

Graeme Dey MSP
Convener
Environment, Climate Change and Land Reform Committee
The Scottish Parliament

By email only: ecclr.committee@parliament.scot

Date: 2 May 2018
Our Ref: Policy/ENV

Dear Mr Dey,

EU Environmental and Animal Welfare Principles Inquiry

We refer to your letter of 2 May 2018. We regret that we were unable to have a witness attend the Committee's evidence session on 1 May and we are grateful for the opportunity to contribute further to the Committee's inquiry on this matter.

As highlighted in our written submission to the Committee, we believe that the law should be clear and as precise as possible. Individuals and organisations need to be able to guide their behaviour by a clear understanding of the standards of conduct expected by the law. It flows from this therefore that any incorporation of environmental and animal welfare principles into the law must have sufficient clarity as to the role and effect of the principles so that citizens remain clear as to the conduct required to adhere to the law.

In light of these comments, we think that any attempt to incorporate these principles expressly into statute must be managed carefully. We do not consider that there is a place for principles to be directly enacted as 'black letter' law as a substitute to substantive legal rules. We do however consider that there is a place for environmental and animal welfare principles to be incorporated into a general duty upon Scottish Ministers and public bodies to 'have regard to' the issues covered by the principles. A similar legislative approach around principles in legislation has been taken, for instance, in the Adults with Incapacity (Scotland) Act 2000 and in the Legal Services (Scotland) Act 2010.

The courts must be able to enforce the principles where they have been enacted in the law, so they should be provided with clear guidance as to how they are to be treated. The guidance should make clear how the discretionary nature of the principles is to be applied and how they are to be balanced with other factors that influence a decision.

As things stand, we anticipate that the environmental and animal welfare principles will continue to apply to Scotland post-Brexit due to their current place in international law and

in EU provisions which will become retained EU law. We appreciate that there are likely to be issues around enforcement of the principles which require to be addressed. In the context of the UK's withdrawal from the EU, an approach should be taken to safeguard the well-settled environmental standards but also to ensure that there remains a degree of consistency of approach among the UK jurisdictions. The extent to which consistency will be sought is a political matter and we have no comment to make on this. Careful consideration will also require to be given to the appropriate approach to be taken within the UK and by devolved administrations to environmental standards in relation to possible impacts upon trade agreements.

We note the provisions of section 13B of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. We welcome the inclusion of this section in the Bill. The section incorporates the EU principles at a high-level as 'guiding principles'. We note, however, that the section applies to Scottish Ministers only, and only in relation to the exercise of powers under the Bill: section 11 (deficiencies arising from UK withdrawal), section 12 (complying with international obligations), and section 13 (power to make provision corresponding to EU law after exit day). If the principles are to be formally adopted, it may be of assistance to have a general duty upon both Scottish Ministers and on other public body decision makers to have regard to the environmental principles, and for this to have general application rather than being restricted to the regulation making functions under the Bill's powers. Only then can the principles serve their role of promoting an underlying coherence and consistency across environmental regulation. Such a duty could be incorporated into legislation on relevant matters subject to our comments below.

When considering any particular course of action, it is likely that there will be a number of matters to be regarded by the decision maker, including domestic policy and EU principles, such as proportionality, fundamental rights, legal certainty, equality before the law and subsidiarity. As referred to in our earlier submission, there must be clear guidance available, perhaps by way of a policy document sitting alongside substantive law, as to the significance and weight to be attached to the environmental and animal welfare principles and giving direction on the interaction of the principles with substantive legal rules.

Consideration may be given as to whether any reporting requirement should be included with regard to such a duty. As referred to within the oral evidence session on this matter, public bodies are already subject to a number of environmental obligations, some of which carry reporting requirements. These obligations include matters in relation to climate change under the Climate Change (Scotland) Act 2009, biodiversity under the Nature Conservation (Scotland) Act 2004 and Wildlife and Natural Environment (Scotland) Act 2011, and legislation dealing with the requirements of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. In

considering Scotland's approach to environmental and animal welfare principles post-Brexit, it is important that account is taken of the current responsibilities incumbent on local authorities and other bodies to ensure no conflict arises, or at least, that mechanisms are in place if any such conflict does arise.

We hope this additional information is helpful. If we can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,
Alison McNab
Policy Executive