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11 April 2024

Land, Nature and Forestry Division
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By email only environmental.governance@gov.wales

Dear Welsh Government

Consultation on the White Paper Securing a Sustainable Future - Environmental Principles, Governance and Biodiversity Targets for a Greener Wales

The Environment Project is a pro bono extra-curricular project for law students at the School of Law and Politics at Cardiff University. The Project is not formally part of the assessment for any degree or professional course and the students volunteering on the Project range from second-year undergraduates to postgraduates to those on solicitor and barrister professional courses.

From 2022 into 2024, we have examined freedom of information, particularly the Environmental Information Regulations 2004, the rights they underpin, from which European and international law and convention they derive, how are they administered in the UK and how they might be reviewed in Wales to enhance their effectiveness.

Last year, we were very grateful to the Senedd Petitions Committee for considering its petition - [The Welsh Govt should take steps to save the Environmental Information Regulations in relation to Wales - Petitions \(senedd.wales\)](#) - which addressed the threat that arose in 2023, that the Retained EU Law Bill, as initially introduced in Westminster, would have 'sunset' the Environmental Information Regulations 2004, including in Wales.

As it happened, after the petition was opened, changes made on amendment during the passage of the Retained EU Law Bill, now enacted as the Retained EU Law (Revocation and Reform) Act 2023, took much of the 'sting' out of the Bill and the threat it posed to the Environmental Information Regulations 2004. However, the petition was a very useful exercise, and we are grateful to Jack Sargeant, the Chair of the Petitions Committee, the other Members of the Committee and to the Clerks.

As part of that petition process, a short Project report - *The Environmental Information Regulations 2004: Report of the Freedom of Information sub-group of the pro bono Climate and Environment Project of Cardiff University's School of Law and Politics 2022/2023* – was submitted to the Petitions Committee and shared by that Committee in November/ December 2023 with other Senedd Committees and with the Minister. That Report dealt with how the Environmental Information Regulations 2004 might be amended to improve them, by and for Wales. We received responses from the Chair of the Legislation, Justice and Constitution Committee, Mr Irranca-Davies, and the Minister for Climate Change, Julie James, both acknowledging the efforts made to assist the Welsh Government. The Report is appended to this letter for ease of reference

Turning to the White Paper, we have noted with some disappointment that it is entirely silent on the right of access to environmental information.

One of the main reasons for our disappointment is that the March 2020 *Report for the Environmental Governance Stakeholder Group – Environmental Governance in Wales Post-Exit From the European Union* recommended (Recommendation 4) that “the Aarhus Convention rights should be articulated and highlighted in any forthcoming legislation so that the Commission¹ could oversee the working of these rights in Wales” (at 3.4 of the Report, relevant extract at Annex 1 to this letter). The right of access to environmental information is, of course, one of the ‘three pillars’ of the Aarhus Convention.

Further, we had noted the Written Statement of the then Minister for Environment, Energy and Rural Affairs, Lesley Griffiths, which had expressly accepted Recommendation 4 - [Written Statement: Environmental Governance Stakeholder Task Group Report \(19 November 2020\) | GOV.WALES](#).

We understand the informal intention to keep the scope of the White Paper tight and not to allow ‘mission creep’. However, we do consider that for Welsh Ministers to take powers, perhaps closely analogous to those taken by Scottish Ministers in the Freedom of Information (Scotland) Act 2002, would enable Wales to ‘keep the door open’ for the Welsh Government, at some stage in the future, to pass Wales’ own Environmental Information (Wales) Regulations, to amend and improve upon the UK Regulations that currently apply in Wales (hopefully, with any future Welsh Regulations addressing some or all of the issues and suggestions identified in the attached Report).

Similarly, we consider that the Environment Governance Bill is the perfect vehicle to use to put on the statute book the provisions that would be required to establish a Welsh Information Commissioner, potentially akin to that in Scotland, to deal with access to environmental information in Wales. Again, that would enable Welsh Ministers to keep the door open to deal with such matters in Wales, information rights not being a ‘reserved matter’.

