

**UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) RESPONSE TO THE
NET ZERO, ENERGY AND TRANSPORT COMMITTEE CALL FOR VIEWS ON
THE ENVIRONMENTAL PRINCIPLES STATUTORY GUIDANCE AND
ENVIRONMENTAL GOVERNANCE**

INTRODUCTION

1. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response is to the Net Zero, Energy and Transport Committee call for views on *Scotland's Guiding Principles on the Environment* and the *Environmental governance arrangements: report*. It has been prepared by UKELA's Governance & Devolution Group which sought input from its specialist UKELA working parties and groups, including the Scottish Working Party. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members..
3. UKELA provided a response to the Scottish Government consultation to the: *Guiding Principles: Consultation on Statutory Guidance (3.2.22)*¹. The specific questions raised by the Committee are answered below with reference to *Scotland's Guiding Principles on the Environment: Statutory Guidance (August 2023)* (the Statutory Guidance). The discussion on environmental governance refers to UKELA's submissions to the

¹ <https://www.ukela.org/UKELA/UKELA/ReadingRoom/Consultation-responses/Consultation-responses-from-UKELA.aspx?hkey=90a51a45-35bf-44ce-879f-98cbe1035c78>

Environmental Governance Consultation submitted on 11.10.23 and included as an Annex to this document.

1. Are you satisfied that the guidance will help the Scottish Government and other public bodies make sound decisions in relation to any matter under consideration that has environmental consequences?

4. The published guidance appears clear on its face who should have due regard to the guiding principles and the principles themselves appear clear. The guidance does explain the need to take environmental principles into account: see e.g. ‘... the purpose of the duty to protect and improve our environment’ (para 5.2 of the Statutory Guidance). UKELA notes the obligation to record compliance with the duty in relevant decision making. The policy and decision makers will be aware that the evidence or supporting documentation behind the compliance decision will be publicly available and so subject to scrutiny.
5. It is not possible to say that the Statutory Guidance ‘*will*’ help. Ultimately, that will be the choice of the policy and decision makers applying the guidance. However, UKELA considers that the Statutory Guidance certainly should help make sound decisions on the environment. Ensuring that the Guiding Principles are understood and prioritised in policy and decision making by all relevant persons will similarly help.
6. A point raised by UKELA in its submissions to the draft statutory guidance was that there should be examples of how the principles will be relevant in areas where the focus does not have an obvious environmental dimension in relation to, say, education or healthcare but where the environmental impacts and effects may still be significant and material. Put another way, the examples given in the statutory guidance continue to be ones that have an obvious “environmental” dimension, as opposed to showing how environmental concerns come into play in not-so-obvious scenarios. This is something to consider as the Statutory Guidance is brought into effect and begins to be employed. There could, for instance, be case studies of how the environmental principles are

brought into play as an aide to best practice and use.

2. Looking at the wording of the guidance, can you envisage scenarios in which it could make a difference; for instance, where it would lead the Scottish Government or a public body to adopt a changed approach on a particular matter?

7. Assuming that all those associated with applying the Guidance are made aware that they should have due regard to the environmental principles, why they are to be applied (i.e. the purpose) and what they mean in practice, they should make a difference in all relevant decision-making where until now the principles had not been applied. It will be a concern if the Scottish Government or public bodies simply continue on a 'business as usual' approach. It will therefore be vital that all policy and decisions that fall within the scope of the principles are monitored and assessed, certainly to begin with, to ensure that the Statutory Guidance is being followed.

3. Will the guidance ensure the Scottish Government and public bodies are required to adhere to the environmental principles to the same extent that governments and public bodies in the EU are required to adhere to the EU's environmental principles?

8. The answer is likely to depend upon the priority that the Scottish Government, public bodies and others such as Environmental Standards Scotland (ESS) gives to the environmental principles and the Statutory Guidance. If there are proper measures in place to monitor and review the application of the principles and the Statutory Guidance then it is possible that adherence to the same extent as the EU will be attained. The Committee will be aware that there will need to be collaboration with relevant bodies within the EU to effectively assess and evaluate the principles as compared to the EU.

