Environment, Climate Change and Land Reform Committee

EU Environmental and Animal Welfare Principles

Written submission from Mike Radford

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The opinions expressed in this submission represent the personal views of the author and are not to be regarded as reflecting the policies of any organisation with which he is associated.
SUMMARY

- Article 13 is significant in expressly recognising that animals are sentient and has the effect that their welfare must be taken into account in specified policy areas which fall within the competence of the EU.

- To date, Article 13 has had little direct effect on animal welfare in Scotland because animal protection legislation enacted at both Holyrood and Westminster has been introduced on the premise that the animals to which it applies are sentient. It may be regarded as having had some indirect effect in by influencing EU legislation which has then be transposed into domestic law.

- That said, the essence of Article 13 should be retained in Scots law, in part because it may have some commercial advantage in helping to define the ‘Scottish brand’, but also because of its potential positive impact on animal welfare. Article 13 is fundamentally different from that of traditional animal protection legislation. The latter largely focuses upon the conduct of those who come into direct contact with animals, in particular those who own or otherwise assume responsibility for them. By way of contrast, Article 13 imposes an ongoing obligation on the state to take account of animal welfare in formulating and implementing policy, and to demonstrate that it has done so. In other words, it requires that the interests of animals are taken into consideration in the development of policy. It is submitted that the formal introduction of this principle into domestic law, and its general application to the Scottish Government, would be highly beneficial by increasing accountability and transparency in respect of the formulation and implementation of policy impacting on animals. As such, it represents a natural and appropriate complement to the traditional legislative approach.

- The importance the public attaches to the issue is evidenced by recent events at Westminster.

- Notwithstanding criticism of the form of the UK Government’s Animal Welfare (Sentencing and Recognition of Sentience) Bill, it has indicated that it intends to bring forward a revised proposal before the commencement of the Withdrawal Bill’s Report Stage in the Lords on the 18th April. It is not known at present what form this will take.

- The European Union (Legal Continuity) (Scotland) Bill requires Scottish Ministers to have regard to the welfare requirements of animals as sentient beings in limited, specified circumstances, but the scope of the provision is significantly narrower than the UK Government’s approach and also suffers from the same shortcoming as the Westminster bill: namely, vagueness as to the precise nature of the duty and, therefore, legal uncertainty.
On the basis that there is widespread support for enshrining the principle of Article 13 into domestic law, and that accountability for its discharge should be political rather than judicial, it is proposed that the following draft provision would address the issue:

(1) *Since animals are recognised to be sentient beings, there shall be a duty on Scottish Ministers to pay due regard to the welfare requirements of animals in the formulation and implementation of public policy.*

(2) *In this section “animals” means vertebrates, other than man, and cephalopods, whether under the control of man or living in a wild state.*

Alternatively

*In this section “animals” means animals of the classes Mammalia, Aves, Reptilia, Amphibia, Pisces and Insecta and any other multi cellular organism that is not a plant or a fungus, whether under the control of man or living in a wild state.*

(3) *It shall be for the Scottish Parliament exclusively, in the exercise of its absolute discretion, to determine how Scottish Ministers are to be held to account for the discharge of their duties under this section.*

(4) *The Scottish Government shall submit a report annually to the Scottish Parliament relating to the formulation, implementation, and effectiveness of policy relating to animal welfare.*

*In respect of subsection (3), it is submitted that the Scottish Parliament should consider establishing an Animal Welfare Audit Committee under the terms of Chapter 6 of its Standing Orders.*

**INTRODUCTION**

1. This response to the Committee’s Inquiry into EU Environmental and Animal Welfare Principles is concerned exclusively with the latter issue, in particular animal sentience. Attention has focused on this matter in consequence of the fact that the sentience of animals is expressly recognised in EU law in Article 13 of Title II of the Treaty on the Functioning of the European Union (‘Article 13’), and is the basis for a requirement imposed on EU institutions and member states to take into account the welfare needs of animals when formulating and implementing a range of specified policies. This leads to the questions identified by the Committee:

- What impact has the existing requirement had on animal welfare in Scotland?
- Should it be retained in Scots law?
- If so, in what form?
THE EVOLUTION OF ARTICLE 13

2. Before considering these questions in detail, it may be useful to the Committee to provide some background information relating to Article 13. It has its origins in the 1980s when NGOs, concerned that animals were regarded in European Community law merely as goods, began to lobby for a status which would differentiate them from the generality of traded products. In particular, it was argued that animal sentiency and the consequential importance of animal welfare should be recognised in EC law. This issue became more pressing with the advent of the Single Market.

3. The initial outcome was a ‘Declaration on the Protection of Animals’, appended to the Treaty on European Union (Maastricht Treaty (1992)). This called upon

“the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.”

