

# Agenda – Climate Change, Environment and Rural Affairs Committee

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Meeting Venue:

Committee Room 3 – Senedd

Meeting date: 12 June 2019

Meeting time: 09.15

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- 1 **Introductions, apologies, substitutions and declarations of interest**
- 2 **Motion under Standing Order 17.42 (vi) to resolve to exclude the public from item 3 of today's meeting**
- 3 **Environmental Principles and Governance post–Brexit – Private Briefing**  
(09.15–09.45)  
Graham Rees, Deputy Director, ERA EU Exit and Strategy Unit – Welsh Government  
Lori Frater, Head of Strategic Environmental Policy – Welsh Government
- 4 **Environmental Principles and Governance post–Brexit – Evidence session 1**  
(09.45–11.00) (Pages 1 – 44)  
Professor Richard Cowell, School of Geography and Planning – Cardiff University  
Dr Mary Dobbs, Director, Masters in Law (MLaw) Programme, School of Law – Queen's University Belfast



Dr Ludivine Petetin, Lecturer in Law, School of Law and Politics – Cardiff University

Dr Victoria Jenkins, UK Environmental Law Association Wales Working Party

Attached Documents:

Research Brief

Paper – Professor Cowell, Dr Dobbs, Dr Petetin

Paper – UK Environmental Law Association Wales Working Party

## **5 Paper(s) to note**

(11.00–11.05)

### **5.1 Correspondence from the Future Generations Commissioner for Wales to the Chair – follow up from meeting on 10 January 2019**

(Pages 45 – 62)

Attached Documents:

Correspondence from the Future Generations Commissioner for Wales – 31 May 2019

### **5.2 Correspondence from the Public Services Ombudsman for Wales to the Chair – Environmental Principles and Governance in Wales Post European Union Exit**

(Pages 63 – 64)

Attached Documents:

Correspondence from the Public Services Ombudsman for Wales – 3 June 2019

### **5.3 Correspondence from the Auditor General for Wales to the Chair – Environment Governance and Principles**

(Pages 65 – 78)

Attached Documents:

Correspondence from the Auditor General for Wales – 4 June 2019

**5.4 Correspondence from the Future Generations Commissioner for Wales to the Chair – Environmental Governance and Principles**

(Pages 79 – 81)

Attached Documents:

Correspondence from the Future Generations Commissioner – 7 June 2019

**6 Motion under Standing Order 17.42 (vi) to resolve to exclude the public from items 7 and 8 of today's meeting**

**Private Session (11.05–11.30)**

**7 Environmental Principles and Governance post-Brexit –  
Consideration of evidence received under item 4**

**8 Proposal for the Royal Welsh Show**

(Pages 82 – 83)

Attached Documents:

Private Paper

Document is Restricted

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol as ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : Yr Athro Richard Cowell (Prifysgol Caerdydd), Dr Ludivine Petetin (Prifysgol Caerdydd) a Dr Mary Dobbs (Prifysgol Queen's, Belffast)

Evidence from : Professor Richard Cowell (Cardiff University), Dr Ludivine Petetin (Cardiff University) and Dr Mary Dobbs (Queen's University Belfast)

### ***Bibliographic background***

*Richard Cowell, Ludivine Petetin and Mary Dobbs are academics with expertise in environmental governance and multi-level governance. Ludivine and Mary are Law Lecturers and bring particular expertise on environmental principles and governance. Richard has expertise on the mainstreaming of sustainability into public policy. All three have undertaken extensive research on these subjects in the context of Brexit. All three are associates of the [Brexit & Environment network](#), which brings together academics analysing how Brexit is affecting the UK and EU environments.*

### **1.0 Overview**

There is much in the Welsh Government's (WG) consultation on *Environmental Principles and Governance in Wales Post European Union Exit* that is positive. The proposals for instituting missing environmental principles in primary legislation, for granting the proposed new environmental body independence and the attention to cross-UK collaboration are to be welcomed, and avoid some weaknesses of the proposals for England. We would also support the WG's intention to resolve environmental governance gaps created by Brexit in an integrated way, fully connected to existing Welsh legislation on environment and sustainability. However, this apparent ambition also creates complexities, and a series of specific issues are under-developed:

- Among the principles, there is no clear commitment to 'high levels of environmental protection', the 'precautionary principle', the 'principle of integration' and cross-border cooperation;
- On the governance arrangements, there are the difficulties of integration with existing bodies and regulatory styles, a need for closer attention to reporting, and concerns about enforcement powers;
- On the case for consistent, cross-UK environmental governance arrangements, there are practical challenges in marrying Welsh good intentions with what is happening in England, Northern Ireland and Scotland.

The freedom of action in creating new arrangements may be constrained by international agreements, especially the Backstop in the Withdrawal Agreement.<sup>1</sup> This contains important obligations, including the domestic incorporation of environmental principles and the presence of (an) independent enforcement bod(y/ies)(Part 2 of Annex 4 of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement – Nov. 2018). The WG's proposed incorporation of the core environmental principles (where it includes a high level of protection, non-regression and the precautionary principle) within Welsh primary legislation will help, although this will either need to be mirrored across the devolved administrations or undertaken on a UK-wide basis. However, it is unclear that the proposed Welsh body would suffice and consideration should be given to the commentary on DEFRA's proposals for an Office for Environmental Protection.<sup>2</sup> Furthermore, the Agreement would significantly affect the future application of environmental principles and the shape and operation of any new structures.

## 2.0 Principles

The Committee is seeking views *on gaps in ... environmental principles post-Brexit in Wales ... whether the Welsh Government's analysis (within the consultation) correctly and comprehensively identifies the deficiencies ... (and) ... The Welsh Government's consultation proposals and questions regarding the environmental principles.*

### 2.1 *The Welsh Government's assessment and solution*

It is our view that WG has conducted a robust assessment of gaps and deficiencies in the coverage of EU environmental within its domestic legislation. We concur with them that rectification at source and the polluter pays principles are missing. We also support the proposal that the missing principles be enshrined in primary legislation: taking this step avoids weaknesses observed in DEFRA's proposals for England.<sup>3</sup>

However, the precise manner in which these principles (and potentially others) are going to be integrated into the legislation requires careful consideration. Having a third piece of legislation dealing with the environment alongside the Well-being of Future Generations (Wales) Act 2015 (FGA) and the Environment (Wales) Act 2016 could be excessive, leading to actors approaching environmental protection from the perspectives of different acts and their different ways of framing environmental protection and environmental principles. It could thereby negate certainty and consistency and create loopholes. Instead, the opportunity should be taken to incorporate a wide range of environmental principles and objectives within one single piece of primary environmental legislation – within Wales and preferably across the UK as a whole.<sup>4</sup> For Wales for the time-being, the Environment (Wales) Act 2016 could be amended accordingly to enable an enhanced level of protection and a more holistic approach towards environmental protection.

Furthermore, lessons should be learnt from the responses to DEFRA's proposals<sup>5</sup> and the principles should be integrated in such a manner as to impose clear obligations to act in accordance with the range of environmental objectives and principles wherever relevant. Thus, the duty cannot simply be one to 'have regard to', which is a notably weak formulation enabling the objectives and principles to be effectively bypassed.<sup>6</sup> Potential approaches could reflect those taken in the FGA whereby actions must be '*in accordance with the sustainable development principle*' (emphasis added).<sup>7</sup> However, they must also be broader in scope than the existing Welsh legislation or regulatory gaps risk appearing. The obligations should be imposed upon all Welsh public authorities and bodies undertaking actions on behalf of Wales (including WG, regulatory bodies and the courts) thereby ensuring that the objectives and principles underpin all Welsh policy and law at all stages –reflecting the current approach to EU environmental law.

### 2.2 *Omissions*

The Welsh Government's proposals also have omissions.

1) A key principle missing from the relevant Acts and what is proposed is the **precautionary principle**. Despite the claim that it is de facto included in the definition of 'sustainable management of natural resources', this gives a weak status to a key international and EU principle. This should not be interpreted as Wales not being precautionary in its approach. But expressly enshrining the precautionary principle as a principle driving forward Welsh policies is paramount and ensures a precautionary approach irrespective of who the decision-makers are in future.

2) Another absence is any explicit **commitment to maintain a high level of environmental protection in the development of future policies**. Article 191 of the Treaty on the Functioning of the European Union, in

setting out the principles that underpin EU environmental policy, provides that ‘Union policy on the environment shall aim for a high level of protection taking into account the diversity of situations in the various regions of the Union’. In the EU context, this overarching goal sets the framework within which the other environmental principles are interpreted. This is very different from the **non-regression principle**. The latter is about not decreasing the current level of protection/standards whilst the former is about fostering a spiral to the top and placing an obligation on the legislator to increase environmental protection and relevant standards. Para 1.5 of the WG’s consultation indicates that Brexit ‘provides an opportunity to develop a structure, which supports not only a commitment to non-regression, but more fundamentally a commitment to enhancing the environment to meet the challenges we face’ but the consultation document does not clarify whether such a commitment is actually enshrined in Welsh legislation. Such a commitment should be made stronger by maintaining this principle in Welsh environmental law and policy. To take it a step further, it would be highly desirable if Wales would also incorporate a **principle of environmental improvement**. To note, these three principles (high level of environmental protection, non-regression and environmental improvement) could act as over-arching objectives, which would strengthen the approach further and should all be incorporated expressly.

3) Incorporation of the **Aarhus principles** granting rights on individuals (and eNGOs) would be a worthwhile endeavour, especially considering the significance yet weaknesses of the existing judicial review system, as well as the loss of EU compliance mechanisms that currently work in tandem.

4) Other principles become of greater significance in a post-Brexit world – including ones addressing borders, cooperation (including within the UK) and the allocation of responsibilities across territory.<sup>8</sup> The **obligation to avoid transboundary environmental damage**, which is commonly recognised as a principle of international environmental law<sup>9</sup> should also be recognised as an environmental principle. Similarly, principles on cross-border cooperation, collaboration and participation should be encompassed, as for instance seen in the Espoo Convention. These principles will be relevant to the *internal* borders within the UK – indeed, they could be a useful driver for cross-UK collaboration on environmental governance (see below) – as well as with the EU and beyond.

5) **The principle of subsidiarity** should remain relevant after EU exit. Subsidiarity is concerned with the allocation of competences between different levels of government, from the local to the global. According to the principle, decisions should, as far as possible, be made by the lowest level of government. However, it also indicates that where circumstances indicate that coordinated decision-making or action would lead to greater efficiencies, e.g. due to the potential for transboundary effects, then some degree of centralisation might be appropriate.<sup>10</sup> The principle would assist in addressing both internal Welsh decision-making and also approaches to decision-making across the UK, through guiding when more localised or more centralised approaches are appropriate.<sup>11</sup> To play the role on a UK level it would need to be embodied within a UK common framework, but it could at least assist within Wales for the time being.

6) The **principle of integration** should become a central pillar of future Welsh legislation. The integration principle is essential to a holistic and effective system of environmental governance, rather than increasing the potential for a silo-ed approach. This is present within the TFEU and ensures that all EU policy must integrate considerations of a high level of protection of the environment. This would lead to the principles mentioned above being fully integrated and underpinning the **formulation of all (sectoral) law and policy at all stages** wherever relevant (not simply environmental law and policy) – as under EU law.

### 2.3 *Integration with principles of SMNR*

In addition to the above, WG has proposed that the duty to pursue the sustainable management of natural resources (SMNR) arising from the Environment Act be extended in its application, as this is deemed to embody a number of EU environmental principles. In itself, there may be merits in extending SMNR principles to include all existing and future Welsh public bodies, including the National Assembly for Wales (NAW) and WG.

In the previous consultation, concerns were raised about potential conflicts between these existing principles and the proposed principles if incorporated<sup>12</sup> – there are indeed some challenges. However, firstly, it needs to be borne in mind that legal principles, whilst binding, are malleable and do not demand specific outcomes unlike rules. Secondly, it would need to be clear which were the overarching objectives (e.g. non-regression, a high level of environmental protection, and environmental improvement) that all the principles were to be interpreted in light of, thereby facilitating coherence. Placing environmental protection principles subordinate to duties to carry out sustainable development, say, raises familiar concerns that environmental obligations become weakened within an approach more concerned with balance.<sup>13</sup>

Our understanding of the proposals is that WG is seeking to make these extensions in order to address the environmental governance challenges of Brexit in a holistic fashion: not simply seeking to plug gaps with new measures, but to think through how strategies for dealing with post-Brexit governance gaps might be integrated with existing Welsh approaches as enshrined in the FGA, the Environment Act and the Planning (Wales) Act 2015. This in itself is laudable, not least because the consultation document seems to recognise that this process of integration pushes two ways: adjusting ‘new’ measures to align with the Welsh context but also being prepared to adjust existing Welsh arrangements to adopt the best features of EU approaches. However, the net result is rather complex and, moreover some of the consultation questions are too reductionist for the issues at hand. This is all more apparent with the second main topic of interest to the CCERA – the proposed governance body.

### **3.0 A new environmental governance body?**

The Committee is seeking views on *gaps in environmental governance structures ...post-Brexit in Wales and whether the Welsh Government’s analysis (within the consultation) correctly and comprehensively identifies the deficiencies; The Welsh Government’s consultation proposals and questions regarding the ...function/constitution/scope of the proposed governance body.*

#### *3.1 Overarching issues - integration*

Creating an entity in and for Wales, to replace the salient environmental tasks previously conducted by EU institutions – i.e. oversight and scrutiny, receiving complaints, enforcement – is very important. We support WG’s ambitions in pursuing this task with a view to creating new institutions that are holistic in scope (in their treatment of the environment) and integrated with existing Welsh machinery. This raises complex questions with potentially far-reaching implications for that existing machinery. Thus, we support WG’s expressed intentions to encourage a ‘wide conversation’.<sup>14</sup> In its consultation, WG also seeks to direct respondents’ attention to the qualities (status, functions, powers) that any new environment body should have, rather than any specific model. We offer specific responses to these qualities below, but we also believe that the way that the issue has been reduced to a series of fairly narrow questions, framed as ‘deficiencies’ may have obscured key issues.

