

10 October 2023

Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee
Scottish Parliament

Dear Mr Mountain,

Thank you for inviting LINK to share views on Scottish Government's report *Scotland's Guiding Principles on the Environment: Statutory Guidance and Environmental governance arrangements: report*.

Guiding Principles on the Environment

LINK welcomes the publication of *Scotland's Guiding Principles on the Environment: Statutory Guidance*. This is welcome progress on the implementation of s.13-18 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

While LINK is disappointed that many of the suggestions made by ourselves and our members, in response to the consultation on the draft guidance, have not been adopted, we consider that this is not sufficiently serious to justify delaying approval and implementation/commencement of the duties in s.13 & 14 of the 2021 Act.

The effectiveness of this guidance, and the duties, will depend on how it is applied in practice over the coming months and years. Thus, we strongly recommend that the Committee undertake, or commission, a review of implementation in 1-2 years time. This would be able to assess the effectiveness based on experience of their application and impact, as well as consider whether the suggestions previously proposed by eNGOs would be appropriate for an updated form of the guidance. It may also identify other possible improvements, arising from the evidence of actual application.

Accordingly, LINK recommends that the Committee should act such as to ensure that the guidance and the duties come into force as soon as possible.

Environmental Governance

LINK is disappointed that the [Environmental governance arrangements: report](#) took a narrow approach to the consideration of environmental governance. We consider this a missed opportunity to examine the environmental governance gaps post-EU Exit in the context of needing to scale up action on the nature and climate crises and a governance landscape that was insufficient even while the UK was a member of the EU. The report clearly sets out the Scottish Government's position, despite this being a consultation to gather views, and fails to include substantive discussion of how Ministers arrived at these positions or what evidence base was drawn upon.

The Review of the Effectiveness of Environmental Governance [consultation](#) defines environmental governance as “a term that can be interpreted broadly to include consideration of the administrative, regulatory and judicial structures that contribute to protection of the environment and promotion of sustainable development. In this wider sense, environmental governance includes the design of arrangements for communities and individuals to participate in decision making, and to make representations and seek routes to redress.” It then, however, proceeds not to comprehensively review or analyse many of the administrative, regulatory and judicial structures that exist, or examine how these might be improved - and it fails entirely to assess whether any of the environmental challenges we face might be better addressed by reforms to these structures.

Rather than adopting a wide ranging approach (as might be expected from the definition used), the review adopts an unnecessarily narrow approach of reviewing only governance matters affected by EU Exit (and then only those aspects that were partially addressed by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021). As a result, the review is of limited value and the Scottish Government should consider if and how to undertake a fuller review - and to consider proposals for wider environmental governance reforms.

Finally, we note that in commenting on the amendment that became section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, the then [Cabinet Secretary](#) said “*it is important to ensure that stakeholders and communities are given sufficient opportunity to participate in the consultation exercise, and for proposals and recommendations to be made that are both meaningful and evidence based*”. In LINK’s view, the narrowness of the approach taken and the lack of evidence and analysis presented in the consultation paper (albeit this was slightly rectified by the publication of a supplementary briefing) mean that this process has been limited in the participation of stakeholders - and has not been meaningful or evidence-based.

Environmental Court or Tribunal (ECT)

LINK welcomes the acceptance that Scotland is in breach of the access to justice requirements of the Aarhus Convention in relation to costs. Paragraph 4.2 then sets out the Scottish Government proposals to address this “in order to ensure Scotland's compliance with the requirements of the Aarhus Convention”. Five processes are referenced - however, while any or all may address (or contribute to addressing) the challenge, none is guaranteed to do so. Thus, we do not consider the work identified to remedy this is sufficient.

Whilst the consultation paper discusses non-compliance with the Aarhus Convention in relation to costs, it does not mention (or address) the issue of merits. Article 9.2 of the Convention requires that states should provide that its citizens (and NGOs) “have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission” (emphasis added).

This purported assessment of the potential of an environmental court or tribunal follows a similar consultation held in 2016-17 based on a paper called “Developments in Environmental Justice in Scotland”. The [analysis of consultation responses](#), published in 2017, noted that: “A substantial majority of the respondents favoured the introduction of an environmental court or tribunal. The majority envisaged a specialised court or tribunal as a means to reducing costs and improving access to justice in civil environmental matters.”

Notwithstanding that strength of expert opinion, the Scottish Government determined that no further action should be taken. It said “the variety of views on what sort of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape caused by Brexit lead Ministers to the view that it is not appropriate to set up a specialised environmental court or tribunal at present” (emphasis added).

LINK therefore considers that the conclusions of the 2016-17 consultation are either overlooked or somewhat misrepresented by the current consultation.

We consider that the evidence provided by stakeholders, that makes the case for an environmental court, has not been refuted and the Scottish Government’s conclusion is not supported by evidence .

The logical next step would be to undertake a more in depth analysis of the options available and seek to find a consensus. We would like to see a ‘next stage’ to the consultation in order to carry out a full appraisal of the options for an ECT. This would take some time - but would enable the next Scottish Government and Parliament to take this issue forward in a properly informed manner.

LINK, therefore, encourages the Net Zero, Environment and Transport committee to recommend that the Scottish Government responds to this consultation process (and the responses it has received) in a positive and constructive manner by:

1. Setting out more clearly how it will ensure that its actions on access to justice will lead to a system compliant with the Aarhus Convention; and
2. Undertaking or commissioning a thorough review of the case for an environmental court or tribunal, including an assessment of all the options, including an evolution of the remit(s) of existing institutions.

You can read LINK’s full response to the consultation [here](#).

Yours sincerely,

Dr Deborah Long
LINK Chief Officer