty as to how it applies in a particular situation and how it interacts with more specific provisions of substantive law. Directly enacting principles in legislation is generally not an effective way of law-making unless their subsidiary role is made clear and there is no instance of principles being relied upon in place of sufficiently precise legal rules being developed. It can be difficult for courts and other authorities to apply or enforce equitably principles that are directly enacted in the law due to the discretionary nature of the process.

There are examples of difficulties arising in legislation where there is a lack of clarity as to the status of principles in applying the law. For example, section 27(8) of the Land Reform (Scotland) Act 2015 allows the Land Court to “take a provision of a Code [of Practice] into account” in determining a matter before it. The Act however gives no guidance as to the effect of this and the weight to be given to the code, in contrast to other factors influencing a decision. It could be said that it is unclear as to whether a code or the

law itself is to take precedence. Similar examples arise in areas of environmental legislation including the need to define 'dark smoke' in the Clean Air Act 1993.<sup>2</sup>

If EU principles were to be enshrined in Scots law, it would be essential that this was done as part of a wider process that ensured that all the other relevant EU principles were also considered. Any principles of environmental protection need to be carefully balanced against counter-balancing principles, including those that protect the interest of persons operating in the environment, such as the EU principle of proportionality. The protection of the principles of EU environmental law is best achieved within the context of the overall approach to how EU law and the principles applying under it will be preserved in Scots law. To pick out specific principles and give them special status which goes beyond that currently applying, runs the risk of unintentionally giving the principles a greater status than other relevant principles. This may fail to allow the striking of an appropriate balance between environmental protection and economic development, as envisaged by the basic regulatory principle in the Regulatory Reform (Scotland) Act 2014 of contributing to achieving sustainable economic growth.

Expressly incorporating the full body of EU principles into Scots law would be a significant task. As things stand, we feel there would be limited gain from this exercise. The principles are already integral to Scots environmental law as they are relevant to the interpretation of any law that implements EU environmental law. The vast majority of Scots environmental law does just that. Assuming that legislation relating to the UK's withdrawal from the EU remains as currently drafted, these principles will continue to have relevance due to the incorporation of EU law into domestic law. We do not consider that there will be a need to expressly incorporate principles into the statute book.

If principles must be incorporated, they should have only a limited role, as a supplement to substantive legal rules.

A general duty on Scottish Ministers and other public body decision makers to have regard to environmental principles could help to ensure that environmental concerns are taken into account when policies and decisions are made and when action is taken. There is a well-established practice of requiring public authorities to "have regard" to various factors. This approach would mean that the principles would not be a controlling factor but simply that they cannot be wholly ignored as irrelevant considerations. An example of this type of approach from another sphere is found in the Land Reform (Scotland) Act 2016, section 56(14)<sup>3</sup> which refers to the International Covenant on Economic, Social and Cultural Rights. This incorporates consideration of high level values which generally are not justiciable or referred to in legislation.

As noted above, however, if this course of action were to be taken it would be important that similar status was given to counter-balancing principles and that guidance be given as to the significance and weight to

<sup>2</sup> See Clean Air Act 1993, section 3.

<sup>3</sup> At time of writing, this section of the Act is not yet in force.

be attached to the environmental principles and their interaction with more concrete legal rules and obligations. This is likely to be a significant task.

#### **4. Views on if and how environmental principles could and should be enshrined in law in Scotland and enforced.**

In response to this question, see our answer to question 3.

#### **5. Examples of where key environmental principles have been enshrined in domestic legislation elsewhere.**

We have no comment on this question.

**For further information, please contact:**

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