Importantly, neither the taking of requisite powers by Welsh Ministers, nor the making of provisions for the Senedd to nominate an Information Commissioner for Wales, while being entirely in line with the maturity of devolved government in Wales, would necessarily require Welsh Ministers or the Senedd to act immediately on either. For example, there would be no bar on postponing commencement of the relevant provisions, thereby allowing for plenty of time to consult widely on either matter at a later date.

However, it would be entirely in line with Lesley Griffiths’ response to the Stakeholder Group that the Environmental Governance Bill is the vehicle to use to make such provision, in advance of any future

¹ Currently, the Interim Environmental Protection Assessor for Wales

work that may be done in Wales to continue the successful divergence of Welsh law on matters of the environment.

Conversely, we fear that if this Bill is not used, it is very unlikely that another appropriate Bill will find sufficient Senedd time for many years.

To that end, taking into account Welsh legislative drafting guidance, and drawing on the useful 'precedents' found in the Freedom of Information (Scotland) Act 2002, we have drafted appropriate clauses and draft Explanatory Notes, and we put these forward for the Welsh Government to consider when drawing up the Bill that is expected to follow the White Paper.

These are at Annex 2 to this letter.

The Environment Project at the School of Law and Politics at Cardiff University stands ready to assist further if that would be considered useful. Please do not hesitate to contact us at any stage.

We look forward to hearing from you. Please reply to: ProBono@cardiff.ac.uk

Yours faithfully,

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Annex 1:

Extract from the Report from the Environmental Governance Stakeholder Group

<https://www.gov.wales/sites/default/files/publications/2020-11/report-from-the-environmental-governance-stakeholder-group.pdf>

“3.4

The pillars of the Aarhus Convention

3.4.1 One final issue that sits between governance and principles but which the Group placed under the Governance heading are the rights under the Aarhus Convention. This UNECE Convention relating to environmental governance is usually referred to as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998). Article 1 of the Aarhus Convention states that: “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each party shall guarantee the rights of

- access to information,
- public participation in decision-making, and
- access to justice

in environmental matters in accordance with the provisions of this Convention.”

3.4.2 This list contains what is widely referred to as the three pillars of the Aarhus Convention and they are not as such principles but rather rights conferred on citizens. The Aarhus Convention was signed by the EU on behalf of member states and certain of its provisions, particularly on information and participation, now appear in (retained) EU environmental law. The UK ratified this Convention in February 2005. As we have seen above, the EU (Withdrawal) Act and the draft Environment (Governance and Principles) Bill included these rights within the set of principles to be included in the statement of environmental principles though they do not now appear in the 2020 Bill. Arguably inclusion is not necessary since the UK has Treaty obligations to ensure that these rights are extended to citizens. Nonetheless, the question arises as to whether there may be value in rearticulating the three pillars in the context of a new governance framework for Wales. The new governance structures explained above are very much about the provision of environmental information, encouraging participation in environmental decision making and offering remedial measures as necessary. Consequently the group felt that **the Aarhus Convention rights should be articulated and highlighted in any forthcoming legislation so that the Commission could oversee the working of these rights in Wales.**”

Annex 2:

Draft clauses drawing on 'precedents' in the Freedom of Information (Scotland) Act 2002