One key point that makes considering new governance arrangements complex is that thinking through how it fits with existing arrangements, and potential deficiencies, has **multiple dimensions**. The new proposals need to address issues of *scope* (i.e. what issues, which aspects of the environment, what range of functions) need



to be covered by any new or revised governance mechanisms and are there any gaps, overlaps or conflicts? They also need to address the dimension of *power* that any governance mechanisms should have i.e. how is goal-setting to be done and how is implementation and compliance to be driven? In the consultation, it looks like WG is interested in both dimensions. Through gap analysis, they are seeking to assess how to replace governance mechanisms pertaining especially to EU environmental legislation and how far existing bodies might do the job (scope). But, in the name of integration and coherence, they are also interested in how far EU-style governance mechanisms (for complaints, enforcement etc) could be instituted to apply across existing Welsh environmental governance systems. We think these are the right questions, but it raises a number of challenges.

**1) Information asymmetry.** Forming a view is made difficult by the fact there is reasonable research evidence about the efficacy of EU-style environmental governance mechanisms (and their problems). However, the innovative Welsh legislation on the environment and its associated governance mechanisms are still new and there is little research as to how well it works.<sup>15</sup> This makes it difficult to judge how far existing mechanisms should be adjusted to acquire more EU-style qualities, or whether the implementation of EU environmental legislation can be adequately addressed by embracing it within existing Welsh approaches.

**2) Regulatory culture.** A major cross-cutting challenge for the UK as a whole in seeking to resolve the environmental governance gap created by the EU is how far UK legal norms, based on common law and an emphasis on procedural compliance can evolve to give greater emphasis on substantive compliance, to hold governments and other public bodies to account for the delivery of environmental goals, standards and targets. Wales is perhaps slightly better placed in this regard than other parts of the UK, in that the FGA is already making public bodies accountable for delivering a wider range of goals. However, many of the principles within Welsh legislation are procedural in nature rather than substantive,<sup>16</sup> making them more slippery objects on which to hold people to account and drive implementation, and where goals exist they lack the precision associated with EU legislation, which facilitate effective monitoring, oversight and enforcement. It would be glib therefore to suggest that EU-style governance mechanisms for driving implementation could be simply stretched to embrace Welsh legislation. Equally, the governance approaches of Welsh legislation (in terms of power) often adopt a very different approach compared to EU environmental governance i.e. the processes are designed to be more consensual and about encouragement, and the objectives are often expressed in less ‘hard-edged’ ways against which implementation can be assessed, being more concerned about balancing economic, social and environmental concerns. Bringing former EU environmental legislation within existing Welsh approaches might therefore amount to weakening them, compared to how they operate currently.

Arguably the challenges of institutional integration are the thorniest in respect of the Future Generations Commissioner (FGC), in that the environmental issues addressed by EU legislation could be considered as just a subset of its remit with respect to well-being (i.e. the FGC’s scope is wider), but the powers of the FGC to drive implementation are arguably weaker than provided by EU institutions at present. If the FGC remains separate from the proposed environment body there must be an expectation that the two will closely collaborate. Such functions would promote holistic approaches, collaboration and joined up thinking when formulating future environmental policies to achieve sustainable development.<sup>17</sup> In the longer term, the small size of Wales might raise questions about having separate ‘watchdogs’ for environmental protection and sustainable development, but any consideration of merger would require informed discussion, including about whether the performance of the FGA and Environment Acts should themselves be subject to the more robust scrutiny, complaints and enforcement mechanisms characterised by EU environmental governance.

### 3.2 *Specific concerns*

There are aspects of WG's proposals that are very positive, notably the aim to make any new body accountable to the NAW and to give independence over appointments and setting of budgets. However, we have a series of more specific concerns about the proposal and the qualities that any new arrangements should have:

1) **Reporting on the application of environmental laws.** The consultation document provides significant details on present environment and sustainability-related reporting arrangements required under Welsh legislation, but it is not clear on how far these would fill the potential vacuum left by EU obligations in terms of: (i) focus on the implementation of environmental legislation and the level of detail associated with that, and (ii) arrangements for publication and accountability. It would be helpful if WG could present further assessment of how far existing environment and sustainability-related reporting arrangements in Wales would fill the potential vacuum left by EU obligations. We recommend that the legislation establishing the new body should provide it with a statutory duty to report regularly on government progress towards achieving its environmental policy goals. As a matter of transparency, each report should be made publically available. The public should also receive regular, authoritative and independent reports on progress towards the government's environmental policy goals by the proposed body. There may also be merits in transposing current obligations on actors or public bodies to report to the EU over to any new body. This would facilitate its reporting capacity and provide the information to conduct closer investigations of particular implementation problems.

2) **Integration with existing bodies.** WG asks 'what role should existing accountability bodies provide in a new environmental governance structure for Wales?' (Question 6). This consultation question is an awkward way of structuring debate around the complex issues entailed and, as we have suggested above, the issue of how existing organisational roles fit within any new environmental governance structure raises dilemmas. While one can understand why WG warns respondents against advocating specific organisational models, it is often only once one thinks about particular organisational forms that the tensions become clear.

Assuming that existing bodies retain environment-related parts of their role creates the risk of fragmented treatment of environmental issues, with any new body addressing only those bits of environment governed by EU legislation not caught in existing Welsh legislation. It also for instance assumes that extant Welsh legislation like the FGA and Environment Act are the examples to follow in a post-Brexit situation, when they were drafted in the context of EU membership i.e. without robust enforcement mechanisms in the event of implementation failure on key environmental issues.

3) **Scope.** The WG is to be commended for pushing for an 'all-encompassing scope' for the new governance arrangements with respect to the environment, and for embracing climate change (*contra* England). The concept of 'natural resources' likely to underpin the ambit of any new body is broad but also explicitly flexible (consultation document para 3.29). One can observe environmental issues that are not specifically listed, though might be encompassed e.g. noise, light pollution, landscape. However, it is also important that the new governance arrangements can engage with the strong environmental dimensions of agricultural and food policy, human and environmental health and with planning.<sup>18</sup> With the latter, there is scope to align planning more firmly to the delivery of environmental goals, a step with evident support among many planning practitioners,<sup>19</sup> as is already underway with alignment to the FGA.

In line with the integration principle, the actions of all public bodies (including WG) should be overseen by the proposed body when they are acting as competent authorities, that is when their decision-making functions and actions impact on the environment (either directly or indirectly).

4) **Powers.** Any new body should have the following powers:

*a. Act in an independent advisory capacity.*

It would highlight issues of its own choosing as part of its scrutiny and compliance functions, as well as responding to advice requests and **proposals for legislative change**.

A matter of great concern is the gap in institutional support, capacity and evidence gathering created by leaving the EU. Sharing information, knowledge and expertise was a key aspect of the EU, especially with bodies such as the European Environmental Agency (EEA) or the European Food Safety Authority (EFSA). The lack of participation in such entities could be felt when formulating new policies and legislation. We recommend that Wales/the UK remain a member of the EEA to remedy to this issue, ensure evidence gathering and access to a larger pool of scientific expertise in environmental matters. It would also save on the costs of having to generate ‘national’ data that would simply replicate what is already available.

*b. Able to oversee and scrutinise.*

The new body should exercise scrutiny functions in order to identify weaknesses and potential improvements within the present legislative framework, covering actions and potential actions across all public bodies, where they pertain to environmental protection. Both formal and informal mechanisms should be created to investigate concerns about government and other public bodies’ implementation of environmental law, and hold them to account.

*c. Investigating complaints from members of the public and guaranteeing citizens’ rights.*

Mechanisms for individuals or organisations to make an official complaint and free of charge about alleged failings in relation to environmental law and governance must be maintained. The fact that individuals can write to their AM, the Assembly or the Public Services Ombudsman is not an adequate substitute. None combine the expertise in environmental law, the independence and the powers of the European Commission.

Similarly to the Commission, the new body should have discretion to decide whether to accept individual complaints. Where complaints are accepted the new body must have effective powers to investigate them, to require competent authorities to co-operate with those investigations and to compel timely compliance where failings are identified.

*d. Enforcement actions.*

Powers to refer a government and other public bodies to court for alleged failings in implementing environmental law is vital. Again, it is clear that withdrawal from the EU will create a lacuna in this area. Currently, in the UK no public authority has power to bring proceedings against government in relation to environmental issues. Moreover, as noted above, there is a need to enable enforcement in the context of non-achievement of targets and standards rather than just procedural compliance.<sup>20</sup>

Similarly, there is much concern that the loss of the powers to fine governments for non-compliance with CJEU judgements represents the loss of a significant lever for driving enforcement. The power for courts to impose fines on the government and other public bodies should be seriously considered. It is a positive feature of WG’s consultation that they entertain alternative enforcement mechanisms such as ‘stop notice’ type actions (where problems are urgent) and restorative justice. Fines collected could be utilised for environmental benefits, i.e. fund projects that would enhance environmental protection.

*e. Links to the environmental principles.*

The proposed body should have oversight over all environmental obligations, both national and international. If environmental principles are to have practical meaning, the new body should be able to call the government to account for failing to meet all environmental obligations – including through failure to act adequately in

accordance with the environmental principles. It should be borne in mind that principles by their nature guide rather than typically mandating specific outcomes, thereby still leaving considerable discretion to the government as to how they implement such principles.

*f. Relationship with judicial review.*

The proposed body should have the power to intervene in judicial review applications concerning the implementation and application of environmental law by competent authorities.

Furthermore, whilst judicial review (in conjunction with the Aarhus principles) by eNGOs in particular is an important tool, despite the suggestions in DEFRA's proposals, it is not an adequate substitute for the European Commission's current powers due its focus on process rather than merits, its high costs and short timeframe to bring a case (UKELA, 2018, Jack and Petetin 2018).<sup>21</sup> There is a risk that if the Commission's role is lost and not replaced by an effective domestic body, then the eNGOs would find themselves playing the supervisory role by default – impacting negatively on the eNGOs' other roles and environmental governance.

#### **4.0 A UK joined approach**

The Committee is seeking views on *the value and practicality of a UK joined approach given the [UK Government's Department of Environment Food and Rural Affairs' \(DEFRA\) proposal](#) that new governance structures in England could exercise functions more widely across the UK.*

##### **4.1 The value of cross-UK mechanisms**

There is much value in the new post-Brexit environmental governance arrangements for the UK operating on a cross-UK basis, and it is very positive that WG's consultation proposals recognise this. It has been recommended by the NAWCCERA in its previous reports, and we have argued for it previously as have other organisations.<sup>22</sup> Creating machinery for environmental governance that operates across the UK would have benefits for:

- Dealing with cross-UK environmental issues in a coherent way, whether that be environmental issues that straddle borders between the UK's constituent nations; issues that have an international dimension, such as complying with international conventions; or issues linked to trade.
- The power and efficacy of the governance arrangements themselves, because cross-UK mechanisms would be independent from any one government or legislature, and provide a framework in which constituent nations could hold each other to account for delivery.
- It would also be fit for the new challenges of Brexit, such as offering scrutiny and oversight for Common Frameworks and dealing with risks such as UK nations – outwith the legislative frameworks of the EU - backsliding on environmental protections to attract jobs.
- One can envisage wider staffing and streamlining benefits, as well as enhanced scope for cross-UK learning. UK-level ring-fencing of funding would also reduce competition for resources with other priorities.

Creating effective cross-UK environmental governance arrangements is also required by the EU Withdrawal Agreement and the Irish backstop provisions.

##### **4.2 Practical issues**

In considering what those cross-national arrangements could be, we do not consider that the main contender should be that the new arrangements being proposed by DEFRA for England could exercise functions across the UK. This is under consideration for Northern Ireland, but as a *force majeure* solution given the ongoing collapse of devolved government and with significant concerns raised even so.<sup>23</sup> Doing the same for Wales

would amount to a significant reverse of devolution – the environment being a highly devolved issue – and proposals emanating from and designed for an England/Westminster setting would fit poorly with the democratic and legislative arrangements that have developed in Wales.

If cross-UK arrangements are to emerge, then they would need to be designed collaboratively in a way that enables them to embrace shared concerns about environmental principles, standards and processes of enforcement, without unduly constraining the ability of the devolved governments to pursue approaches to environmental protection appropriate to local circumstances.<sup>24</sup> **Subsidiarity** and **proportionality** are important here. However, pursuing cross-UK environmental governance arrangements also raises broader issues. Designing effective, cross-UK environmental governance issues raises potential trade-offs between accountability (e.g. to Wales) and environmental efficacy (for those aspects served by a cross-UK approach), in that it may entail some pooling of sovereignty on environmental issues across the UK.

Nevertheless, there is cross-UK recognition of the merits of cross-UK environmental governance arrangements, caveated by concerns for the devolution settlement and the process by which shared arrangements are created.<sup>25</sup> The problems are practical, and fall into two categories.

### *1) Time*

The need to avoid environmental governance gaps created by Brexit in the short term has driven DEFRA to act; the devolved governments, for various reasons, have moved more slowly. As a result, the timeframes at which London, Edinburgh and Cardiff are moving are mismatched, and this – and the ticking of the Brexit clock – makes effective collaboration difficult. The time dimension is especially important given that thinking carefully about shared UK arrangements for environmental governance requires more time and bandwidth than is likely to be available.

A key question for cross-UK collaboration is how to manage short-term uncertainties in such a way that better, more integrated, cross-UK approaches are not ‘locked out’ in future. Professor Colin Reid at Dundee University makes useful suggestions:<sup>26</sup>

- *Any new arrangement should not needlessly impede collaboration*, e.g. they should enable the sharing of data between bodies exercising similar functions in other parts of the UK.
- *The different administrations should agree to review the position in a few years’ time to see if there is scope for improvement*, such as streamlining or closer integration. It is a widely shared view that the intra-UK governance architecture will need reinforcement, post-Brexit, to address various new demands placed upon it;<sup>27</sup> the scope for more collaborative environmental governance arrangements, with cross-UK reach, may co-evolve with these wider developments.

