

Consultation Response

Guiding principles on the environment: draft statutory guidance

8 February 2022



Scottish
Environment
LINK

Question 1

Do you think that the draft guidance is clear and has the right content to support the implementation of the duties in the Continuity Act? How could it be improved?

Yes ✓

No

Don't Know

How can this be improved?

LINK members are content with the broad direction of this draft guidance, which helpfully sets out how the environmental principles are to apply to Scottish matters. However, there are a few distinct improvements we think could be made to the draft to clarify how the duties are to be implemented in practice. These are:

- To set out that the environmental principles have been used by the courts to interpret and apply EU environmental law. This wider framing makes it clear that the principles will be there to help guide the courts in interpreting and applying environmental law – this is a vital part of keeping pace. This will be important when it comes to the application and functioning of the human right to a healthy environment, and will give the crucial steer to the courts in how to interpret environmental law.
- It would be helpful if, early on, the guidance gives some specific examples of the types of stakeholders who might be interested in the guidance - beyond decision-makers who are required to have due regard to the guidance -, and who should be actively encouraged to read it and speak to government about the principles. The paragraph on p.05 could be expanded to give this context.
- Include a principles summary/glossary at the start of the document (see answer to Q2).
- Provide further clarification about what is expected from officials exercising their duties under the Continuity Act 2021; what weight the principles should be given in the decision making process; and be clear about how officials must set out how they have considered the principles including, when possible, how they have been applied. This will also provide examples and be a valuable resource for other officials (see answer to Q3).
- Throughout, a stronger emphasis on what the principles are designed to achieve, with a clear link to s.16 purpose and what should be done when applying the principles. As drafted, we feel the guidance currently focuses too strongly on what will not be achieved by applying the principles, or what is not expected of those discharging their duties - this creates a lack of clarity and should be balanced with a clearer steer towards purpose and what *is* expected of officials. For example, LINK members would strongly support the insertion of a paragraph such as: "It should not be considered a tick box exercise, but should be used to deliver high quality policies that actively mitigate against environmental harm, allowing action to be

taken to ensure ministers do not fail in their duties.” This would be in line with the sentiment set out in the ministerial foreword.

- Overall there is quite a lot of repetition throughout the guidance which could be slimmed down in places to improve readability and clarity - for example, paragraph 4.1 has been set out in the section above, paragraphs 5.1 and 5.2 also repeat information set out in previous sections.

Question 2

Do you think that the draft guidance provides useful explanation of the meaning of the guiding principles? How could this be improved?

Yes ✓

No

Don't Know

How can this be improved?

Much of the information provided in the draft guidance is useful for explaining the meaning of the guiding principles, but LINK members suggest some improvements:

- A one-page summary (or infographic) of the environmental principles and their definitions, early on, could help a more general audience grasp their meaning and implications before reading later sections of the guidance which give more detail.
- As mentioned above, we feel that a clearer reference to the s.16 purpose of the environmental principles could be made earlier in the guidance and that the purpose could be linked back to more frequently throughout the guidance, so it is clear that officials and stakeholders should always have that purpose in mind.
- We have some suggestions about the definitions chosen for the environmental principles. In particular, we have concerns about the use of the Rio Declaration 1992 definition of the Precautionary Principle. This has significantly developed and strengthened since then. See for example the [EU Commission Communication 2000](#).

Question 3

Do you think the draft guidance provides a good explanation of how the guiding principles will be used during the development of policies and other significant decisions?

Yes

No ✓

Don't Know

How can this be improved?

- The structure of the sections which cover how the duties should be interpreted are quite confusing. Paragraphs 2.4, 5.1 and 5.2 collectively describe the duty and define how a duty

to 'have due regard' should be interpreted - we suggest those paragraphs would be better situated in the section entitled '4. Duties and Application'. Section 4 starts off with an explanation of the environmental principles and what they are - this is repeating information set out in section 3 and may be unnecessary. We suggest that paragraphs 2.4, 4.3, 5.1 and 5.2 should be consolidated and form the opening to section 4.