Clause [XYZ] - The Welsh Information Commissioner

- (1) An officer known as the Welsh Information Commissioner (in this Act referred to as the "Commissioner") is established who is to be an individual appointed by His Majesty on the nomination of the Senedd.*
- (2) Subject to subsection (3), an individual is ineligible for appointment as the Commissioner at any time if—*
- (a) the person is or holds office in, or is an employee of, another Welsh public authority;*
 - (b) the person has held office as the Commissioner.*
- (3) The Senedd Commission may determine the terms and conditions upon which the Commissioner is to hold office, which may—*
- (a) prohibit the Commissioner from holding any other office, employment or appointment or engaging in any other occupation as specified in the terms and conditions of office or within a description so specified,*
 - (b) provide that the Commissioner's holdings of any such office, employment, or appointment or engagement in any such occupation is subject to the approval of the Senedd Commission.*
- (4) The Commissioner is entitled to—*
- (a) a salary of such amount; and*
 - (b) such allowances, as the Senedd Commission may determine.*
- (5) Subject to subsection (6), the Commissioner is to hold office for such period not exceeding eight years as the Senedd Commission, at the time of appointment, may determine.*
- (6) The Commissioner may be removed from office by His Majesty where the officer makes such a request as to be relieved.*
- (7) The Commissioner may be removed from office by His Majesty where –*
- (a) the Senedd Commission is satisfied that the Commissioner has breached the terms and conditions of office and the Senedd resolves that the Commissioner should be removed from office for that breach, or*
 - (b) the Senedd resolves that it has lost confidence in the Commissioner's willingness, suitability or ability to perform the functions of the Commissioner,*
- and, in either case, the resolution is voted by a number of members of the Senedd not fewer than two thirds of the total number of members.*
- (8) The validity of any actions of the Commissioner is not affected by a defect in the nomination by the Senedd for that officer's appointment.*
- (8) The Commissioner, in the exercise of that officer's functions (except the function of preparing accounts), is not subject to the direction or control of the Senedd Commission, of any member of the Welsh Government or of the Senedd.*

(9) Where the office of Commissioner is vacant, the Senedd Commission may appoint a person (who may or may not be a member of the Commissioner's staff) to discharge the functions of that office until a new Commissioner is appointed, who—

(a) may be relieved of that appointment at that person's request;

(b) may be removed from office by the Senedd Commission by notice in writing given by them;

(c) in other respects, holds office on such terms and conditions as the Senedd Commission may determine; and

(d) while holding that appointment, is to be treated for all purposes as the Commissioner, except those of subsections [XYZ] to [XYZ] and those of paragraph [XYZ] of schedule [XYZ]. [relating to provision for a pension]

(10) The Commissioner may—

(a) obtain advice, assistance or any other service from any person who, in the opinion of the Commissioner, is qualified to give it; and

(b) Subject to subsection (c), the Commissioner may pay to that person such fees and allowances as the Commissioner determines; and

(c) Any payment is subject to the approval of the Senedd Commission.

(11) Any function of the Commissioner may be exercised on behalf of that officer by any person (whether or not a member of that officer's staff) authorised by the Commissioner to do so (and to the extent so authorised).

(12) The Senedd Commission is to pay—

(a) the salary and allowances of the Commissioner;

(b) Subject to subsection (13), any expenses properly incurred by that officer in the exercise of functions under this Act so far as those expenses are not met out of sums received and applied by that officer under this section; and

(c) any sums payable by virtue of subsections [XYZ] to, or in respect of, a person who—

(i) is appointed under subsection (9); or

(ii) has ceased to hold office by virtue of having been so appointed.

(13) The Senedd Commission is not required to, but may, pay any expenses incurred by the Commissioner, which do not exceed or are otherwise not covered by a budget, or as the case may be, revised budget approved budget under para XYZ of schedule XYZ.

(14) The Senedd Commission is to indemnify the Commissioner in respect of any liabilities incurred by the Commissioner in the exercise of the Commissioner's functions under this Act.

(15) Schedule [XYZ] to this Act has effect with respect to the Commissioner.

Explanatory Note to clause [XYZ] – The Welsh Information Commissioner

XYZ .This clause provides as to the appointment of the Welsh Information Commissioner and the basis on which that office is held.

