Environment, Climate Change and Land Reform Committee

EU Environmental and Animal Welfare Principles

Written submission from Professor Colin Reid

I wish to make the following comments in response to the call for evidence on the above issue.

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1. The environmental principles noted (precautionary principle, preventive action, rectifying environmental damage at source, polluter pays) have played a major part in shaping environmental law across the EU and beyond in recent decades and should continue to do so. It is important, though, that they are placed within a broader objective of seeking a high level of environmental quality — e.g. “protecting and improving the environment (including managing natural resources in a sustainable way)" in the words of SEPA’s general purpose under the Environment Act 1995, s.20A. Without such a general objective there is a danger of the principles being viewed in isolation and misinterpreted and misapplied, e.g. suggesting that the polluter pays principle makes causing pollution acceptable so long as the polluter is willing to pay for doing so.

2. A further principle that might be argued for inclusion is the “non-regression” principle, which proposes that any changes in law or policy should maintain or increase the level of environmental protection, and not allow any deterioration. Given the extent to which there can be tensions between environmental goals (e.g. where renewable energy projects affect biodiversity), let alone with other strands of sustainable development, this principle can be particularly difficult to apply and since its fundamental objective can be satisfactorily achieved through the inclusion on a strong overriding objective as noted above, the case against adding it is strong.

3. If environmental principles are to be enshrined in any way, it must be clear why this is being done. The answer is that they serve to guide decision-making and ensure that concern for the environment is not overlooked. The successful achievement of all social and economic objectives depends on a world that can supply our needs, and although our current way of living is using up about three times the resources our planet can provide, our policies do not recognise the achievement of an ecologically sustainable future as an essential pre-requisite for all other goals. Against this background, it is vital that something is done to ensure that the political and legal arena is not completely dominated by short-term, economic and politically attractive considerations to the exclusion of regard for a sustainable future. Too often at present the environmental imperative does not feature in decision-making.

4. The use of environmental principles also provides a degree of coherence and consistency to the approach to environmental policy and regulation. Since the issue arises in so many contexts – sometimes centrally, sometimes as a secondary matter - and since our policy and regulatory frameworks have too often developed is
isolation, the use of principles can help to resolve inconsistencies and provide some “big picture” guidance to help in making sense of a fragmented landscape.

5. Calling for environmental principles to be formally recognised does not require that they are always given priority. In any given situation there may be a number of different, often conflicting or overlapping, principles which should be taken into account and our legal and administrative systems are well accustomed to this. What is achieved by formal recognition is that arguments based on environmental considerations are regarded as legitimate, so that they can do battle against other established principles and the decision-maker cannot refuse to listen to arguments based on them. In many situations there may be other considerations that properly have more weight but at least environmental concerns will be part of the conscious balancing act as opposed to being dismissed as irrelevant.

6. The fundamental role of ensuring that environmental concerns are not overlooked arises in many different contexts. Principles can guide policy development and policy implementation, guide the interpretation of legislation, structure the exercise of discretion by public decision-makers at all levels of government, and provide a criterion for challenging thorough political or judicial routes decisions that have been made. These may require different legal structures; for policy matters a strong policy guidance may suffice but for any legal impact legislation is required.

7. The most obvious option is a general statutory duty on public authorities to have regard to the principles in the exercise of their functions, a pattern that exists for many other considerations (see para.9 below). Such a duty serves the function noted above of ensuring that environmental concerns are always a relevant consideration. It would take the most egregious failure on the part of an authority for it to be held by a court to have acted in breach of this duty, but the fact that environmental concerns must at least be listened to does achieve something compared to the status quo.

8. An alternative to the direct legislative embodiment of the environmental principles (offering greater flexibility over the number and definition of the principles) is a national Policy Statement, but this too should be underpinned by legislation. All or specified public bodies could be required (subject to the normal provisos) by statute to act in accordance with or having regard to a national environmental principles Policy Statement. The statute should also set out the procedure by which the Statement shall be established and amended, including both wide public consultation and parliamentary approval.

9. The recommendation for a statutory duty on public authorities to have regard to the environmental principles is made with some reservation since this will only add to a plethora of other matters which authorities are already legally bound to take into account, have regard to, further or promote. In the environmental area alone instances include the natural heritage of Scotland (Countryside (Scotland) Act 1969, s.66), biodiversity (Nature Conservation (Scotland) Act 2004, s.1) climate change targets and sustainability (Climate Change (Scotland) Act 2009, s.44) and the requirements of the Habitats Directive (Conservation (Natural Habitats etc.) Regulations 1994, reg.3). Not only do such duties overlap and potentially conflict, but when added to all the other duties in relation to equality, best value, etc. that also apply to authorities, they are likely to lose their impact. When every consideration is
highlighted as having special importance, none of them do. I would strongly urge a review of all the general duties placed on public authorities with a view to their rationalisation and streamlining so that the authorities’ attention is focussed on the important matters that must not be overlooked, in a way that is actually manageable.

10. If the principles are to be recognised in judicial decision-making, a legislative provision that the courts are entitled to take account of the environmental principles is essential. Although this could be introduced as simply a principle of statutory interpretation, it would be preferable for this to have general application. At present environmental well-being does not to feature among the “background” presumptions and approaches which the courts use when the statutory or common law rules they are applying do not provide a clear answer. These background matters have developed over the years and for understandable historical reasons do not include concern for the environment; equally understandably the courts can change only when given a clear signal by the legislator. In the vast majority of cases, clear rules will leave little room for the environmental principles to apply, but where there is room for discretion, again it is valuable for the environment to be among the factors “added to the mix”.

11. In the development of any legal duty or Policy Statement it is important that there should be discussion with all the other administrations across the UK to establish whether a consistent set of principles can apply across devolved responsibilities and those retained by the UK government.

12. In terms of enforcement, as noted above, it is unlikely that a general duty will be breached in a way that leads to direct sanctions or a finding of illegality, but this does not mean that the duty has no effect in ensuring that an authority cannot close its ears to the principles. A rare example where disregard for a principle (polluter pays) did have legal consequences is the Privy Council’s decision in Fishermen and Friends of the Sea v Minister of Planning, Housing and Environment (Trinidad and Tobago) [2017] UKPC 37, but this depended on the principle being given a more influential role in decision-making than is envisaged here.

13. If more is thought appropriate to ensure that environmental concerns are indeed being taken seriously, then some form of periodic reporting requirement could be imposed (as for the biodiversity duty under the Nature Conservation (Scotland) Act 2004) or the extent to which the principles are being respected and implemented could be an element of the remit of any environmental oversight function introduced to replace the role of the EU Commission in ensuring that the government and other bodies do meet their environmental targets and fulfil their commitments.

14. In terms of experience elsewhere, around the world, near and far, 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. It is important, however, that the phrasing, status and effectiveness of each of these are carefully examined in their specific context since each exists within its own distinct regulatory and governmental structure. How such principles are interacting with other statutory duties and national policies and how far they are doing work that is or might be done
here in other ways must be considered (e.g. the presence of more specific national policies such as our National Planning Framework). There is much that can be learned by looking at other experience, but this must be a matter for careful study, taking account of the wider context, not simply copying legislative phrases.