### *2) Substance*

The second problem is envisaging the substantive form of any shared arrangements, given the time frame and the different national circumstances and institutional design principles that need to be balanced. One might envisage this in terms of creating some portmanteau cross-UK arrangements in which the various bodies serving the UK nations would sit, and then within that portmanteau there being layers of collaboration which could be built up over time. Perhaps the first ‘layer’ for cross-UK collaborative governance could focus on monitoring and reporting protocols and external compliance, and be performed by an institution similar to the JNCC. A second layer might apply the format of the Climate Change Commission – its monitoring, scrutiny and reporting function - for other dimensions of environment on a cross-UK basis.

Importantly, the ability of EU institutions to drive environmental policy implementation across the EU is built on principles and legislation that are themselves shared across the Member States. Similarly, the scope for

‘deep’ cross-UK collaboration in environmental governance would depend on how far environmental legislation across the UK exhibits common features. WG is right in its consultation to raise the prospect of instituting a set of shared environmental principles for the UK as a whole. Doing this would facilitate cross-UK governance of environmental issues. Effective cross-UK action would also depend on the extent to which the constituent UK governments support Common Frameworks in the environmental field.<sup>28</sup>

<sup>1</sup> E.g. [https://www.parliament.scot/S5\\_Environment/Meeting%20Papers/ECCLR\\_2018.04.30\\_Meeting\\_papers\\_\(public\).pdf](https://www.parliament.scot/S5_Environment/Meeting%20Papers/ECCLR_2018.04.30_Meeting_papers_(public).pdf) .dated 30<sup>th</sup> April – p.41 (aka 13); also C. Reid, submission to the Scottish Government Consultation (19<sup>th</sup> May 2019).

<sup>2</sup> E.g. M. Lee, ‘The New Office for Environmental Protection: Scrutinising and Enforcing Environmental Law after Brexit’, 18 January 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3312296](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312296); and Environmental Audit Committee, *Report on the Scrutiny of the Draft Environment (Principles and Governance) Bill*, 25 April 2019, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/>.

<sup>3</sup> E.g. M. Lee and E. Scotford, ‘Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill’, 30 January 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3322341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3322341); M. Dobbs, ‘Environmental Principles in the Environment Bill’, 30<sup>th</sup> January 2019, <https://www.brexitenvironment.co.uk/2019/01/30/environmental-principles-environment-bill/>; and M. Dobbs and L. Petetin, Written Evidence to the EFRA Scrutiny of the draft Environment (Governance and Principles) Bill, (January 2019) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/prelegislative-scrutiny-of-the-draft-environment-principles-and-governance-bill/written/95916.html>.

<sup>4</sup> E.g. C. Brennan, M. Dobbs & V. Gravey, ‘Out of the Frying Pan, Into the Fire? Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland’, (2019) *Environmental Law Review* (forthcoming), pre-proof version available at: [https://eprint.ncl.ac.uk/file\\_store/production/256535/D066ED55-7546-446C-875D-7A4590826805.pdf](https://eprint.ncl.ac.uk/file_store/production/256535/D066ED55-7546-446C-875D-7A4590826805.pdf).

<sup>5</sup> E.g. *ibid*; Environmental Audit Committee, *Report on the Scrutiny of the Draft Environment (Principles and Governance) Bill*, 25 April 2019, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/> and Dobbs & Petetin, *op cit.* n3.

<sup>6</sup> E.g. Environmental Audit Committee, *The Government’s 25 Year Plan for the Environment*, HC 803, 24 July 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>; Select Committee on the Natural Environment and Rural Communities Act 2006, *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?*, HL 99, 22 March 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/ldnerc/99/99.pdf>; and <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/environmental-principles-and-governance-consultation/oral/85180.html>.

<sup>7</sup> Similarly, express, mandatory obligations are imposed within the Environment Act (Wales) 2016.

<sup>8</sup> See a range of proposed objectives and principles in Brennan, Dobbs & Gravey, *op cit.* n4.

<sup>9</sup> R. Bratspies and R. Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, (CUP, 2006); and B. Jack and L. Petetin, *Environmental principles and governance after EU exit*, (2018) available at: <http://orca.cf.ac.uk/114856/>.

<sup>10</sup> M. Dobbs, ‘Attaining Subsidiarity Based Multilevel Governance of Genetically Modified Cultivation?’ (2016) 28(2) *Journal of Environmental Law* 245-273. Author accepted version available at: [https://pure.qub.ac.uk/portal/files/17421201/Dobbs\\_Ataining\\_SBMLG\\_of\\_GM\\_Cultivation\\_accepted\\_version.pdf](https://pure.qub.ac.uk/portal/files/17421201/Dobbs_Ataining_SBMLG_of_GM_Cultivation_accepted_version.pdf). See also, L. Petetin, ‘Managing Novel Food Technologies and Member States’ Interests: Shifting more Powers towards the Member States?’ in M. Varju (eds), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019) 233-253.

<sup>11</sup> A. Engel and L. Petetin, ‘International Obligations and Devolved Powers – Ploughing through Competences and GM Crops’, (2018) 20 (1) *Environmental Law Review*, 16 <http://journals.sagepub.com/doi/abs/10.1177/1461452918759639>.

<sup>12</sup> L. Walker and K. Orford, *Environmental governance post-Brexit: closing the ‘governance gap’*, 27 June 2018, <https://seneddresearch.blog/2018/06/27/environmental-governance-post-brexit-closing-the-governance-gap/>; V. Jenkins, Evidence to the CCERA on *European Union Environmental Governance and Principles*, 10<sup>th</sup> May 2018, <http://senedd.assembly.wales/documents/s74961/Evidence%20paper%20from%20Dr%20Victoria%20Jenkins.pdf>

<sup>13</sup> V. Jenkins, ‘Sustainable Management of Natural Resources: lessons from Wales’, (2018) 30:3 *Journal of Environmental Law*, 399-423, <https://academic.oup.com/jel/article-abstract/30/3/399/5032465>.

<sup>14</sup> WG, Consultation on *Environmental Principles and Governance in Wales Post European Union Exit*, 18<sup>th</sup> March 2019, WG35189, <https://gov.wales/sites/default/files/consultations/2019-03/eu-exit-consultation-document.pdf>, section 3.24, p.27.

<sup>15</sup> Jenkins, *op cit.* n13.

<sup>16</sup> See the table in the consultation document, page 17.

<sup>17</sup> L. Petetin and M. Dobbs, ‘Collaborating for Agricultural Sustainability’, 13 June 2018, <http://blogs.cardiff.ac.uk/environmental-justice-research-unit/2018/06/13/collaborating-agricultural-sustainability/>.

<sup>18</sup> L. Petetin, M. Dobbs and V. Gravey, Written Evidence to WG ‘Brexit and Our Land’ Consultation, October 2018, available [https://pure.qub.ac.uk/portal/en/publications/written-evidence-submitted-to-the-welsh-government-on-brexit-and-our-land-consultation/cffc26d7-37bf-4023-be22-59de5e7a7635\).html](https://pure.qub.ac.uk/portal/en/publications/written-evidence-submitted-to-the-welsh-government-on-brexit-and-our-land-consultation/cffc26d7-37bf-4023-be22-59de5e7a7635).html).

<sup>19</sup> RTPI, ‘Environmental Planning After Brexit’, January 2019, [https://www.rtpi.org.uk/media/3186871/environmental\\_planning\\_after\\_brexit.pdf](https://www.rtpi.org.uk/media/3186871/environmental_planning_after_brexit.pdf).

<sup>20</sup> Reference HoC EAC Report para 1.22.

<sup>21</sup> Brennan, Dobbs and Gravey, *op cit.* n4.

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<sup>22</sup> E.g., Petetin and Dobbs, op cit. n3. For a more exhaustive account of the benefits, see the report by the Broadway Initiative <https://www.iema.net/assets/newbuild/Broadway/Governing%20the%20environment%20-%20is%20there%20a%20case%20for%20UK%20nations%20sharing%20architecture.pdf>

<sup>23</sup> V. Gravey and M. Dobbs, Supplementary evidence to the EFRA Scrutiny of the draft Environment (Governance and Principles) Bill, (March 2019) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/prelegislative-scrutiny-of-the-draft-environment-principles-and-governance-bill/written/98726.html>.

<sup>24</sup> Brennan, Dobbs and Gravey, op cit. n4. section 4.1; and Dobbs, op cit. n10.

<sup>25</sup> E.g. Explanatory Notes to the Draft Environment (Principles and Governance Bill), p.40, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766849/draft-environment-bill-governance-principles.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf); Welsh Government consultation, page 35; Interim Scottish Government response to the 4<sup>th</sup> Report on Common Frameworks, 25 April 2019, [https://www.parliament.scot/S5\\_Finance/General%20Documents/scot\\_gov\\_response.pdf](https://www.parliament.scot/S5_Finance/General%20Documents/scot_gov_response.pdf); and Cabinet Office, The European Union (Withdrawal) Act and Common Frameworks, 2018 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/788764/CCS207\\_EUWithdrawalActAndCommonFrameworks.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788764/CCS207_EUWithdrawalActAndCommonFrameworks.pdf).

<sup>26</sup> Reid, op cit. n1. These have been supported by the House of Commons Environment, Food and Rural Affairs Select Committee in its *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill* (2017-19 HC 1893, para.139).

<sup>27</sup> For example, Welsh Government Brexit and Devolution – Securing Wales’ Future; and C., Burns, N. Carter, R. Cowell, P. Eckersley, F. Farstad, V. Gravey, A. Jordan, B. Moore, and C. Reid, (2018) *Environmental policy in a devolved United Kingdom: Challenges and opportunities after Brexit*, <https://www.brexitenvironment.co.uk/wp-content/uploads/2018/10/BrexitEnvUKReport.pdf>.

<sup>28</sup> For further on common frameworks see for instance, V. Gravey, Evidence to the CCERA on *Common Frameworks on Agriculture and Environment*, 2018, <http://senedd.assembly.wales/documents/s75638/UK%20Dr%20Viviane%20Gravey%20-%20Queens%20University%20Belfast.pdf>; or Brennan, Dobbs and Gravey, op cit. n4, section 4.1.

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol as ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : Dr Victoria Jenkins, Gweithgor Cymdeithas Cyfraith Amgylcheddol y DU yng Nghymru

Evidence from : Dr Victoria Jenkins, UK Environmental Law Association Wales Working Party

The UK Environmental Law Association aims to make better law for the environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by UKELA's Wales Working Party (UKELA WWP), following a consultation event with the wider membership in Wales and on the request of and in discussion with the Brexit Task Force.

UKELA WWP makes the following comments on the proposals.

## **Overview**

1. UKELA WWP welcomes the consultation paper published by the Welsh Government in March 2019 entitled: *Environmental Principles and Governance in Wales Post European Union Exit* (EPGW Consultation). UKELA regards the matters discussed as being critical to UK environmental law, including EU derived law, post-Brexit. It is crucial to be clear at the earliest possible stage how environmental law and governance fits and supports the Welsh Government's long-term aspirations for environmental protection.

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2. UKELA WWP welcomes Welsh Government's recognition that there will be governance gaps in environmental protection on EU exit and its approach in considering in broad terms what this might mean for environmental governance in Wales going forward. It is appropriate to start this process by asking for comment on the key issues around environmental principles and accountability before making progress on the design of any new arrangements that might result from this. Nevertheless, this means it will be prudent to also consult on proposals regarding the more concrete organisational structures that subsequently emerge.

## **ENVIRONMENTAL PRINCIPLES**

**1: Do you agree the following principles should be included within legislation for Wales? – Rectification at source; and Polluter pays**

**2: Do you think there are other principles, which may also need to be included?**

3. UKELA WWP believe that all four EU environmental principles currently referred to in Article 191 Treaty on Functioning of the European Union (TFEU) should be supported within legislation in Wales following EU exit.
4. We note that Wales already has a number of principles contained in the Well-Being of Future Generations (Wales) Act 2015 and Environment (Wales) Act 2016 and we agree that we would wish to avoid any overlap. However, the principles contained in these Acts are included in support of a well-being agenda across government that can be clearly distinguished from the specific needs of environmental protection; and, in support of the operationalisation or Sustainable Management of Natural Resources (SMNR).
5. We also disagree that these Acts sufficiently address the precautionary principle. In particular, the precautionary principle cannot be equated with the principle that it is

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important to “take account of all relevant evidence and gather evidence in respect of uncertainties” (s4 Environment (Wales) Act 2016). IT is also significant that this only applies at present to the Welsh Ministers and NRW, but perhaps most importantly it is arguably not equivalent to the current interpretation of the precautionary principle in the EU.

6. The principle of a high level of environmental protection has also been significant in EU environmental law. It may be prudent to consider whether this should be included, if not as a principle within Welsh legislation then as an important objective. One criticism of the draft Environment (Principles and Governance) Bill proposed by the UK government has been that although it identified key environmental principles it appeared to discard the rest of Article 191 of the Treaty for European Union. This states -

Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

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**3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?**

**4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?**

7. UKELA WWP supports the extension of these principles to all public bodies in Wales 'so far as they are relevant to the discharge of their functions'. A legislative provision to this effect would ensure that these principles are considered in the work of these bodies wherever relevant without creating a duty for them to pursue them exclusively.

## **ACCOUNTABILITY**

**5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?**

8. The UKELA WWP agrees that there will be governance gaps relating to:
- independent accountability;
  - a simple and inexpensive mechanism to raise complaints; and
  - enforcement mechanisms.
9. Specifically, we see gaps arising in the following respects:
- standards of reporting data and implementation information to the Commission.
  - enforcement by the Commission, and the CJEU, including sanctions for persistent breach of environmental laws. There will no longer be a means of bringing government departments and public bodies to account and challenging non-compliance with environmental laws. This cannot be achieved by any of the bodies

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currently operating in Wales nor by the National Assembly.