XYZ .Under clause [XYZ] the Commissioner will be appointed by His Majesty on the nomination of the Senedd. The Senedd Commission will determine the Commissioner’s salary, allowances and other terms and conditions. The Commissioner will hold office for a term not exceeding 8 years and for no longer than 2 terms unless re-appointment for a third is desirable in the public interest. The Commissioner retires at the end of the calendar year in which the age of 65 is reached, and can be removed from office by His Majesty following a resolution of the Senedd passed by a majority of no less than two thirds of the total number of members of the Senedd.

XYZ .Under clause [XYZ] the Commissioner is not subject to the direction or control of the Senedd, the Senedd Commission or any member of the Welsh Government, except in relation to the preparation of accounts which must be in accordance with any directions provided by the Senedd Commission and the appointment of staff which requires the approval of the Senedd Commission.

Schedule [XYZ] - The Welsh Information Commissioner

Status

1.

(1) The Commissioner and that officer's staff are not to be regarded as servants or agents of the Crown or as having any status, immunity or privilege of the Crown; and the Commissioner's property is not to be regarded as property of, or property held on behalf of, the Crown.

(2) The Commissioner is, as such, to be regarded as a juristic person distinct from the natural person holding the office.

Pensions, allowances etc

2.

(1) The Senedd Commission may arrange the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to hold the office of Commissioner and (without prejudice to that generality) may—

(a) make contributions or payments towards provision for such pensions, allowances or gratuities; and

(b) establish and administer pension schemes.

(2) The references to pensions, allowances, and gratuities in sub-paragraph (1) could include pensions, allowances, or gratuities by way of compensation for loss of office.

Staff

3.

(1) The Commissioner may appoint such staff, on such terms and conditions, as that officer may determine.

(2) The Commissioner may make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of such staff and (without prejudice to that generality) may—

(a) make contributions or payments towards provision for such pensions, allowances or gratuities; and

(b) for the purposes of this sub-paragraph, establish and administer one or more pension schemes.

(3) The references in sub-paragraph (2) to pensions, allowances and gratuities include references to, as the case may be, pensions, allowances or gratuities by way of compensation for loss of employment.

(4) The exercise of a power in sub-paragraph (1) or (2) is subject to the approval of the Senedd Commission.

Accountable officer

4.

(1) The Senedd Commission is to designate the Commissioner or a member of that officer's staff as the accountable officer for the purposes of this paragraph.

(2) The functions of the accountable officer are—

(a) those specified in sub-paragraph (3); and

(b) where the accountable officer is not the Commissioner, the duty set out in sub-paragraph (4), and the accountable officer is answerable to the Senedd for the exercise of those functions.

(3) The functions referred to in sub-paragraph (2)(a) are—

(a) signing the accounts of the expenditure and receipts of the Commissioner;

(b) ensuring the propriety and regularity of the finances of the Commissioner; and

(c) ensuring that the resources of the Commissioner are used economically, efficiently and effectively.

(4) The duty referred to in sub-paragraph (2)(b) is a duty, where the accountable officer is required to act in some way but considers that to do so would be inconsistent with the proper performance of the functions specified in sub-paragraph (3), to—

(a) obtain written authority from the Commissioner before taking the action; and

(b) send a copy of that authority as soon as possible to the Auditor General.

Budget

5.

(1) The Commissioner must prepare a budget to lay out use of funds before the start of each financial year. This budget must be sent to Welsh ministers for approval by the date determined by them.

(2) The Commissioner may prepare a revised budget during a financial year, which would cover the remainder of the financial year. This must be sent to Welsh ministers for approval.

(3) In preparing a budget or revised budget, the Commissioner must ensure that their resources will be used economically, efficiently, and effectively; and

(4) All budgets and revised budgets must contain a statement confirming that the Commissioner has complied with sub-paragraph (3).

Accounts

6.

(1) The Commissioner must—

(a) keep accounts; and

(b) prepare annual accounts in respect of each financial year,

in accordance with such directions as the Scottish Ministers may give that officer.

(2) The Commissioner must send a copy of the annual accounts to the Auditor General for Wales for auditing.