4. There is also now a [UK policy statement on environmental principles](#). It applies to the development of policy by UK Ministers including when developing policy relating to Scotland in reserved areas. It does not apply to Scotland where the policy does not relate to reserved areas.

Do you have a view on whether there is complementarity between the Scottish guidance and the UK policy statement. If not, could this lead to any difficulties on the ground, for instance in relation to cross-border bodies?

9. UKELA has not yet had the opportunity to undertake a comparative analysis between the UK and Scottish environmental principles. It does seem a worthwhile task; in particular because of the transboundary nature of environmental impacts and effects. Moreover, we agree that if there is not complementarity and consistency in approach then it would well lead to practical difficulties in applying the provisions. This point was made in UKELA's *Submissions To The Net Zero, Energy And Transport Committee On Proposals For Environmental Outcomes Reports* (October 2022)².

5. Will the guidance help the Parliament, or members of the public, hold the Scottish Government and public bodies to account on their decision-making?

10. Yes, UKELA considers that the guidance should help Parliament and the public hold Scottish Government and public bodies to account in their policy and decision-making. It provides a benchmark for everyone with an interest in the environmental principles to evaluate their application and use.

² <https://www.ukela.org/UKELA/UKELA/ReadingRoom/Consultation-responses/Consultation-responses-from-UKELA.aspx?hkey=90a51a45-35bf-44ce-879f-98cbe1035c78>

6. Any other relevant views you may have on the guidance.

11. Overall, UKELA welcomes the publication of the statutory guidance and also looks forward to their effective use and application in policy and decision-making.

Environmental Governance

12. On Environmental Governance, UKELA attaches its consultation response to the at the Annex to this paper.

UKELA

11 October 2023

ANNEX

UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) CONSULTATION RESPONSE TO THE SCOTTISH GOVERNMENT'S SECTION 41 REPORT INTO THE EFFECTIVENESS OF ENVIRONMENTAL GOVERNANCE

INTRODUCTION

13. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
14. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response is to the Scottish Government's Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Report).
15. It has been prepared by UKELA's Governance & Devolution Group in conjunction with the Scottish Working Party seeking input from other specialist UKELA working parties and groups. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members.

CONSULTATION QUESTIONS

16. Section 6.1 of the Report notes that the Scottish Government is seeking views on the three key matters listed in section 41(2) of the Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act 2021), including:
 - 1) whether the provisions of the Continuity Act have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU?

- 2) is the law in Scotland on access to justice on environmental matters effective and sufficient?
- 3) whether and, if so, how the establishment of an environmental court could enhance the governance arrangements introduced by the Continuity Act?

17. Each question is answered in turn below. The further questions raised in paragraphs 6.3-6.6 are answered at the end as appropriate.

1. Whether the provisions of the Continuity Act have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU?

18. Within the EU the European Commission (EC) plays a critical role in relation to the environment through its key functions in proposing and implementing policies to ensure a high level of environmental protection and preserve the quality of life of EU citizens, and in policing the implementation of EU law. Similarly, the Court of Justice of the European Union (CJEU) also has a critical role in determining whether there had been compliance with EU legislation. While the European Parliament offers the ability of EU individuals and others to petition Parliament making a complaint about breaches of EU law including environmental law. The European Parliament requires petitioners to have exhausted all legal options in the relevant Member State. However, providing the petitioner has done so, the Parliament will hear the petition and then decide any further action including referring the matter to the EC to review who may then take enforcement action and sanction a Member State for its non-compliance with environmental law.
19. Governance is only effective if it brings about compliance with existing requirements and leads to improvement in outcomes. In theory, the Continuity Act puts in place a legislative framework which allows for the functions of the Commission and the Court of Justice to be replicated by Scottish Ministers, the Scottish Parliament, Environmental Standards Scotland (ESS) and the Court of Session. At present, there appears to be post-Brexit lacuna in which there is no function of governance allowing for individuals, community groups or others to refer a specific breach of environmental law to any parliamentary body or otherwise engage in any body equivalent to the EC. Thus, while ESS is now covering many of the functions formerly carried on by the EC including the option for investigating concerns raised by individuals, organizations, and any member

of civil society, it cannot act as an enforcement body for an individual case³. That said, ESS not dealing with individual decisions may be acceptable providing it grapples with the systemic problems that prompt the individual concerns.