- The legal requirement on government to ensure that penalties for breaches are “effective, proportionate and dissuasive”.  
(see e.g. Water, Waste, Air Quality Framework Directives, REACH etc)
- Right of individuals to activate enforcement of environmental laws, at no cost, through complaints to Commission.
- Uncontentious, ‘even’ application of EU derived environmental laws and environmental principles throughout the UK.

## **6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?**

10. UKELA WWP considers that this question cannot be answered without establishing what the new approach to environmental governance will be. However, we also note that there are already a number of Commissioner’s operating in Wales, none of which are suitable to take on this role including the Future Generations Commissioner.

11. We would not support this role being taken on by the Future Generations Commissioner (FGC) because this would result in the protection of the environment being subsumed into the wider role of the FGC. Nor does the FGC currently have the independence that we would like to see for the new body.

12. To establish any body that is capable of bringing government departments and public bodies to account absolutely requires a body with a strong measure of independence from the executive, and this can be done either through its relationship with the national Parliament (National Assembly for Wales) or through establishing it as part of the existing audit body. Therefore, we consider that the Commissioner for the Environment and Sustainable Development in Canada might be a possible model.

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## **7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?**

13. UKELA WWP agrees that the role of the new body should not be confined to advocacy but involve scrutiny of the actions of Welsh Government regarding the implementation of environmental law. This will effectively extend to ensuring holding Welsh Government to account for the work of NRW.
14. It should be noted that ensuring legislation is developed in line with the principles in Welsh legislation is quite different to overseeing implementation and delivery on the objectives of environmental law. If this body is going to be involved in the development of environmental law in Wales it will need to have a statutory obligation to keep abreast of developments in science and law around the world, including the EU.
15. Careful consideration needs to be given to the prudence of providing the new environmental body with both a role in advocacy and legislative development with scrutiny of the implementation of environmental law in Wales.
16. It is especially important that the new body can receive and will respond to complaints from citizens, but it is also important that it should be able to take action of its own volition as the EU Commission currently does.

## **8: Which policy areas should be included within the scope of new governance arrangements?**

17. We agree that safeguarding Wales's natural resources should be the overall objective of the new body.

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18. The remit of the new body should be all encompassing and extend to all policy areas that interact with the environment. This would mirror the current approach of the EU Commission that considers environmental effects across all areas of competence.

**9: Do you consider the proposed list of bodies to be appropriate?**

**10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?**

19. It is our view that the environmental principles and the law applying these should apply to all public bodies and it follows, therefore, that accountability to the new environment body should also be extended in this way. Doing less than this is not full implementation of the *acquis communautaire* and is inconsistent with a principle of non-regression in environmental protection after EU exit. Where responsibility for the environment has been devolved, as in Wales, responsibility for ensuring non-regression will be a responsibility for the Welsh Government, not just the UK government.

**11: What should be the status, form and constitution of an oversight body?**

20. The new environmental body should have the highest level of independence and strong connections with the Assembly. It should not be appointed by Welsh Government. Appointment might involve an Assembly Committee perhaps equivalent to the Environmental Audit Committee in Parliament. We note the Chair of Natural England is scrutinised by the Select Committee and we might do something similar in Wales but provide the Assembly with greater powers of scrutiny.

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21. The budget of the new body should be fixed in legislation. Although there will clearly need to be the possibility of review budget cuts should be subject to careful monitoring.

## **12: Should an oversight body be able to act in an advisory capacity?**

22. The role of this body in providing advice to government needs careful thought. It should not duplicate, or appear to duplicate, the work of NRW or that of the Future Generations Commissioner.

23. There is a significant difference between public bodies being able to request advice from the body (or indeed it being able to proffer advice) and the body providing advice as part of its scrutiny and compliance functions.

24. As stated above, it is also important to consider the prudence of providing this body with both a role in advocacy and legislative development with scrutiny of the implementation of environmental law in Wales.

## **13: Should an oversight body be able to scrutinise implementation of environmental legislation?**

## **14: What should be the extent of this function?**

25. Scrutiny can involve monitoring and reporting that includes data collection. It is important to recognise that environmental data collection can also feed into the development of environmental law and be important to environmental management. The different objectives of data collection will lead to very different approaches to the nature and extent of that process.

26. NRW function in data collection is to produce a State of Natural Resources Report that exists them in their role in the management of those resources and feeds into  
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**Pack Page 39**

the development of the National Natural Resources Policy that provides strategic direction for SMNR in Wales.

27. Data collection is also an essential element of the process of monitoring and reporting to the EU Commission on the implementation of environmental legislation. This function is quite different to that provided by the State of Natural Resources Report.

28. The National Assembly for Wales has created a fairly strong system of scrutiny through its Committee system. Nevertheless, the inquiries tend to be general and thematic. The approach of the National Assembly for Wales reflects the fact that its role is to provide general oversight as a non-expert body.

29. The new body needs to be able to scrutinise, in an expert way (that expertise including knowledge and understanding of both the science and policy, legislation implementation context), the way in which specific pieces of legislation or targets are being met. An example would be air pollution targets.

**15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?**

30. UKELA WWP believes that it is essential that citizens should be able to make a complaint to the new environmental body and that this route of complaint should be both simple in its operation and free of charge.

31. However, we also recognise that will be important that the environment body has the power to dismiss vexatious claims and discretion to decide on and prioritise appropriate responses to citizen's complaints. Nevertheless, it is vital that procedures are clearly transparent. Citizen's complaints must also always be subject to some form of response if the new body is to gain legitimacy.

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32. The idea of providing recommendations at this stage seems odd. Either the environment body will decide not to take up the complaint (in which case the individual will be notified of this) or the environment body will decide to take up the complaint and the informal process of consultation with the public body involved will begin.

33. The investigatory powers of this body must be clearly underlined to its purposes to ensure that there is no overlap with other bodies such as the Future Generations Commissioner and the Public Services Ombudsman. The introduction of a Citizens Complaints portal or some such device might be utilised to put this into good effect.

**16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?**

34. A system of informal communication followed should be adopted to replicate the current arrangements adopted by the EU, but it is vital in ensuring that recourse to the courts remains an avenue of last resort.

**17: What enforcement actions do you consider need to be available?**

35. UKELA WWP believes that a mechanism for referral of cases investigated by the new environmental body to the courts is essential. We do not consider judicial review to be sufficient in itself in this context. In particular, the court should be able to review government decisions on their merits. Therefore, UKELA WWP advocates the use of court mechanism such as a tribunal as the preferred route of challenge for the new environment body, with access to judicial review available as a last resort.

36. We note that at present the General Regulatory Chamber of the First Tier Tribunal deals with environment cases. This is an England and Wales body. There may be merit in continuing to refer cases to this body where those involved are currently

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developing expertise in relation to such cases.

37. The tribunal mechanism is preferred because the approach is more investigatory and focused on providing solutions than simply focusing on procedural issues as is usually the case in judicial review.

38. Whatever judicial enforcement mechanism is decided upon considerable thought must be given to issues of access to justice. The problems that judicial review presents in environmental cases are well documented and the need to comply with the Aarhus Convention is paramount.

39. Timely resolution of cases will also be an important consideration and the use of financial sanctions may also be prudent.

## **Working across the UK**

### **18: Would there be advantages in have a shared core set of common environmental principles?**

40. Safeguarding natural resources is an objective that should be of importance to all four nations of the UK and, crucially, cannot be achieved, especially on the island of Great Britain, without full co-operation.

41. The core principles of EU environmental law have created a shared vision of the way forward for environmental protection for many years now and this approach is vital to the continued success of environmental policies and law.

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42. UKELA WWP urges the UK Government and devolved administrations to achieve agreement or close cooperation with each other to ensure that (i) common environmental principles are adopted and (ii) that the environmental principles are applied in a similar way across the UK.
43. This will also help ensure consistent commitment to the UK's international environmental obligations. It will also present a common position on environmental protection to trading partners and third countries generally and set standards for international co-operation and collaboration.
44. The fact that the list of principles in the EU (Withdrawal) Act 2018 is different to that in existing relevant Welsh legislation adds complexity. So too does the intention to provide a statement of those principles as there may be differences between the four nations in their interpretation.
45. It is essential to environmental protection and the safeguarding of natural resources across all four nations that they are able to act by mutual agreement and it is vital that institutional mechanisms are created to support this.

**19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations.**

46. UKELA WWP suggests that one possibility is a common structure, such as the one for the UK Climate Change Committee. The new arrangements must fully respect national/devolved laws and differences, pool resources, set common frameworks of recognisable environmental principles and common standards and methods of applying them. It should also include machinery to challenge government departments and public bodies for non-compliance with environmental legislation.

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47. Alternatively, we should at least provide a duty of collaboration with bodies with comparable functions in all other parts of the UK, and legislative provisions which will both allow and encourage the adoption and promotion of similar principles and standards.

48. Finally, there would be real merit in setting a duty to review these arrangements for common frameworks with counterparts in other parts of the UK, for example within 5 years.

### **UK Environmental Law Association Wales Working Party**

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**Pack Page 44**

By email

31 May 2019

RE: Correspondence from the Climate Change, Environment and Rural Affairs Committee

Dear Mike,

Thank you for your letter dated 21 March 2019, following the meeting on 10 January 2019.

Please read below the information you requested.

## Role and responsibilities of the Commissioner

We note that a significant part of your role to date has centred around supporting the cultural change necessary to embed the Act across public bodies. Your role has also led you to publicly challenge the way in which some of these bodies are applying the Act in practice. For example, in the case of Natural Resources Wales to decisions on environmental permitting, and the Welsh Government's decision-making process for the M4 relief road.

### **1. Can you explain how you approach balancing these different aspects of your role?**

In the first two years of the implementation of the Act, my role has been more focused on advice and assistance, supporting public bodies and less on challenging them directly. Over the years, I foresee that this balance might change. As I have stressed many times before, I was not established with a case-work function unlike other commissioners.

I have established criteria to decide when I challenge systemic issues and behaviours which are relevant at the population level rather than at individual case level, which are raised with me in addition to the areas of change, I have proactively chosen to pursue, such as decarbonisation and budgeting for the future.

The criteria I ran to consider issues flagged to me include the following questions:

- Does it involve bodies covered by the Act?
- Can the process still be influenced?
- What is the scale of the project/decision?
- Does it affect more than one part of Wales or a significant section of the population?
- Is it a cross cutting issue?

- Are there precedents?
- Does it come within my areas of focus?
- Is there potential for transferable knowledge?
- Have we done work on this issue before?
- Can we resource action?

I have used such criteria to decide to act in relation to the M4, land use planning and environmental permitting. I have also provided advice and challenge to the Government on a number of topics, including the establishment of the Infrastructure Commission, the childcare offer, the Local Government Bill and the interaction between PSBs and RPBs, the criteria for the Housing Innovation Programme, the allocation of the Health Transformation Fund and 5G for example. I have also responded to calls for evidence from Assembly Committees and Government in relation to air pollution, decarbonisation of houses for example.

In addition to those, I have also responded to 183 requests for advice and assistance from public bodies and answered 251 letters from members of the public, their representative and community groups in the last year alone.

2. We would like you to explain:

- **In what circumstances you would consider exercising your power to review public bodies under section 20 of the Act:**

I am considering using my review powers in a similar way as described above and I believe my criteria is also relevant. In addition to this, I want to use this power as an extension of advice I have already given to public bodies, or when problems or issues clearly emerge through my monitoring and assessment of progress (or lack of progress) towards well-being objectives, or through issues raised with me directly while within the legal parameters of the power.

This year, I am minded to use my review powers for the first time in relation to procurement and in relation to the relationship between Welsh Government and the health sector, exploring the extent to which Welsh Government enable and incentivise health bodies to meet their well-being objectives and fully embed the five ways of working across their work. I am minded to use this course of action because having provided advice on procurement and to the Health Department in Government and subsequently undertaking the first round of monitoring and assessing of public bodies, I cannot see how sufficient progress is being made. Both these areas relate to my areas of focus, i.e procurement is a key driver of either positive or negative progress across the well-being goals and is directly related to a majority of my areas of focus. The extent to which the Government is driving or hindering health boards' application of the Act is key to making progress in my areas of focus relating to better ways to keep people well.

- **and whether, in your view this power could be used to challenge misapplication of the Act or non-compliance with duties under the Act:**

The provisions around me conducting a review are set out in section 20 the Act:

*The Commissioner may conduct a review into the extent to which a public body is safeguarding the ability of future generations to meet their needs by taking account of the long term impact of things the body does under section 3.*

*In conducting a review, the Commissioner may review—*

- (a) the steps the body has taken or proposes to take to meet its well-being objectives;*
- (b) the extent to which the body is meeting its well-being objectives;*
- (c) whether a body has set well-being objectives and taken steps to meet them in accordance with the sustainable development principle.*

I am minded to use this power when I would like to issue formal recommendations on systemic issues using the criteria above or when I think the sustainable development principle can particularly help or resolve blockages in the application of the Act.

I am intending to use this route when I see lack of progress, barriers to implementation and potentially wrong behaviours contrary to the application of the Act.

It is important to stress that this power would not allow me to change decisions already made and that my recommendations would apply for the future only. My role was not set up to be an Ombudsman or an extra level to appeal in the Act.