4. As its title implies, this provision was declaratory and not legally binding.

5. Subsequently, by virtue of the Treaty of Amsterdam (1997), a ‘Protocol on Protection and Welfare of Animals’ was attached to the Treaty establishing the European Community, which stated:

The High Contracting Parties, desiring to ensure improved protection and respect for the welfare of animals as sentient beings, have agreed upon the following provision which shall be annexed to the Treaty establishing the European Union,

In formulating and implementing the Community’s agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

6. The Protocol developed the Declaration further by expressly incorporating the term ‘sentient’; extending its application to the formulation of policy (not simply its drafting); and introducing the caveat relating to the legislative or administrative provisions and customs of the Member States.

7. While the Protocol demonstrated both the importance and legitimacy of promoting animal welfare as a policy objective, the European Court of Justice held that it did not have the status of law, stating that

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1 Declaration 24.

2  *Nationale Raad van Dierenkweders en Liefhebbers VZW and another v Belgium* (Case C-219/07) [2008] All ER (D), 243 (ECJ).
“it is apparent from its very wording that it does not lay down any well-defined
general principle of Community law which is binding on the Community institutions.
Although it provides that “full regard” must be had to the welfare requirements of
animals in the formulation and implementation of the Community's policy, it limits that
obligation to four specific spheres of Community activity and provides that the
legislative or administrative provisions and customs of the Member States must be
respected as regards, in particular, religious rites, cultural traditions and regional
heritage.”

8. The Treaty of Lisbon addressed this issue by providing that a revised version
of the Protocol be incorporated into the Treaty on the Functioning of the
European Union as Article 13 of Title II:

In formulating and implementing the Union's agriculture, fisheries, transport, internal
market, research and technological development and space policies, the Union and
the Member States shall, since animals are sentient beings, pay full regard to the
welfare requirements of animals, while respecting the legislative or administrative
provisions and customs of the Member States relating in particular to religious rites,
cultural traditions and regional heritage.

9. In consequence, Article 13 now constitutes part of the primary law of the
European Union and, while the UK’s membership continues, is binding on the
UK Government.

THE SIGNIFICANCE OF ARTICLE 13

10. The significance of Article 13 at the EU level is:

- It represents the only instrument which has international effect which
expressly recognises that animals are sentient.

- It both justifies and imposes a legal requirement for the welfare requirements
of animals to be taken into account in formulating and implement policy at an
EU level in the specified areas.

- Similarly, it provides authority for member states, many of which do not have
the same tradition of animal protection legislation as the UK, to take account
of animal welfare.

11. In consequence, animal welfare cannot be ignored; it must be taken into
account. That said, the potential impact of Article 13 is limited not only by the
caveats set out at the end, but also by the nature of the duty it imposes: to
pay full regard to the welfare requirements of animals is significantly different
from actually giving effect to them.

3 Jippes v Minister van Landbouw, Natuurbeheer en Visserij (Case C-189/01)
[2001] ECR I-5689, para 73. Cf the view of the European Court of Human Rights,
which has described the European Union as having “conferred the highest legal
ranking on the protection of animals as ‘sentient beings’ and stated the Protocol
amounted to a “legally binding obligation” (Herrmann v Germany (App. No. 9300/07)
WHAT IMPACT HAS ARTICLE 13 HAD ON ANIMAL WELFARE IN SCOTLAND?

12. The short answer is that Article 13 has had little direct impact on animal welfare in Scotland. Although not expressly stated, animal protection legislation applying to Scotland, whether originating from Westminster or Holyrood, has, since the first enactment in 1850, been introduced on the premise that the animals to which it applies are sentient. It may be argued that there has been some indirect impact in the sense that Article 13 may have subsequently influenced EU law, the terms of which have then been transposed into Scots law, either by direct effect or as a result of consequential domestic legislation. However, the standards imposed are at least compatible with those which Scotland may be presumed to have chosen to apply on its own initiative.

SHOULD IT BE RETAINED IN SCOTS LAW?

13. So, it may be asked, would anything be lost if Article 13 ceased to apply in the UK after we have left the EU? The answer, it is submitted, is very much in the affirmative.

14. First, the express reference to sentiency is of huge symbolic importance in international terms. It not only has ethical significance, it is also a commercial asset. As the UK and its constituent parts embark on the uncertain waters of international trade alone following Brexit, branding and reputation which emphasise the quality of home produced products are going to be crucial. High welfare standards based upon science and a recognition of the inherent needs of animals can make a particular contribution to this end.