- Greater reference to the s.16 purpose should be made in this section, to emphasise that anyone carrying out their duties should have a view to the purpose. LINK members strongly suggest the following paragraph is included to be clear on that purpose: "It should not be considered a tick box exercise, but should be used to deliver high quality policies, that actively mitigate against environmental harm, allowing action to be taken to ensure Ministers do not fail in their duties."
- Paragraph 4.3 of the guidance clarifies that individual regulatory decisions will, on the whole, not be captured by the duty, but sometimes will be if potential impacts on the environment are deemed to be significant. We think an example box should be added to illustrate the hierarchy of policy/decision making and where the duties would apply, including a situation where an individual decision would have a significant environmental impact and therefore bring the environmental principles into play. For example, the approval of major infrastructure decisions such as those projects included in the Strategic Transport Projects Review 2 (STPR2) and the national developments outlined in the draft National Planning Framework 4.
- The guidance should more strongly emphasise that the principles must be applied early in the process, not once policy agreed or almost set, at which point the principles would have to be retrospectively applied/retrofitted.
- Whilst para 4.10 is helpful in reminding officials of the status of the principle, we are concerned by the use of the word "balance" since it suggests a trade-off and that environmental principles could be 'over-ridden'. This would not be consistent with the Act (specifically s.16), the ministerial foreword, nor the Integration Principle - the purpose of which is to ensure the environment is taken account of across all government plans and policies. When considering the principles other considerations should be excluded at that stage as they can of course be taken into account later.
- We suggest that more detail is provided on the interpretation of the 'have due regard to' this guidance. Section 2.9 sets out what failing to have regard to the guidance does *not* mean, but it would be helpful to provide more contextual examples of what taking regard of the guidance *would* mean in practice. This would show how the principles can help decision-makers balance environmental and other priorities.

Question 4

Do you think the draft guidance adequately supports recording and documenting compliance with the duties?

Yes ✓

No

Don't Know

Please share your comments:

LINK members think it is vital to record and make publicly available a record of when Scottish Ministers have applied the principles under their s.14 duty as well as clarify within the specific documents. This would provide transparency on how the government is, as set out in s.16, complying with the duties “with a view to (a) protecting and improving the environment, and (b) contributing to sustainable development” as well as meeting its commitment to ‘maintain or exceed’ EU environmental standards. This would allow future parliamentary enquiries to effectively scrutinise the application of the principles in practice. This could be reported alongside the Government’s annual report to parliament on the application of the keeping pace power in Part 1 of the Continuity Act.

Question 5

Do you think that there is appropriate use of examples and case studies in the draft guidance?

Yes ✓

No

Don’t Know

Can you suggest any additional examples or case studies to illustrate the guiding principles?

While we welcome the inclusion of the examples in the draft guidance, LINK members suggest some additional examples could provide additional clarification for duty bearers and the general public. This includes the example provided in answer to Q.3 on major infrastructure projects. We also think that examples of how the principles should be taken into consideration in the development of government strategies and plans that affect a large number of people/large area would be useful. This includes the development of Local Development Plans and an example on this would be particularly timely given the the fourth National Planning Framework will come into effect this year.

-

Question 6

Do you have any further comments or views on the draft guidance that you would like to share?

LINK members are concerned that there will be a delay between the implementation of the principles and guidance, and the development of major government strategies that are currently underway including NPF4, the National Strategy for Economic Transformation and the Human Rights (Scotland) Bill.

We urge officials to consider how the application of the principles could be taken into account in the development of strategies and draft bills that are already underway and will set the direction of government policy for a significant period of time (10+ years for both the strategies cited and presumably longer for the Human Rights (Scotland) Bill). Such fundamental and long-lasting policy

strategies should consider taking the environmental principles into account even though it is not (yet) a legal requirement. This would be an excellent example of the government meeting its commitment to 'maintain or exceed' environmental standards.

This response represents the collective view of LINK's Governance Group. Members may also respond individually in order to raise more detailed issues that are important to their particular organisation.

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

For more information contact:

Vhairi Tollan
LINK Advocacy Manager
vhairi@scotlink.org
07512 828004