Welsh Ministers are not required to respond to recommendations you make in accordance with Section 21

### **3. Do you believe such requirement should be included in the Act?**

Section 22 Duty to follow recommendations

- (1) A public body must take all reasonable steps to follow the course of action set out in a recommendation made to it by the Commissioner under section 20(4) unless—*
  - (a) the public body is satisfied that there is good reason for it not to follow the recommendation in particular categories of case or at all, or*
  - (b) it decides on an alternative course of action in respect of the subject matter of the recommendation.*
- (2) The Welsh Ministers may issue guidance to other public bodies about how to respond to a recommendation made by the Commissioner.*
- (3) In deciding how to respond to such a recommendation, a public body must take such guidance into account.*
- (4) A public body must publish its response to a recommendation made by the Commissioner and if the body does not follow a recommendation, the response must include the body's reasons for that and explain what alternative course of action, if any, it proposes to take.*

It makes clear that, as a public body, Welsh Government must publish a response to my recommendations issued under section 20 following a review but it does not mention the recommendations I can issue under section 21 in relation to my recommendations about the well-being goals or the national indicators. While I expect Welsh Government to respond to all my recommendations and correspondence, it could make sense for consistency if Welsh Ministers had to issue a statutory response to all the recommendations I make under section 20 or 21 or any recommendations I may issue. But I understand this is a matter for the Assembly and Government as this would require a change in the Act.

#### Welsh Government's budget process

In December 2018 you published a report 'Advice to Welsh Government on taking account of the Well-being of Future Generations Act in the budget process'.

#### **4. Has the Welsh Government provided a response to your report? Has the response been published?**

Welsh Government have not published a response to my advice, but I have had two meetings with the Minister for Finance and I am expecting to meet her again in July. I am focusing my monitoring of the budget in three areas:

- Developing a Journey Checker on the budget process, demonstrating what can change, starting with simple changes, then more adventurous change and finally transformational change. Welsh Government have been receptive to working with us on this so far.
- Prevention: Using the definition of prevention agreed by Welsh Government last year, focusing on how Welsh Government's budget process is prioritising investment in prevention; and monitoring this.
- Decarbonisation: Following the publication of 'Prosperity for All: A Low Carbon Wales' and the recent declaration of a Climate Emergency, assessing the level of investment needed to support the level of ambition; and monitoring this.

#### Monitoring and assessment of public bodies

In your annual report for 2017-18, you said that one of the areas on which you would be focusing during 2019 would be "the process of monitoring and assessing public bodies as they produce their first set of annual reports"

#### **5. Can you describe how you will undertake this work and the timescales for its completion?**

Building on my work from 2017 when I analysed the 345 well-being objectives set by public bodies, I drew out common themes emerging, which gave me a unique 'helicopter view' of how the Act was being implemented



particularly in my policy priorities. Overwhelmingly, objectives had the tone of improving the economic and social well-being of localities, with less emphasis on the environment or culture. My reflections on the purpose, progress and pace of this work and recommendations on what I would expect to see in annual reports were included in my report ['Well-being in Wales - the journey so far'](#) published in May 2018.

Between April 2018 and March 2019, public bodies produced their first annual reports following the setting of their well-being objectives. This enabled me to start monitoring and assessing progress.

I designed a methodology which fully embraced the Act and the five ways of working and which supported public bodies to keep trying, keep communicating and keep moving in (generally) the right direction. I also wanted to encourage them to share their successes and their shortcomings openly so that we can all learn together. I wanted to provide public bodies with a helpful assessment on areas which may require further focus and not be an overly burdensome process.

Given the extent of my resources, I chose to meet my duty by reviewing the first annual reports (2017/18) of each public body with the help of an external, independent research team. The monitoring was based on a self-reflection tool in 3 parts to map and assess organisational progress in the delivery on: their well-being objectives, the five ways of working and my areas for change. I also gave them an opportunity to flag any information beyond their annual reports which they wanted to flag to me or which showed their progress.

Public bodies were then grouped into collaborative communities of practice to share their findings with each other, which served as feedback and learning for each public body, as they go about drafting their corporate plans and annual reports in future. I will give individual feedback to each public body over the coming months and will produce an overall report in the summer containing the methodology, key findings and sector-specific observations.

Next year, I will provide more tailored advice on progressing towards well-being objectives. This will be based on common themes arising from objectives across Wales. This work will also inform the contents of my first Future Generations Report in 2020.

Extracts of feedback from public bodies:

The self-reflection tool has helped see alignment to their accounts and particularly the seven corporate areas for change

It helped look at strategic priorities and the goals, the five ways of working and seven corporate areas of change in a different way this year. *"The self-reflection tool has really helped us with this – with thinking differently."*

One body will put the questions from the tool in their business planning processes. *"The way we're setting up our annual report this year will be different because we've had this tool. It's been real learning"*

The tool was initially viewed as a “another thing to do” but has actually “*provided a really useful framework for looking at things*”.

One body felt that the value was in doing something like this again next year as it helped them to see where they were, and they can look back.

Another said that “*It prompted us to have honest discussions across the organisation about the progress that we’ve made. It provides a baseline that we can consider future progress against. We plan to use the tool on an ongoing basis as part of our quarterly business planning reporting*”.

## Decarbonisation

In your report ‘Advice to Welsh Government on taking account of the Well-being of Future Generations Act in the budget process’, you recommend that:

“Welsh Government clearly articulate how the actions set out in the Low Carbon Delivery Plan will be funded in order for us to meet our statutory emission reduction targets.”

### **6. What are your views on the Welsh Government’s first Decarbonisation Plan, that was published on 21 March 2019?**

The Plan is comprehensive and covers a wide range of policies and proposals given the timescales for the plan as it is only to 2020. It sets a good foundation but we will need to see future plans being more ambitious if we are going to address the 11-year window of climate emergency.

In my response to their consultation last Summer, I highlighted areas I felt were not ambitious enough – eg transport sector. Welsh Government’s proposed actions did not include anything on public transport whereas the plan now includes:

- proposals to achieve a modal shift from car dependency to sustainable forms of transport,
- significantly increasing modal share of active travel for short journeys,
- using planning policy to promote sustainable travel and reduce the need to travel, and
- increasing travel by rail and bus.

I am also pleased to see a focus on equity and climate justice through the establishment of a ‘climate just’ advisory group, and also the announcement of £5million funding from the ESRC for a new Centre to focus on research into behaviour change on decarbonisation. It is positive to see a strong focus on people and behaviour change, however people also need to see that things are actually changing – for example if the majority of new

houses being built in Wales are not being built to zero carbon standards, and Welsh Government have the power to set better standards in Wales, why aren't they enforcing these? Again, it is positive to see actions in the plan around setting higher standards for new build, driving innovation through the Innovative Housing programme, and funding through the Sustainable Buildings Policy, but this is something that could and should have been done 10 years ago so we need to see radical change – e.g. all new homes to be zero carbon, and quickly.

These proposals are welcome, but we now need to see investment to support these actions and this has not been articulated in the Low Carbon Plan.

Since publishing the plan in March Welsh Government has declared a “climate emergency”, the UK Committee on climate change has also published its Net Zero report advising how UK should aim for net zero emissions by 2050 (95% for Wales). I am expecting future plans to be more ambitious and include stronger commitments such as restricting car use in urban centres to tackle climate change and air quality issues, further investment in decarbonising housing stock and a closer link between the steps that need to be taken to halt ecological decline especially in those areas such as peatland restoration and tree coverage which also have a positive impact on carbon reduction.

**7. The first Decarbonisation Plan contains no detailed costs. Given that the Welsh Government has declined to take forward your recommendation, what action do you intend to take?**

Their current plan – Low Carbon Wales – covers actions up to 2020. My budget monitoring work last year indicated that only around 1% of the total Welsh Government budget is spent supporting decarbonisation actions – this clearly isn't adequate given their declaration of a climate emergency.

Their Regulatory Impact Assessment for Low Carbon Wales that informed the Climate Change Regulations 2018 ([http://www.assembly.wales/laid\\_documents/sub-ld11811-em/sub-ld11811-em-e.pdf](http://www.assembly.wales/laid_documents/sub-ld11811-em/sub-ld11811-em-e.pdf)) does include some information on costing the pathways, based on estimates provided by the UK CCC, but more detailed costing for these proposals whilst being a significant undertaking, is clearly necessary. I am concerned that without more detailed costing on specific actions another budget round will pass without the necessary resources being allocated to the climate emergency. With this in mind, my office have been drawing from a range of existing evidence and engaging with a range of stakeholders to produce a discussion paper which will outline the possible funding allocations which will be needed to deliver the low carbon plan and resource the climate emergency. This 10 point plan will be published shortly and will form the basis of further discussion with experts NGOs and Government which will in turn inform my approach to monitoring this year's budget.

## 8. Are you satisfied with the approach taken by the Welsh Government?

I am pleased to see considerable focus on the Well-being of Future Generations Act within the plan, which reflects the emphasis placed by the Decarbonisation team within Welsh Government on following the 5 Ways of working and reflecting the 7 well-being goals:

- There is a spotlight on the 7 well-being goals throughout the plan, and for each sector they set out the evidence from the well-being appraisal that they've followed, using their well-being matrix. They have also set out how the Ways of Working and considering the well-being goals have guided the development of the Plan – they have adopted the 5 Ways of Working to guide and shape their plan:
  - Prevention: establishing a Climate Justice Advisory group to ensure a transition that is equitable and avoids unintended consequences;
  - Integration and collaboration: Decarbonisation is now a cross-government priority so governance includes a Ministerial Task and Finish group, a cross-government Programme board, and also an internal and external cross-sector group to facilitate collaboration;
  - Involvement: they have involved range of stakeholders throughout process.
- They have developed a well-being policy development tool (matrix) to help explore the social, cultural, economic and environmental impact of potential decarbonisation actions. It prompts consideration of well-being goals and well-being objectives relating to a broad range of areas, including jobs, air quality, and community cohesion. It identifies expected impacts and suggests where policies can be strengthened in relation to one or more of the well-being goals.

I am encouraged by their approach, but I do feel that ambition, scale and pace of change, needs to accelerate over the next few years, focusing on what can be achieved urgently and over the coming decade to avoid the climate breakdown predicted by the IPCC. Although their proposals in some sectors (eg transport) have improved in the final plan, compared with the ideas proposed in the consultation, action and investment to support the significant change that's needed, such as modal shift, now needs to follow. There are other areas such as zero carbon new homes which have been discussed and considered for many years – Low Carbon Wales includes a policy to “Set higher energy efficiency standards for new builds through reviewing Building Regulations Part L (Conservation of Fuel and Power)” but we now need to see firm commitments being made urgently.

### Environmental Permitting

## 9. We would like you to clarify whether you were involved in the development of the guidance, as suggested by NRW in its evidence to us.

We participated in several meetings and we commented on the initial draft. As I indicated in a letter to the Minister for Environment, Energy and Rural Affairs in December 2018, we were not given an opportunity to comment on the final draft. While I think that the guidance has achieved some clarification of what SMNR entails for NRW, I am not sure it

clarifies all the interactions between the Environment Act and the Well-being of Future Generations generally, and in particular in the context of environmental permitting.

**10. What further action do you intend to take to ensure that your concerns about the robustness of the guidance are addressed?**

The Minister indicated in a letter to me in October 2018. She said: she “agree[s] we should be looking to ensure better transparency of the application of regulatory processes, including how they interact with each other. At present many specific environmental legislation requirements are derived from EU law, and will be rolling over for Brexit. As you can appreciate, resources within Welsh Government are focused on Brexit. However, following the Brexit transition period we will have the opportunity to review all our environmental legislation to ensure it is fit for purpose, including testing alignment with both the Environment Act and the Well-being of Future Generations Act.”

**11. We would like you to provide an update on discussions you have had with NRW and the Welsh Government on the suggested contradictions between the guidance and the matrix. In particular, are you satisfied that this issue has now been resolved?**

I have written specifically to the Minister and NRW in December 2018 asking for an explanation of where such contradictions arise as they are not apparent to me. We have had two initial meetings with Welsh Government officials in January and February 2019 but are awaiting to hear from NRW and Welsh Government where they see contradictions exactly. My team have written to them again in May 2019 to this effect. I am clear that the SMNR duty of NRW does not supersede the Well-being of Future Generations Act duties and that the well-being duty like the equality duties and other duties have all to be met. I see that complementarity and integration are integral to our Act. While I am still awaiting a clear explanation of where they see contradictions, the letter referred to above suggested this is something Welsh Government will explore post-Brexit in the context of the wider environmental law context.

**12. We would also like you to clarify whether work on the matrix has now resumed. If so, when is it likely to be completed?**

We have had no discussions with NRW on the Matrix work since November 2018 when they decided to stop the work on the Matrix which they said ‘was no longer appropriate’ now the Welsh Government’s Guidance had been published.

While this work on the specific Matrix has not resumed, I will publish in the summer my report on monitoring and assessing which will include a similar document, a flowchart this time setting out my expectations as to the evidence which I advise the public body to produce to show how the Act is being applied in their decision-making process. It will provide advice on the different elements of the Act I think should be considered in line with the

Well-being of Future Generations Act and the 'Making Good Decision' Guidance from the Welsh Government. This will be equivalent to the contents of the proposed Matrix, presented differently and it will be relevant to all Public Bodies and anyone who want to use the Act. I will expect NRW to take account of my advice in their work as will every public body contributing to the achievement of the well-being goals.

### M4 relief road

In your evidence to us, you made clear that you do not consider that the decision-making process of the proposed M4 relief road has "reflected the requirements of [the 2015 Act]." We are concerned about this. We are equally concerned that legal representatives in your Office and within the Welsh Government are interpreting the Act in considerably different ways. This does not bode well for the successful implementation of the Act.

### **13. We would like you to set out any action you intend to take to seek to ensure that these differences in interpretation are addressed.**

My duties include to act as the guardian of the ability of future generations to meet their needs and therefore I believe it is my role to challenge the Welsh Government to lead by example, be ambitious and drive the change needed by current and future generations. I meet regularly with Welsh Government officials regarding a range of issues and work closely with them in providing joint advice support and guidance to public bodies. For example, we work closely with Welsh Government's 'Local Government Partnerships' team in providing advice, support and guidance to the 19 Public Service Boards in Wales. A recent example is our office leading a PSB thematic training event in Wrexham focused on skills, in conjunction with Cardiff Business School. Similarly, we have developed a joint work programme with Welsh Government's NHS Planning Team focused on ensuring health bodies are embedding the WFG Act into everything they do. One aspect of this relates to long-term planning and at the NHS long-term planning conference in March 2019 my team ran a workshop on long-term and futures thinking, using the '3 Horizons' model. The purpose was to demonstrate that whilst the focus of IMTPs is on the 'medium term', this should be in the context of the longer term. We received very positive feedback from delegates.