15. Second, the effect of Article 13 is fundamentally different from that of traditional animal protection legislation. The latter largely focuses upon the conduct of those who come into direct contact with animals, in particular those who own or otherwise assume responsibility for them. By way of contrast, Article 13 imposes an ongoing obligation on the state to take account of animal welfare in formulating and implementing policy, and to demonstrate that it has done so. In other words, it requires that the interests of animals are taken into consideration in the development of policy. It is submitted that the formal introduction of this principle into domestic law, and its general application to the Scottish Government, would be highly beneficial by increasing accountability and transparency in respect of the formulation and implementation of policy impacting on animals. As such, it represents a natural and appropriate complement to the traditional legislative approach.
In the light of the foregoing, it is the view of the author that there is a very strong argument for introducing apply a similar general provision to the Scottish Government.

EVENTS AT WESTMINSTER

The importance the public attaches to the issue is evidenced by recent events at Westminster.

Shortly after his appointment, the Secretary of State for Environment, Food and Rural Affairs was asked during oral questions in the House of Commons whether he would confirm that Article 13 of the Lisbon Treaty (sic) would be part of the repeal Bill (sic), to which he provided the unqualified answer: “Absolutely”. There was accordingly some surprise when no such provision was included in the European Union (Withdrawal) Bill as originally published.

In the light of this discrepancy, Caroline Lucas MP put down an amendment during the Commons committee stage of the European Union (Withdrawal) Bill – ‘New Clause 30’ – with the intention of effecting transposition of Article 13 into domestic law. The Government opposed the amendment and it was ultimately defeated by 313 votes to 295.

The Government’s position was presented in the debate by Dominic Raab, the Minister of State at the Ministry of Justice. It is worth reproducing his statement at some length, because it illustrates how quickly and radically the Government’s position changed:

We certainly support the sentiment behind new clause 30 and the related amendments, but I am afraid we cannot accept it. Let me briefly try to explain why.

Article 13 of the treaty on the functioning of the European Union places an obligation on the European Union when developing certain EU policies and on member states when developing and implementing those EU policies to have full regard to the welfare requirements of animals. The intention of the new clause is to replicate—I am not sure whether it is replicate or duplicate—that obligation in domestic law when we leave the EU.

The reference to animals as sentient beings is, effectively, a statement of fact in article 13, but even though it is, in effect, declaratory, I can reassure the hon. Member for Brighton, Pavilion (Caroline Lucas) that it is already recognised as a matter of domestic law, primarily in the Animal Welfare Act 2006. If an animal is capable of experiencing pain and suffering, it is sentient and therefore afforded protection under that Act.

We have made it clear that we intend to retain our existing standards of animal welfare once we have left the EU and, indeed, as my right hon. Friend the Secretary

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5 New Clause 30 stated: “Obligations and rights contained within the EU Protocol on animal sentience set out in Article 13 of Title II of the Lisbon Treaty shall be recognised and available in domestic law on and after exit day, and shall be enforced and followed accordingly.”
of State for Environment, Food and Rural Affairs has made clear, to enhance them. The vehicle of this legislation will convert the existing body of EU animal welfare law into UK law. It will make sure that the same protections are in place in the UK and that laws still function effectively after the UK leaves the EU.

In this country—we should be proud to say this—we have some of the highest animal welfare standards in the world, and we intend to remain a world leader in the future. Leaving the EU will not prevent us from further maintaining such standards; in fact, it will free us in some regards to develop our own gold-standard protections on animal welfare. Animals will continue to be recognised as sentient beings under domestic law, in the way I have described. We will consider how we might explicitly reflect that sentience principle in wider UK legislation.

To tack on to the Bill the hon. Lady’s new clause, which simply refers to article 13, would add nothing, however, and she was fairly honest in her speech about the limited practical impact it would have. Given that it is ultimately fairly superfluous, it risks creating legal confusion. Obviously, if she wants to propose improvements to wider UK legislation—I am sure she will, knowing her tenacity—she is free to do so, but this new clause is unnecessary, and it is liable only to generate legal uncertainty. Having addressed some of her concerns, I hope that she will withdraw the new clause, having powerfully and eloquently made her point.6

21. Yet within the month, the Secretary of State had made a written statement announcing his intention of bringing forward legislation.7 During the interim, of course, there had been a very significant public outcry, originating largely from social media, but also widely reported in the traditional media, accusing Ministers of denying that animals were sentient. Notwithstanding that such a view was based on a misunderstanding of the Government’s position, there was a political imperative to respond.

THE DRAFT ANIMAL WELFARE (SENTENCING AND RECOGNITION OF SENTIENCY) BILL

22. Accordingly, the UK Government produced the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill, somewhat out of the blue, in December 2018, clause 1 of which was intended to reflect the principle of animal sentience in domestic law.