20. Only time will tell whether the supra-national effectiveness of the EU will be translated into a post-Brexit devolved system of governance in Scotland. What is missing is an indication of how environmental protection can be built into all aspects of public bodies decision making (will the forthcoming implementation of the duty to have regard to environment principles make a difference?), and how effective the existing arrangements are in holding public bodies to account.

2. Is the law in Scotland on access to justice on environmental matters effective and sufficient?

21. As a Scottish body with a scrutiny and enforcement role based in Scotland, ESS may be better placed to understand and respond to Scottish issues than the European Commission would have been. Prima facie, accessing ESS to make representations or raise a concern appears straightforward. One simply submits a form. However, in terms of progressing access to justice (even in broad terms) via the ESS;

- it is understood that ESS may not take forward all cases with merit. Their strategic plan outlines how they will decide what to take forward;
- it is clear that they are not an appeal body and cannot consider individual cases; and
- their remit is only to ensure that public authorities comply with environmental laws and implement these effectively and does not extend to reviewing injustices caused by private companies/individuals (although it is recognized that this function was not available to the EC).

22. The proposals for further steps to strengthen the rights of individuals in relation to the environment discussed in the Report are welcome although there continues to be a gap because these proposals have yet to be put into effect. Nor do these proposals cover all of the non-compliance matters referred to in the Decision

³ England and Northern Ireland provides this through the complaints process to the Office for Environmental Protection. In Wales, if the successor to the Interim Environmental Protection Assessor for Wales (IEPAW) is given powers to investigate complaints made to it. Currently the IEPAW can receive complaints but cannot investigate these.

VII/8s concerning the UK of the Aarhus Convention 7th Meeting of the Parties, (October 2021)⁴. The length of time it has taken to take steps to improve access to justice on environmental matters (at least 9 years since a finding of non-compliance) means that the existing law is not effective and sufficient. Moreover, the dismissal in the Report of third party rights of appeal in planning and related cases is poorly analysed and is another area where the effectiveness and sufficiency of access to justice in environmental matters will remain open to question.

3. Whether and, if so, how the establishment of an environmental court could enhance the governance arrangements introduced by the Continuity Act?

23. The Scottish Government advises that it sees no strong argument for the creation of a specialist environmental court, pointing to the lack of cases taken forward as an indication that the current arrangements are satisfactory. It highlights that a number of matters are being considered to improve access to justice including:

- a) recognition of the right to a healthy environment in a Scottish Human Rights Bill;
- b) a review of the Protective Expenses Order regime;
- c) the introduction of an exemption from court fees for Aarhus cases in the Court of Session;
- d) legal aid reform which will consider extending legal aid availability for legal persons such as NGOs; and
- e) exploring means to provide expert support to prosecutors and the judiciary on environmental matters.

24. These matters are welcome. However, at present, any legal challenge in relation to environmental matters is daunting and often cost-prohibitive and therefore the lack of cases does not necessarily mean that matters are being resolved, nor that there is not a desire to raise them. Considering the matters in turn:

- a) There is concern about providing a substantive right to a healthy environment

⁴ Decision VII/8s refers back to the non-compliance in Decision VI/8k of (September 2017) and then to Decision V/9n (June 2014) which provides at para 2: "(a) By not taking sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive and, in particular, by not providing clear legally binding directions from the legislature or the judiciary to this effect, the Party concerned continues to fail to comply with article 9, paragraph 4, of the Convention; (b) In the light of the above finding that the Party concerned has failed to take sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5; ... (d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned continues to fail to comply with article 3, paragraph 1, of the Convention; ...

if this cannot be enforced through a legal justice system that is inaccessible, lacks technical and scientific expertise and is prohibitively expensive.