Since the establishment of a Future Generations Unit in Welsh Government we have met twice with officials to discuss interpretation questions and application of the Act. I have shared with them the decision-making flow chart I am working on, following taking legal advice from Queen's Counsel and others. I am conscious that the Government are unlikely to express a position different from that which they put forward during the public inquiry on the M4, whilst that decision is pending, and therefore I intend to meet with officials and lawyers again once the First Minister has made his decision on this matter.

**14. Given the significance of this decision and your concerns that any misapplication of the Act could set an unhelpful precedent, we would also like you to clarify what action you intend to take if, in your view, the Welsh Government's decision on the M4 relief road is unfavourable.**

I am currently considering a number of options but have not formally decided what I will do as it will depend on the Welsh Government's decision and justifications. I will consider very carefully my options when the decision is made and in light of any legal action that may be taken by other parties.

Transport

In reference to WelTAG 2017, you said in your annual report 2017-18 that you were:

“in the process of agreeing an approach with Welsh Government to monitor and assess the effectiveness of new guidance and have committed to supporting them to look at how it is being applied on a small number of projects, to assess its impact and record how it is leading to different decisions.”

**15. Can you provide an update to the Committee on this matter?**

In the past few months, I have reviewed and challenged two WelTAG reports – one for a scheme in Llandeilo and another for Haverfordwest and discussed other schemes with Welsh Government officials. I am concerned that generally those writing or commissioning the reports do not have adequate understanding of the Act and the new ways of working. At the end of April 2019, I wrote to all transport officers in Welsh Government, local authorities and main consultancies, asking for them to flag with me what is working well and not so well in their application of the new WelTAG guidance. I have pointed directly to them my recent 'Transport Fit for the Future' and stressed the importance of the role of the transport sector if we are to realise the ambition set out in the Welsh Government Decarbonisation Pathway. I will consider the responses I receive in deciding what would do next to be most useful and impactful.

I have been very clear on my expectations which is, if they haven't applied the five Ways of Working at Stage 1, they need to start again. I am also clear that WelTAG cannot be applied to proposed road schemes as such. The whole idea is to consider first if there are other solutions which can address the congestion first and for the longer-term. To address this, I have contributed at several events with engineers and professionals working at all levels of the transport planning system.

As part of the Welsh Government review of the application of WelTAG to date, I have also facilitated workshops with the Welsh Government for the different groups using WelTAG (consultants, Local authorities, planners etc.) to discuss the application of WelTAG and to restate the importance of using my Well-being Framework for projects included in the Welsh Government supplementary guidance to be used alongside the WelTAG guidance itself.

Consultants explained that their clients sometimes asked them to apply WelTAG to a bypass 'they already wanted'. This shows there is a clear need to raise awareness and train all those involved in the process at government, local authority and consultancy level. The Welsh Government committed to continue organising

such workshops to build a dialogue, to share findings and to promote good practice in the sector. We will continue to take part in those.

Whilst this is welcome, this highlights an issue that I have been raising continually with Government regarding the lack of investment for implementing the Wellbeing of Future Generations Act and supporting the significant cultural change that is required. I would welcome the committee raising this point with Cabinet Secretaries.

### 16. How will you measure the impact of your intervention?

See also my response at question 22. As with any of my work, I will use my strategic performance measures for my Office to assess the impact of this intervention. These are used and detailed in:

- Frame debate and get issues on the agenda
- Encourage discursive commitments from Ministers, Government and others
- Secure procedural change in how public bodies go about things
- Affect policy content and commitments
- Influence practical behaviour change in others

I am also working on an internal system to follow up in the longer-term which will integrate the different strands of my duties, powers and work programmes. I include a diagram which explains the approach I take :





## Housing

### **17. Can you provide an update on the outcome of discussions with the Welsh Government in relation to your concerns about the current application criteria for the IHP?**

Following an assessment of the criteria for the Housing Innovation Programme I became involved during the second year of the programme. I met with the Cabinet Secretary to express my concerns and followed up with officials to provide clarification regarding the Act. A member of my staff also attended a meeting with the project teams where the short-listed projects were discussed, as well as the feedback issued back to IHP in how they met the Well-being of Future Generations Act. Decisions had already been made as to which projects to choose and the clarification meetings did not change the outcome of these.

My main concern was that the application process stressed that each project should only contribute to one goal. This goes against the holistic concept of well-being where public bodies should seek to achieve all goals and the statutory guidance is clear that we cannot cherry pick goals.

I provided ongoing advice to the teams involved to improve both the Welsh Government and candidates' awareness and assessment of the projects in Year 3 and how best practice can be shared with other projects moving forward. This resulted in a commitment from Government that in Year 3 the Act would be given much more consideration and weight.

I have been pleased to see that my advice has been taken on board and the launch of year 3 IHP programme information now formally states that the aim of IHP is to:

Increase the supply of affordable housing as part of the 20,000 additional affordable homes target;

Do this in a way that aligns the design and delivery of affordable housing with the seven goals of the Well-being of Future Generations (Wales) Act (WFGA);

Address cost and value in new homes, and develop housing that meets specific current and future housing needs;

Publicly disseminate key findings and maximise learning.

The Technical Specification for the IHP was developed reflecting these aims. The guidance states that all schemes must demonstrate compliance with the Well-being of Future Generations (Wales) Act. The application will need to set out how the scheme will support meeting *all* of the well-being goals, and also demonstrate how the ways of working will be used to improve the scheme through its life. They have now mapped out the 7 Goals against the focus themes within the application form and looked at the short-term, medium-term and long-term benefits. Innovation must meet at least one but not more than three of the seven cross-cutting focus areas: CO2, capital, change, health, energy, space and place. There is no longer a requirement to only focus on one goal.

I will still advise them that they need to go even further and ensure that proposals should maximise their contribution to all of the goals. The guidance maps out the goals against the themes, but the 5 ways of working are not reflected. I will also enquire about plans for the future of this funding stream to understand how innovation will be supported beyond Year 3.

**18. Can you set out how you intend to influence the development of future application criteria for the IHP?**

Answered above.

**19. In terms of the extent to which you have been able to influence the IHP, what do you believe would constitute a success?**

I believe what would constitute success would be to have several projects completed, monitored and measured which constitute real sustainable innovation (fully contributing to the well-being goals), that can be scaled up and applied to most if not all future new housing developments and which will meet future needs.

The Innovative Housing Programme needs to provide demonstration of homes fit for the future, meet future needs, are low carbon, adaptable, reduce fuel poverty, and provide healthy and safe environments to live in that connect communities, for example in line with the Act.

It is important that the best practice developed in Years 1 to 3 relating to the design and built process are shared and adopted throughout the housing industry.

I would also like the Well-being of Future Generations Act (goals, objectives and five ways of working) to be embedded within all future housing funding application schemes.

Few projects have been completed yet but we can see examples of good practice emerging which I will follow with interest. In Swansea:

- The council built 18 units of new affordable housing in year 1 to Passivhaus Standard. Monitoring is being carried out to review the effectiveness of energy savings within the homes. In year 2, they secured funding for 34 units of homes as power stations which are currently being constructed. They will allow a comparison against the construction method of Passivhaus and fabric first to compare effectiveness of the projects.
- The Swansea-based housing association Coastal Housing Association in partnership with a social enterprise received funding to deliver three new innovative housing projects across South West Wales.
  - One of them is to build 12 homes at Killan Road in Dunvant to energy-positive standards i.e. they will produce more energy than they use. The homes will be built using the Homes as Power Stations (HAPS) model, with a focus on reducing energy consumption and addressing fuel poverty through reduced reliance on fossil fuels. This new street of innovative, energy positive homes will use solar PV, electric battery storage and borehole ground source heat

pumps (GSHP) to generate up to 80% of their energy required for heat and power. The remaining 20% will be provided by the electricity grid, of which a small percentage will come directly from a community owned local solar farm, administered by Gower Power. Coastal Housing will also provide an electric vehicles for communal use as part of the project.

- Another project they will deliver will comprise of 8 new homes in Neath Port Talbot, all constructed off-site, to showcase the best modular designs from Wales and Japan. As modular housing is still an emerging construction technique in Wales, Coastal hopes that the project will provide an opportunity to learn from other countries where it is more advanced.

### Milestones under the Act

The Welsh Government is currently consulting on national milestones, required under the Act. The Government's intention is to identify a small set of the national indicators against which national milestones will be developed.

#### **20. We would like your view on the extent to which this approach is in keeping with the Welsh Government's duties under the Act.**

I welcome the approach officials have taken in engaging on the proposed criteria to set milestones and views on the existing indicators in an effort to model the five ways of working and improve involvement within the process. I understand they have provided a number of opportunities for interested parties to engage alongside the online consultation. I appreciate the work that has gone into identifying the original 46 indicators, and the current proposed selection of 15 indicators among those against which milestones could be developed. This is a difficult task.

In general, I agree with the proposed five essential criteria for selecting the national milestones as outlined within the consultation document and welcome how they are linked to the five ways of working, however, I have recommended additional criteria that the milestones should be easily communicable.

My office has liaised with the members of my Advisory Panel, alongside other interested parties, who have shared their views regarding setting milestones against specific indicators. These views are outlined within my response to the consultation, and I believe some of the concerns highlighted would be mitigated by my proposal to set headline milestones, which would apply to a suite of indicators. I have suggested that there is a case for aligning the milestones with my priority areas which were set following extensive consultation as well as engagement and involvement with a range of stakeholders and experts. These areas have been selected as areas which, if the right sort of progress is made, had the biggest potential to drive progress across all the well-being goals. These could then be used within the grouped themes of: Early Years; People's Health and Well-being; Good Jobs; Fairness and Living Standards; Involved and Responsible Communities; Language and Culture; Low Carbon Economy; Healthy Ecosystems, as proposed within my response to the consultation on the national indicators in 2015.

Whilst I appreciate that national data may currently be lacking in some of the suggested areas, I have invited further engagement on how the Government can be supporting measurement which is future focused.

In my 2015 response, I raised specific concerns regarding the disaggregation of data by protected groups and the inclusion of children. Whilst I understand some progress has been made, I am aware that the Children's Commissioner has raised her concerns regarding reporting arrangements for indicator 6 'measurement of the development of younger children'. I firmly believe that it is essential to understand and measure the views and experiences of children and young people. It is also vital that indicators are capable of disaggregation by all of the protected equality characteristics and by socio-economic group as we must be able to understand whether certain groups are being left behind. I have requested that I am updated by Welsh Government on the progress in this area.

Officials have committed to meeting further following the closing of the consultation to explore further my proposed approach and to model what the milestones could look like in practice, which I look forward to doing in due course.

### Governance and transparency

#### **21. Can you provide the Committee with further information about the operation of the advisory panel, in particular, how often the panel meets and where other relevant information, such as notes of meetings, are published?**

I formally consult and meet with my advisory panel twice a year to discuss my strategic priorities, my work programmes, my annual reports and progress on my Future Generations report. Notes of meetings are not published.

I value the perspectives each member brings to meetings and over the last three years I have taken on board many of their suggestions.

I also seek advice from members regularly where their experience has a direct relevance to an issue. For example, I am currently working with the Children's Commissioner to ensure young people's voices are heard as part of the climate emergency. I have discussed my proposed intervention in respect of the health service with the Chief Medical Officer and will be sharing the findings from my monitoring and assessing work with the panel. My correspondence team has liaised with the team of the Public Services Ombudsman and I have also engaged the members of the panel (via their offices) in developing my work on providing guidance on the goals through my Art of the Possible Programme.

I reviewed this combination of formal and informal contact with my panel in May 2019 and we agreed this is a unique forum in which as well as advising me on my statutory matters we all learn about potential areas of overlap in our work programmes and value the opportunity to discuss integration and collaboration opportunities. We have agreed to continue with this format for the remainder of my term. I will also be asking Welsh Ministers to appoint a person to represent the Third sector to my advisory panel this year.

## 22. Can you explain the processes that are in place to assess your impact and that of your Office on the exercise of your functions?

As I mentioned in my 2017-18 Annual Report I have adopted performance measures which will help me demonstrate the impact of my office. These are focused on outcomes rather than outputs. I didn't want to measure things done, I wanted measures that would provide evidence of what difference my office is making and show how the work we do is supporting and challenging others to change towards a more sustainable way of working.

My five strategic performance measures are:

- ✓ Framing debates and getting issues onto agendas
- ✓ Encouraging discursive commitments from ministers, Government and other policy setters
- ✓ Securing procedural change in how public bodies and others go about things
- ✓ Affecting policy content and commitment
- ✓ Influencing practical behaviour change in others

The measures are qualitative, and I set out the impact we have made on the transformational agenda for public bodies in Wales in my 2017-18 annual report. The report also highlights how this work contributes to the seven well-being goals and provides examples of where the five ways of working are being used to good effect. I will report on progress again in all my future annual reports.

### Land use planning

## 23. Can you explain how the Act is successfully embedded into the revised PPW?

Firstly, the Act has been fully used to create the policy from day one. The officials clearly used the 5 ways of working themselves and sought to maximise the contribution of the policy to the goals. I would like to stress that this one of the best examples we have seen to date of the use of the Act to design national policy in Wales and of engagement with my office.

Secondly, the policy actively promotes the use of the 5 ways of working by the users of the policy throughout the document and in the different chapters of the policy. Its substance seeks to and will directly contribute to the achievement of the goals, helping for example with decarbonisation, tackling poverty, reducing inequalities through the transport, energy, housing sections for example. There are a multitude of examples to choose from which I am sure the Committee has noticed. This intent is clearly shown in the Annex B table showing how each element of the policy is designed to drive outcomes contributing to achievement of each of the well-being goals. The concept of place-making also places people at the heart of the policy and is designed to maximise contribution across all of the goals. The policy states in multiple places that proposed developments must be used to identify proposed developments that bring benefits to all four aspects of well-being.