23. The decision to provide statutory recognition of animal sentience was taken at very short notice in response to political pressure. Not only was the drafting of the Bill unusually vague, it was apparent from the time of its publication that the Government was uncertain as to the adequacy of Clause 1. Thus, it indicated that the Bill “presents one possible formulation for delivering the policy objectives” and expressly sought views on whether the Bill’s provisions represented the best approach for achieving these.8

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7 HCWS340, 12th December 2017.
24. It is not necessary to present a detailed critique of the Bill here. Suffice it to say that the House of Commons’ Environment, Food and Rural Affairs Select Committee roundly condemned the form in which it had been published. Acknowledging that the concepts it enshrined were “important and worthwhile”, the Committee observed that “[t]hey deserve better than to be treated in a cavalier fashion….It appears that this draft Bill has been presented to the public – and Parliament – in a far from finished state.”

THE HOUSE OF LORDS’ AMENDMENT

25. A further attempt was made to incorporate a version of Article 13 into the European Community (Withdrawal) Bill in Committee in the House of Lords. The amendment was eventually withdrawn, but the debate it engendered demonstrated significant support for the principle it enshrined.

DEFRA’S RESPONSE

26. The UK Government has indicated that it will be bringing forward a redrafted provision before the Withdrawal Bill’s Report Stage in the Lords, which begins on 18th April. It is not clear at present whether the intention is to incorporate it within the Withdrawal Bill or place it in a separate Bill. The situation may have been clarified by the time the Committee comes to consider the issue, and the author would be happy to submit further evidence in the light of this.

27. Regardless of which means is employed, it is clear from the Animal Welfare (Sentencing and Recognition of Sentience) Bill and subsequent comments that the Government is intending its provision to be significantly wider in scope than Article 13. So, for example, the intention is that it should apply to all animals – both under the control of man and free-living – and also to all policies.

UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL

28. Turning to Scotland, the Legal Continuity Bill was amended during its passage through the Scottish Parliament so it now provides that Scottish Ministers are required to have regard to a number of ‘guiding principles’ in respect of the content of any regulations intended to address (a) deficiencies arising from UK withdrawal, (b) compliance with international law, and (c) the need to make provision corresponding to EU law after exit day. One of these guiding principles is “that regard must be had to the welfare requirements of

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11 Clauses 11(1), 12, 13(1), and 13(B)(1).
animals as sentient beings". While this provision is well-meaning, it is significantly narrower than that which the UK Government appears to have in mind and also shares the same shortcoming with clause 1 of the Animal Welfare (Sentencing and Recognition of Sentience) Bill: namely, vagueness as to the precise nature of the duty and, therefore, legal uncertainty.

THE SUGGESTED FORM

29. It is apparent that there is significant support for incorporating the spirit of Article 13 into domestic law, and it is to be hoped that the Scottish Parliament would not wish to introduce a measure which was narrower in its scope than a similar provision enacted by Westminster. It is also assumed that any provision introduced at Westminster is likely to apply only to the UK Government – unless it was minded, and the devolved legislatures consented, to extend the scope of the provision to the devolved administrations. It is also submitted that, should the Continuity Bill come into force, the wording of clause 13(B)(3)(e) would raise more questions than it answers. Finally, one of the conclusions which came out of the EFRA Select Committee’s inquiry was the preference for accountability for the discharge of a duty to have regard to animal welfare to be political rather than judicial.

30. A suggested way in which this could be accomplished is to introduce a statutory provision to the effect that,

Since animals are recognised to be sentient beings, there shall be a duty on Scottish Ministers to pay due regard to the welfare requirements of animals in the formulation and implementation of public policy.

31. The meaning of ‘animals’ in this context could be

“animals” means vertebrates, other than man, and cephalopods; whether under the control of man or living in a wild state.

Or, if the Scottish Parliament was minded to be more inclusive, it could adopt the definition of ‘animal’ in the Zoo Licensing Act 1981,

‘animals of the classes Mammalia, Aves, Reptilia, Amphibia, Pisces and Insecta and any other multi cellular organism that is not a plant or a fungus, whether under the control of man or living in a wild state’.

32. In order to emphasise that accountability for carrying out the above duty, there should be a provision which specifies “It shall be for the Scottish Parliament exclusively, in the exercise of its absolute discretion, to determine how Ministers of the Crown are to be held to account for the discharge of their duties under this section.

33. Together with a requirement that “The Scottish Government shall submit a report annually to the Scottish Parliament relating to the formulation, implementation, and effectiveness of policy relating to animal welfare.”

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12 Clause 13(B)(3)(e).
34. In order to carry out its responsibilities, the Scottish Parliament could consider setting up an Animal Welfare Audit Committee under the terms of Chapter 6 of the Parliament’s Standing Orders.

35. Because scrutiny would be political rather than political, there is no need to define terms such as “sentient”, “pay due regard”, “public policy”.