- b) A review of the protective expenses order regime should address the concern that the current costs cap of £5,000 can be prohibitive for some applicants particularly when facing the prospective of facing expenses (disbursements) and having to pay for their own legal costs.
- c) The introduction of an exemption from court fees for Aarhus cases in the Court of Session would assist, as would a more general review of fee exemption for environmental cases.
- d) Adequate and timely reform of legal aid (with prior consultation with stakeholders as to what is needed in an effective legal aid system) would similarly improve the current system.
- e) It is unclear what expert support to prosecutors and the judiciary may involve. Environmental law is often quite complex which draws upon similarly complex science. Training any number of prosecutors and the judiciary who will happen upon such cases comparatively infrequently is likely to be inefficient as the law is subject to change and training would need to be regular rather than a one-off. Prosecutors and the judiciary need to be exposed to enough disputes of an environmental nature to allow them to develop expertise. A dedicated environmental court could be staffed with permanent technical experts and appropriately qualified judges. Any environmental court should be a court of first instance with provision for appeals.

6.3 Overview of environmental governance. The scope of the review is focused on matters within the Continuity Act. The content of chapter two highlights wider issues of environmental governance that are outwith the formal scope of the report. The Scottish Government welcomes general comments on the review and wider issues of environmental governance.

6.3.1. Do you have any general comments on the scope of the review and the Scottish Government approach?

- 25. Overall, UKELA considers that the Report lacks depth and without really considering the necessary detail and scrutiny that is required at this time; some

two years after Brexit. It considers matters at a high level of generality without really engaging with many of the issues that have given rise to concern, nationally and internationally, over a number of years.

26. Further, while it is encouraging that the Scottish Government is progressing matters such as placing the Circular Economy on a statutory footing and developing some positive notions of human rights in the Human Rights Bill⁵ it appears that environmental concerns and sustainability are not yet being embedded into policy and decision-making, and providing adequate resources to support that see e.g. the capacity to make the biodiversity assessments necessary if the Biodiversity Strategy is to be delivered.

6.3.2. Do you have any further comments on wider issues of environmental governance?

27. No.

6.4 Environmental governance post-Brexit

Chapter three provides an overview of environmental governance following the exit of the UK from the EU, covering issues such as environmental law, existing governance arrangements, the role of Environmental Standards Scotland and how this compares to governance within the EU.

6.4.1. Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?

28. See the discussion above.

⁵ The Human Rights Bill is relied on as filling some gaps, but it is a long way off in terms of conferring enforceable rights and there is a lot of work to be done to fill out the detail.

6.4.2. Do you have any further comments on the existing environmental governance arrangements?

29. No.

6.4.3. Do you have any further information or evidence on the issues presented in chapter three?

30. No.

6.5 Access to justice on environmental matters

Chapter four covers evidence around access to justice on environmental matters in Scotland, presents stakeholders' input and the Scottish Government position on ensuring that there is effective access to justice on environmental matters in Scotland.

6.5.1. Do you have any comments on the content of chapter four and the Scottish Government position on this subject?

31. See the discussion above.

6.5.2. Do you have any further comments on existing access to justice on environmental matters?

32. No.

6.5.3. Do you have any further information or evidence on the issues presented in chapter four?

33. No.

6.6 Governance Arrangements and Environmental Court

Chapter five provides an overview of the evidence provided on whether an environmental court can enhance existing governance arrangements, and presents the current position of the Scottish Government on the issue.

6.6.1. Do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?

34. See discussion above.

6.6.2. Do you have further comments on whether an environmental court can enhance governance arrangements?

35. No.

6.6.3. Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?

36. No.

UKELA

11 October 2023