## 24. Can you provide examples of revisions that have been made to PPW as a result of your work and that of your Office?

I have influenced the Government's processes in using the five ways of working and in particular the involvement principle and ensured a strong narrative on the Well-being of Future Generations Act was consistent and focused on the seven well-being goals.

I have advised early the team of officials that they needed to involve stakeholders and people much before any consultation stage on a draft policy. Following this advice, they organised workshops throughout Wales about their intentions and to ask what representatives of the four pillars of well-being would expect a new Planning Policy Wales to include or address. They said that the feedback they got at this very initial stage enabled them to be bolder in the policy approach they would take.

We also worked together on aligning the policy to the well-being goals which is visible throughout the document and is clearly set out in Annex B of the document. I have also insisted on the long-term vision the policy should provide and I required the inclusion of and the consideration of future trends each time it was possible.

I ensured that the aspirations contained correct references to the five ways of working, to the well-being goals in their holistic nature, including low carbon, equality and reduction in poverty.

I worked with officials and stakeholders to ensure the policy had the right focus in line with the goals as is reflected in the hierarchy of energy sources, transport hierarchy, mix of housing offer and placing people at the centre of planning among other things.

I insisted cultural well-being was included and facilitated contacts between officials and the sector.

I stressed the need to have clear evidence of the decision-making process, including how any proposed development would contribute to all aspects of well-being (building on the experience from environmental permitting). Such requirement is now included at paragraph 1.19 of PPW10.

I have also flagged that the implementation of the policy on the ground will be a key challenge, and learning from the experience with WeITAG to date, Welsh Government and the sector will need to invest significantly in training to ensure the aspirations of the policy truly come to life. This is because the Act and this Policy require a fundamental cultural change for all involved, from developers to councillors and because of the complexity of the system which includes governance arrangements for the production of plans at 3 levels (NDF, SDPs potentially and LDPs). This is an area I might revisit in the future once the new policy has had a chance to be embedded.

Yours sincerely,

**Sophie Howe**

Our ref: NB/mm

Ask for: Nick Bennett



Date: 3 June 2019



Mike Hedges AM  
Chair, Climate Change, Environment & Rural Affairs Committee

**Via Email Only:**  
**SeneddCCERA@assembly.wales**

Dear Mike

### **Environmental Principles and Governance in Wales Post European Union Exit**

Thank you for your letter of May 8<sup>th</sup>.

Having appraised myself of the Welsh Government's consultation I am sure that any steps to protect and enhance environmental governance in Wales post Brexit are to be welcomed. I am also glad that the consultation refers to established governance structures, including my office.

In principle, I agree that there is a regulatory gap resulting from Brexit. However, in respect of individual complaints about personal injustice affecting a citizen of Wales, my office will remain the appropriate body to consider complaints about Natural Resources Wales (NRW), local authorities or the Welsh Government.

Should Welsh Government establish a new body in this field then our vires will also be affected as Welsh Government is in our jurisdiction and I would expect any new body to be listed in Schedule 3 of the PSOW Act, as the NRW and Welsh Government currently are. I am aware that the proposed Office for Environmental Protection (OEP) in England includes provisions for the new body to be in the Parliamentary Commissioner's jurisdiction and that there has been ongoing dialogue between DEFRA and the PHSO.

The broader issue relating to Brexit and governance arrangements in policy fields, which currently have a split competence between the EU commission and Member States/ Devolved Governments, is something that is discussed regularly with the all Public Service Ombudsman Group in the UK, and also with the European Ombudsman. Whilst post Brexit accountability mechanisms are a matter for

Page 1 of 2



government/s, we have a joint interest in ensuring that whatever mechanisms that are in place post Brexit are as clear as possible to the citizen.

I do have regular meetings with Welsh Government officials regarding complaint matters, however we have not discussed this matter directly. I have asked the European Ombudsman for any data emanating from Wales on environmental matters and will happily share any data that might be of use to your committee.

I think it is important that any reforms in this area fill any emergent environmental regulation gap, but do not duplicate existing complaint systems or create confusion for the citizen. I note that the consultation paper suggests (p59) that my office is not specifically focused on environmental issues (which is correct) and that we may not have the technical expertise for complex environmental issues. My office considers complaints about a wide range of complex issues, including health and environmental issues, and my staff are absolutely able to deal with such technical complex cases. However, I do not have a regulatory role, and consider individual complaints about personal injustice arising from maladministration or service failure. I would add that whilst I can question professional judgement in health and social care matters, I am not able to do so in environmental matters. This, coupled with the fact that my role is to consider personal injustice, perhaps reinforces the need for a regulator in this area to deal with wider environmental concerns – eg by a lobbying group.

I will respond along these lines to the Welsh Government and will also happily collaborate with Welsh government so that any complaints system in this policy area is as citizen focused as possible. Thank you again for seeking my views.

Best wishes.

Yours sincerely

**Nick Bennett**  
Ombudsman



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**Reference:** AC/147/caf  
**Date issued:** 4 June 2019

Dear Mike

## Environment Governance and Principles

Thank you for your letter of 8 May 2019 in which you invite my views on:

- the Welsh Government's proposals for a new body to oversee the implementation of environmental laws in Wales, as outlined in its consultation document, *Environmental Principles and Governance in Wales Post European Unit Exit*, and particularly my views on the implications of the proposals for the delivery of my functions;
- the level of engagement between the Welsh Government and my office to date regarding how my role might fit with the new environmental governance arrangements; and
- any other aspect of the Welsh Government's consultation, or any other matters referred to in the Committee's terms of reference.

I address these lines of enquiry below. First, however, I think it may be helpful if I outline the differences between audit on the one hand and regulation on the other, as I think it is important that those differences are clear from the outset.

### The differences between audit and regulation

In essence, audit is a matter of examining accounts and the stewardship of resources, including arrangements for such stewardship, and reporting on such work so as to provide "assurance" (meaning independent, objective assessment). While an auditor may report, for example, that a body has poor arrangements for achieving value for money, and may provide recommendations for improving arrangements, it is not the role of audit to set standards, nor enforce standards. Those are regulatory functions.

It is, however, sensible to recognise that there are some overall practical similarities between audit and regulation. Both are forms of external review, and

there are therefore elements of common experience and transferable learning between the two. Nevertheless, it is important not to see audit and regulation as the same thing.

### The Welsh Government's proposals for a new environmental oversight body and the implications for the delivery of my functions

I do not see major problems arising from the creation of an environmental oversight body in terms of my functions. This is chiefly because I do not see myself as having a *direct* role in filling the environmental regulatory gap left by Brexit. While I have a function under the Well-being of Future Generations (Wales) Act 2015 of assessing the extent to which public bodies have acted in accordance with the sustainable development (SD) principle of that Act when setting and pursuing well-being objectives, that activity does not intersect with the regulation currently provided by the EU Commission. My examination function under the 2015 Act is in essence a matter of reporting on the way objectives are set and pursued, such as the extent to which a body is taking account of the need to prevent problems (see section 5 of the Act, which sets out the “five ways of working”). This is quite removed from EU Commission regulatory activity, such as taking legal proceedings against a government for inadequate measures to prevent illegal waste transfers.

My examination function under the 2015 Act is quite limited. My examinations under the Act do not even extend to examining *whether* bodies have set appropriate well-being objectives, nor whether those objectives are being achieved. (Those are specific functions of the Future Generations Commissioner (FGC) (section 20(2) of the 2015 Act).) My functions do not approach anywhere near the regulatory and enforcement work currently undertaken by the EU Commission.

I do, however, see some implications for my audit work from the creation of a new Welsh public body with environmental regulatory functions, but these are much the same as for any other new Welsh public body. A new Welsh public body will almost certainly require some form of funding from the Welsh public finances. If the Assembly is to provide funding, whether directly by supply from the Welsh Consolidated Fund or indirectly from the Fund via the Welsh Government, it would be important for the Assembly's assurance that public funds are being used as intended for the body to be audited by me, and that there is provision for me to lay reports before the Assembly on the body's accounts and stewardship of resources. I do not think a new audit would be particularly onerous.

An alternative would be provision for the Assembly to appoint a commercial auditor. However, commercial auditors are generally not well-acquainted with the requirements of regularity reporting (that funds are used as intended by the Assembly), so I do not think that that is a good option.

### The level of Welsh Government engagement regarding how my role might fit with the new environmental governance arrangements

I have responded to the Welsh Government's consultation document, and I enclose a copy of my response. Given, as indicated above, that I do not see any problematic intersection between environmental regulation and audit, I am not sure that it has been particularly necessary for the Welsh Government to specifically engage with me regarding the creation of the regulator. I should, however, welcome any early engagement regarding making appropriate audit arrangements.

### Views on any other aspect of the Welsh Government's consultation and other matters in the Committee's terms of reference

While I have not specifically examined regulatory systems to any great depth to date, I think it may be helpful to outline on the basis of wider experience of *review* arrangements some features that a sensible regulatory regime of the future might possess.

### Avoidance of overlapping or interlocking functions between several bodies

Overlapping functions clearly risk inefficiency, but interlocking functions also risk confusion, duplication and inefficiency. A sensible regulatory regime would avoid such a situation.

By way of illustration, my examination function under the Well-being of Future Generations (Wales) Act 2015 interlocks with the functions of the FGC, as mentioned above. While in theory there is a clear separation between the FGC's role in monitoring and assessing progress towards meeting wellbeing objectives and the Auditor General's role in assessing the extent to which bodies have acted in accordance with the SD principle, this separation is unsurprisingly hard to maintain.

In my examinations work, I will inevitably review the progress of actions taken to meet wellbeing objectives while assessing the extent to which the SD principle has been followed in taking those actions. Similarly, it is inevitable that the FGC's work to review "whether a body has set well-being objectives and taken steps to meet them in accordance with the sustainable development principle" involves examining the same evidence as when the AGW assesses "the extent to which" the setting of objectives and steps taken is in accordance with the SD principle.

In practice we have sought to mitigate the potential for duplication of work (and minimise the burden on public bodies) through, for example, arranging joint fieldwork with the FGC to discharge our separate duties simultaneously. The former AGW and the FGC also agreed a memorandum of understanding setting out how they seek to discharge their duties in a complementary manner. The staff of the WAO and the FGC's staff also meet regularly to discuss and co-ordinate respective activities. These co-ordination efforts do, however, have their own cost.

They also present potential problems in terms of ensuring audit independence, as I am the auditor of the FGC.

### Avoidance of combining advisory functions with review functions in the same body

Combining advisory functions with review functions in one body tends to lead to apparent, if not actual, conflicts of interest and reduces confidence in the review functions. This is evident from the crisis in commercial audit where advisory work is widely seen as having detracted from statutory audit work or has actually undermined the rigour of such audit work. (See, for example, <https://www.theguardian.com/news/2018/may/29/the-financial-scandal-no-one-is-talking-about-big-four-accountancy-firms>.)

The danger of undermining objectivity by providing advisory services is explained in the 2016 Ethical Standard published by the Financial Reporting Council. While that Standard is specific to audit, many of the principles are transferable. In my view, a sensible review system will avoid giving a review body advisory functions.

### Avoidance of proliferation of functions and principles in a review system

Increasing the number of functions and principles in a system (and over-prescribing them) tends to impede operational efficiency and effectiveness. A sensible review system will avoid such proliferation and focus on a small number of key principles.

The need for avoiding such proliferation has been evident from our own experience of the Local Government (Wales) Measure 2009. For example, section 15(2) of the Measure requires Welsh improvement authorities<sup>1</sup> to report on numerous specific matters each year (see box overleaf for details). In addition, a further five subsections of section 15 impose specific publication requirements.

To accompany these requirements on authorities, section 17 of the Measure requires the Auditor General to “audit” each authority’s compliance with section 15. This sits alongside the Auditor General’s duty to assess compliance with the general improvement and all the various specific duties in Part 1 of the Measure, and to report on all this work each year. Furthermore, all the Measure work sits alongside the audit of accounts under the Public Audit (Wales) Act 2004, which includes a duty to consider arrangements for securing economy, efficiency and effectiveness (which covers many of the matters required by the Measure), as well as the requirement for examinations under the Well-being of Future Generations (Wales) Act 2015.

Overall, the numerous functions and principles imposed by the 2009 Measure have led to performance improvement work being seen as burdensome and bureaucratic by some authorities. At the same time, it is not clear that the

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<sup>1</sup> Currently, county and county borough councils, national park authorities and fire authorities

performance improvement requirements of the Measure have actually led to improvement in authorities' performance, though it is difficult to identify particular effects given the complex environment that local government operates in, especially with reductions in funding.

**Section 15(2) of the Local Government (Wales) Measure 2009: an illustration of excessive numbers of functions and over-prescription**

(2) The authority must make arrangements for the publication of—

(a) the authority's assessment of its performance during a financial year—

(i) in discharging its duty under section 2;

(ii) in meeting the improvement objectives it has set itself under section 3 which are applicable to that year;

(iii) by reference to performance indicators specified under section 8(1)(a) and self-imposed performance indicators which are applicable to that year;

(iv) in meeting performance standards specified under section 8(1)(b) and self-imposed performance standards which are applicable to that year;

(b) the authority's assessment of its performance in exercising its functions during a financial year as compared with—

(i) its performance in previous financial years; and

(ii) so far as is reasonably practicable, the performance during that and previous financial years of other Welsh improvement authorities and other public authorities (to the extent that those authorities exercise similar functions to those exercised by the authority);

(c) details of the ways in which the authority has during a financial year exercised its powers of collaboration for the purpose of discharging or facilitating the discharge of its duties under sections 2(1), 3(2) and 8(7) during that year;

(d) details of the information collected under section 13 in respect of a financial year and what the authority has done to discharge its duties under section 14 in relation to that year.

