



**Response to the Scottish Parliament’s Environment, Climate Change and Land Reform
(ECCLR) Committee’s call for responses on EU Environmental and Animal Welfare
Principles**

1. The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law.
2. UKELA’s members are involved in the practice, study or formulation of environmental law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
3. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics.
4. UKELA takes the position that:

“The development of a post-Brexit framework of environmental legislation presents a unique and critically important opportunity for the UK Government and devolved administrations to explore ways of improving and strengthening environmental regulation.”¹
5. UKELA welcomes the ECCLR’s inquiry in to the EU Environmental and Animal Welfare Principles and the opportunity to provide evidence on the questions raised on this issue.

¹ UKELA position statement on Brexit. July 20, 2016. <https://www.ukela.org/press-releases?pressid=97>. See also the detailed BREXIT reports issued by UKELA at https://www.ukela.org/brexitactivity#elem_6267

UK Environmental Law Association: better law for the environment

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President: Rt Hon Lord Carnwath CVO of Notting Hill



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**

The first four principles are fundamental principles of EU environmental law and policy and therefore those principles currently flow through to and have had an appreciable effect on environmental law in the UK and Scotland given the considerable body of EU derived legislation which has taken effect in UK and Scottish law (directly and indirectly).

The government should adopt all the environmental principles in EU Treaties as a coherent set of integrated and well-tested foundation guidelines for policy and legislation, within an overarching goal of achieving a high level of environmental protection. There are real dangers of misinterpretation or misapplication of these principles if ‘cherry-picked’ and applied in isolation. They should be underpinned with legislation and provide a mechanism that permits the addition of further principles, such as non-regression, where appropriate.

Animal welfare and prevention of cruelty to animals is a significant concern in our modern society and many have suggested that the law requires to be significantly strengthened from the current position in Scotland in a similar way to the recent proposals that have been made for on this matter (which have led to the consultation on the Animal Welfare (sentencing and Recognition of Sentience) Bill 2017 which is intended to affect only ministers of the crown). There have so far been significant difficulties in establishing the parameters of the surrounding definitions i.e. “animals”, “sentience” and “welfare” and the parameters of those

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concepts do not as yet seem to be conclusively established or agreed. This difficulty and contention is the principal reason that the concept of animal sentience has been separated from the fundamental EU principles in relation to that proposed legislation. The proposed principle would have considerable merit if the associated hurdles in producing an accepted clear and coherent definition can be overcome.

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

As noted above, these principles have formed part of established environmental law in Scotland as EU derived law has been a critical component of our current body of law. A clear example is the “polluter pays” principle which is prominent in the contaminated land regime. However, all of the EU derived legislation in force currently in the UK and Scotland has been impacted by those principles, whether that be water, waste, air or other sectors.

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

There is a general consensus that the retention of these principles is essential to protect biodiversity and landscape and that following exiting the EU these principles should be retained. The core principles can be valuable in assisting interpretation where there are ambiguities or developments and they are perceived to bring coherence to law and policy which results. The clarity and stability that would be provided by enshrining these in statute having had

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appropriate consultation would in our view be preferable given the significance of these principles and an analogy can be drawn with the principle of sustainable development which is now enshrined in the Planning Scotland Acts.

If the principles are not enshrined in law and are only policy guidance, there is a significant concern that this will lead to an erosion of their significance and value and the continuity they provide as overarching principles underpinning environmental law. The alternate view is that principles can be enshrined in policy documents, but still have a significant legal effect (for example in the planning system) and can remain more flexible. The extent of the legal effect may be uncertain/less effective however unless resulting legislation imposes very specific requirements to act in accordance with the relevant policy documents. In addition there is a concern that for such significant principles leaving them exposed to potential political changes and policy may make them vulnerable to change without adequate consultation and consideration.

We would call for a wider review of the environmental duties on public authorities in Scotland with a view to their rationalisation. For example at present public authorities have obligations to be mindful of climate change, biodiversity, sustainability, and conserving the natural heritage. Simply adding these principles as an environmental duty adds to this pile-up.

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

Enshrining in law: We have covered this above, specific legislation could be enacted requiring regard to be had to these principles in the formulation and implementation of policy. Alternatively the principles could underpin policy guidance in a similar way to

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national planning policy guidance and there could be a requirement to comply with those policy principles in resulting legislation

Enforcement:

We understand that in England DEFRA proposes an independent statutory body to champion and uphold environmental standards. UKELA welcomes this initiative and would suggest that Scotland should either appoint its own statutory body or should explore with the UK and other devolved authorities ways of enabling environmental oversight to be exercised on a collaborative or shared basis. Care will have to be taken to ensure that principles already established in Scotland are not undermined by any collaboration and that commitments made to higher standards (for example in relation to water quality in Scotland) are maintained.

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

We should be mindful of inappropriate copying from other jurisdictions. There are various examples where environmental principles have a more prominent role in governance, e.g. under the Well-being of Future Generations (Wales) Act 2015 and the Resource Management Act 1971 in New Zealand, but these exist within their own distinct regulatory and governmental structures, so care must be taken in drawing lessons from these. This is a matter for careful study, taking account of the wider context, not looking at it in isolation.

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