**Funding and governance arrangements that ensure sufficient independence and avoid perverse disincentives**

We know from experience that funding and governance arrangements need to ensure sufficient independence and avoid perverse disincentives. For example, before 2014, studies for improving economy etc and services in local government bodies (studies under section 41 of the Public Audit (Wales) Act 2004) were funded by fees to local authorities. It was apparent from discussions with local authorities that they were not overly keen on such studies, including in terms of the effect on their audit fees, and that they preferred the number and scope of such studies to be minimised. Since 2014, local government studies have been funded by supply from the Welsh Consolidated Fund. This has enabled more

constructive dialogue with authorities, so helping study planning to have a clearer focus on the areas of significant risk to value for money.

Similarly, it is important that bodies are sufficiently resourced to enable them to exercise their functions. My predecessor's report, *The development of Natural Resources Wales*, February 2016, noted that NRW faced challenges of lacking capacity and capability for the functions it was given (see page 16). Subsequent audit work has found that NRW has struggled with regularity issues in the exercise of its forestry functions. The costs of a new organisation or system should not be underestimated, as, for example, my predecessor found in his, *Review of the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill*, December 2014.

### **Robust access rights**

Robust access rights are essential for efficient and effective review work. While the legislation governing the Auditor General's work is not perfect, one of its great strengths is the access rights that it provides. These access rights have enabled the Auditor General to rigorously examine the use of public money provided to private and voluntary sector entities. For example, the Auditor General's access rights under paragraph 17 of Schedule 8 to the Government of Wales Act 2006 enable him to examine the records of NHS contractors, such as dentists and opticians. Even the local health boards making payments to such contractors do not have such access rights. As a result, the Auditor General is able to examine issues such as counter fraud much more effectively and efficiently than NHS bodies themselves.

My colleagues and I should be happy to support the Committee further, and I hope that this material is helpful to you.

Yours sincerely

**ADRIAN CROMPTON**

**Auditor General for Wales**

# Environmental Principles and Governance in Wales Post European Union Exit

## **Consultation response form**

Your name: Adrian Crompton, Auditor General for  
Wales

Organisation (if applicable):

e-mail/telephone number:

[WalesAuditOffice@audit.wales](mailto:WalesAuditOffice@audit.wales)

Your address: 24 Cathedral Road, Cardiff CF11 9LJ

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit  
Department for Energy, Planning and Rural Affairs  
Welsh Government  
1st Floor East, Cathays Park 2  
Cardiff  
CF10 3NQ

or completed electronically and sent to:

e-mail: [Environmental.Governance@gov.wales](mailto:Environmental.Governance@gov.wales)

## **Environmental Principles**

Question 1: Do you agree the following principles should be included within legislation for Wales?

If the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission (which would seem appropriate), then I consider these principles need to be included in legislation for Wales.

Question 2: Do you think there are other principles, which may also need to be included?

Again, if the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission, then the Precautionary principle should be included explicitly (and, to ensure consistency, with reference to EU Commission interpretation). I am not convinced by the Welsh Government's analysis that the Precautionary principle is already covered in Welsh legislation. I recognise that there are some similarities between the Sustainable Management of Natural Resources (SMNR) principles (set out in section 4 of the Environment (Wales) Act 2016) and the Precautionary principle (set out in Art 191 of the Treaty on the Functioning of the European Union (TFEU) and explained in Communication (COM 2000)—for example, the mention of uncertainty. However, there are also significant differences. For example, COM 2000 sets out a specific preliminary condition of identification of potential adverse effects. It also sets out specific informing principles, including risk evaluation, and it provides a clear emphasis on determination of the degree of scientific uncertainty.

It appears that the Precautionary principle will be explicitly covered in UK legislation. Section 16 of the European Union (Withdrawal) Act 2018 already requires the Secretary of State to introduce legislation providing for maintenance of the Precautionary principle. It would, therefore, be unfortunate if Welsh legislation were to be less clear and rigorous than UK legislation.

Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Ensuring application of the principles set out in Art 191 of TFEU would seem appropriate. As mentioned in response to Q2, I am not convinced that application SMNR principles quite has that effect.



Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Please see responses to Qs 2 and 3. As I understand it, Art 191 of the TFEU applies to all public bodies as emanations of the state. If the intention is to provide comparable arrangements, this will need to be replicated.

### **Accountability**

Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Essentially, yes, I agree with the gaps identified. As I understand it, the gaps reflect the role of the EU Commission.

Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

While it might be ancillary to environmental governance, I consider that it would be appropriate for the Auditor General for Wales to audit the accounts of any new Welsh public body. The Auditor General's functions in respect of the body should include consideration of arrangements for securing economy, efficiency and effectiveness, and consideration of the regularity of expenditure. I also think it would be appropriate for the Auditor General to have a power to undertake examinations of economy, efficiency and effectiveness. The Auditor General should report to Assembly in respect of all of these functions, so as to enable the Assembly to be assured of the proper stewardship of resources.

Those functions, however, relate to the use of public financial resources, especially resources provided by the Assembly, rather than matters of environmental governance *per se*. The assessment at para 3.20 of the consultation document that the Auditor General and the Public Services Ombudsman are not responsible for scrutinising implementation of environmental law is correct. Likewise, the the Future Generations Commissioner (FGC) is not responsible for scrutinising implementation of environmental law. This should perhaps be more clearly recognised, along with the overall nature of the Well-being of Future Generations (Wales) Act 2015, as has been underlined in the Cymer Afan case.

I should note that I agree with the views reflected in para 15 of the Climate Change, Environment and Rural Affairs Committee's report that the NRW and FGC are not appropriate bodies to fill the gaps left by exit from the EU—that fundamental change to their functions would be required, and that they lacked resources. My predecessor's report, *The development of Natural Resources Wales*, February 2016, noted that NRW faced challenges of lacking capacity and capability for the functions it was given (see

page 16). Subsequent audit work has found that NRW has struggled with regularity issues in the exercise of its forestry functions.

Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Generally, I think the outlined role is appropriate, but with the significant exception of acting in an advisory capacity. Having a specific function of acting in an advisory capacity risks undermining the regulatory functions. Combining advisory functions with review functions in one body tends to lead to apparent, if not actual, conflicts of interest and reduces confidence in the review functions. This is evident from the crisis in commercial audit where advisory work is widely seen as having detracted from statutory audit work, or has actually undermined the rigour of such audit work. (See, for example, <https://www.theguardian.com/news/2018/may/29/the-financial-scandal-no-one-is-talking-about-big-four-accountancy-firms>.)

As I understand its activities, the EU Commission sets strategy and provides interpretation of its principles, but it does not actually act in an advisory capacity to public bodies.

Question 8: Which policy areas should be included within the scope of new governance arrangements?

The list given in the consultation document, as per section 2 of Environment (Wales) Act 2016 seems a sensible starting point. There may be merit in making clear that the scope includes the interaction of the listed items with other items, such as noise, radiation, waste, emissions, discharges and other releases into the environment. It may also be useful to make clear that the interaction of public policies with the environment is in scope.

Question 9: Do you consider the proposed list of bodies to be appropriate?

The list seems practically reasonable in itself, but please see answer to Q4. In addition to the general point of it being appropriate for all public bodies to be covered, I would suggest that if a selected list is used, consideration be given to the inclusion of national park authorities and Transport for Wales.

Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Yes. See answer to Q4

Question 11: What should be the status, form and constitution of an oversight body?

I agree with the suggestion that the body should be accountable to the National Assembly rather than the Welsh Government. This is analogous with the arrangements for public audit, which is required for the sake of objectivity to be independent of the Welsh Government.

I also agree, as indicated at Q6, that the body should be audited by Auditor General. Furthermore, I agree that the body should have independent appointment arrangements and independent funding (independent from the Welsh Government).

Question 12: Should an oversight body be able to act in an advisory capacity?

As indicated above at Q7, no.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes. No other existing body (other than the EU Commission) lends itself to this function.

Question 14: What should be the extent of this function?

Audit experience shows that the function needs to be supported with good access rights, as indicated in the consultation document.

As for thematic reviews, I think it is important that such a function is clearly defined so that it substantively supports the setting and enforcement of environmental standards. Too wide a thematic review function would risk overlap with, for example, the functions of the FGC, and it may risk dilution of focus on monitoring and enforcing environmental standards.

Question 15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?

The suggestions of powers to conduct investigations etc set out in the consultation document seem to be reasonable ways of addressing the gap left by not having the EU Commission operating in respect of Wales. While it seems appropriate that a new body should be required to give existing public bodies' complaints procedures a reasonable amount of time to operate and provide resolution, I do not think such procedures should be able to significantly delay the new body's investigations.

By analogy, I think the Freedom of Information Act 2000, together with Information Commissioner guidance, provides a sensible model in that the Commissioner normally expects complainants to exhaust public bodies' review procedures first, but generally limits the amount of time for such procedures to 20 or 40 working days. (Those timescales are probably too short for many environmental matters, but I think the principle is appropriate.) This contrasts with the arrangements provided for the Welsh Language Commissioner, whose legislation requires an investigation regardless of existing public bodies' complaints procedures. In my view, that model tends to lead to excessive duplication, yet does not lead to speedier resolution.

Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?

I consider that emulating the informal and formal mechanisms operated by EU Commission, insofar as that is possible, is a sensible approach. I think, however, that it is important not to hamstring the body by imposing a duty to work collaboratively, without such a duty being made subject to the body's discretion to achieve enforcement by what it considers the most appropriate means. Omitting such prioritisation of duties would risk the body becoming toothless.

Question 17: What enforcement actions do you consider need to be available?

Again, the Freedom of Information Act 2000 may provide a useful model. Under that Act, the Information Commissioner reviews cases and issues decision notices, which may, for example, order disclosure of information. Those notices can be appealed by either party to the Information Tribunal. Tribunal decisions can be appealed to the High Court, but only on points of law. This model seems to provide a reasonably accessible and cost-effective means of dealing with alleged breaches of FOIA. An environmental law tribunal would of course have a cost, but it would be means of getting expert consideration of alleged breaches, without the very considerable cost of judicial review (in most cases).

### **Other**

Question 18: Would there be advantages in having a shared core set of common environmental principles?

I think that there would be considerable advantages in having a shared core set of common environmental principles. Common principles should, for example, enable business to readily understand requirements in each territory. This would be particularly helpful for businesses that operate across the border. (Similarly, having a shared set of principles across not only Wales and England, but also with the EU, would also have strong advantages in terms of business understanding of compliance requirements.)

I think it is important not to overstate or misunderstand the existing differences in Welsh environmental governance. The difference are not ones that necessitate the establishment of differing core principles. In particular, as indicated at Q6, the Well-being of Future Generations (Wales) Act 2015 does not concern enforcement of environmental standards. Instead, it is a framework for aspirational corporate planning and governance. In essence, it operates by encouraging improvement rather than enforcement of standards.

Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Not in a position to answer this question.

By email

07/06/2019

RE: Correspondence from the Chair of the Climate Change, Environment and Rural Affairs Committee |  
Gohebiaeth gan Gadeirydd y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig

Dear Mike Hedges AM,

Thank you for your letter dated 8 May 2019 regarding the Climate Change, Environment and Rural Affairs Committee's inquiry into environmental governance and principles.

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

#### Contents of the law

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

I am concerned that the government in England places the sustainable development principle on an equal footing within their 'environmental principles' listed in Draft Clause 2 of the Draft Environment (Principles and Governance) Bill.

*Draft Clause 2 states:*

*In this Act "environmental principles" means the following principles—*

- (a) the precautionary principle, so far as relating to the environment,*
- (b) the principle of preventative action to avert environmental damage,*
- (c) the principle that environmental damage should as a priority be rectified at source,*
- (d) the polluter pays principle,*
- (e) the principle of sustainable development,*
- (f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
- (g) the principle of public access to environmental information,*
- (h) the principle of public participation in environmental decision-making, and*
- (i) the principle of access to justice in relation to environmental matters.*

In Wales, the Sustainable Development Principle is overarching. Our concept of well-being is holistic. It brings together the economy, society, environment and culture. Focusing only on the environment and having principles only applying to the environment or treating the environment separately is not in line with our concept of well-being in Wales. It is important to continue to look at wider and cross-cutting issues because all things impacting on the environment are not necessarily environmental e.g. human mobility has a huge impact on the natural environment. Equally, we already have protective operating principles such as SMNR and 5 ways of working including prevention, integration, etc. in Welsh Law and any new (UK) principles should not go against them or diminish their scope and depth. Equally some of the Welsh legal concepts might need amending as the consultation points. For example, the precautionary principle does not appear as such in Welsh law but SMNR principles 'capture the key components' of it as the consultation document states however, SMNR only applies to Welsh Government and NRW and not to all public bodies nor to the private or third sector. This is why great care needs to be taken to ensure the current level of protection is maintained and enhanced.

I understand that devolution is complex, but it is important that Wales does not operate post Brexit to any principles which would dilute both the overarching and operating principles we currently enjoy now in Wales within any post-Brexit UK, England and Wales or Wales only setting.

The principles set out in the Well-being of Future Generations Act should be used to design the new governance system.

### Governance

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less than those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

I do not have particular views as to which organisation(s) or structure(s) is to be used or created it is essential that it enhances rather than contradict existing structure, is expert, appropriately resourced, independent, easily accessible by citizens.

I believe any new body or reformed body, or bodies should be more than a regulator and it must be able to handle individual complains and be detached from government. I agree with the Public Services Ombudsman that any proposed system should be citizen centred and of easy access. It is important once more that we do not lose what we can currently enjoy within the EU framework and Welsh framework and seek to enhance the protection given to the environment and the access to justice given to current and future generations.

I believe it is important to consider whether all the public bodies listed in the Well-being of Future Generations Act should fall under the remit of new body and not only some of them.

Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

I will respond to the Welsh Government consultation in these terms.

Yours sincerely,

Sophie Howe  
Future Generations Commissioner for Wales



# Agenda Item 8

By virtue of paragraph(s) vi of Standing Order 17.42

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