(3) The financial year of the Commissioner is—

(a) the period beginning with the date on which the Commissioner is appointed and ending with 31st March next following that date; and

(b) each successive period of twelve months ending with 31st March.

(4) If requested by any person, the Commissioner must make available at any reasonable time, without charge, in printed or in electronic form, the audited accounts, so that they may be inspected by that person.

General powers

7.

(1) The Commissioner may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of that officer's functions; and without prejudice to that generality, may in particular—

(a) acquire and dispose of land and other property; and

(b) enter into contracts.

(2) The exercise of the power to acquire or dispose of land is subject to the approval of the Senedd Commission.

Location of office

8.

The Commissioner must comply with any direction given by the Senedd Commission as to the location of the Commissioner's office.

Sharing of premises, staff, services and other resources

9.

The Commissioner must comply with any direction given by the Senedd Commission as to the sharing of premises, staff, services or other resources with any other officeholder or any public body.

Restrictions on subsequent appointments etc.

10.

(1) A person who has ceased being the Commissioner may not, without the approval of the Senedd Commission—

(a) be employed or appointed in any other capacity by the Commissioner,

(b) be a Welsh public authority or hold office in, or be an employee or appointee of, a Welsh public authority, or

(c) hold any other office, employment or appointment or engage in any other occupation, being an office, employment, appointment or occupation which, by virtue of section [XYZ], that person could not have held or, as the case may be, engaged in when Commissioner.

(2) The restriction in sub-paragraph (1)—

(a) starts when the person ceases to be the Commissioner, and

(b)ends on the expiry of the financial year next following the one in which it started.

Explanatory Note to Schedule [XYZ] – The Welsh Information Commissioner

XYZ. This schedule sets out various matters relating to the Welsh Information Commissioner.

XYZ. Paragraph 1 provides that the Commissioner, and his or her staff and property, are independent of the Crown and do not have any status, immunity or privileges of the Crown

XYZ. Paragraph 2 provides that the Senedd Commission may make arrangements for the payment of pensions, allowances or gratuities to former Commissioners (including compensation for loss of office).

XYZ. Paragraph 3 provides that the Commissioner may appoint staff, on such terms and conditions as that officer may determine, and(2) may make arrangements for the payment of pensions, allowances or gratuities to former members of staff (including compensation for loss of employment). However, the Commissioner will require the approval of the Senedd Commission in these matters.

XYZ. Paragraph 4 provides that the Commissioner, or a member of his or her staff, will be designated by the Senedd Commission as accountable officer for the office of the Commissioner. The functions of the accountable officer are to sign accounts, ensure propriety and regularity of finances, and ensure that resources are used economically, efficiently and effectively. The accountable officer is answerable to the Parliament for the exercise of the functions provided for under this paragraph.

XYZ. Paragraph 6 provides that the Commissioner must prepare and keep accounts, in accordance with any directions the Senedd Commission may give, and send a copy of the annual accounts to the Auditor General for Wales for auditing. The Commissioner's audited accounts must be made publicly available, subject to certain conditions. The Commissioner's financial year runs from 1st April to 31st March.

XYZ. The Commissioner is provided with powers in paragraph 7 to do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of the functions of the Commissioner, and in particular may acquire or dispose of land and other property, and enter into contracts

[check para numbers]

Clause XYZ - Power to make provision relating to environmental information

(1) In this section “the Aarhus Convention” means the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.

(2) For the purposes of this section, “the information provisions” of the Aarhus Convention are Article 4, together with Articles 3 and 9 so far as relating to that Article.

(3) The Welsh Ministers may, in relation to information held by or requested from any Welsh public authority, by regulations make such provision as they consider appropriate—

(a) for the purpose of implementing the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention; and

(b) for the purpose of dealing with matters arising out of, or related to, the implementation of those provisions or of any such amendment.

(4) Regulations under subsection (3) may in particular—

(a) enable charges to be made for making information available in accordance with the regulations;

(b) provide that any obligation imposed by the regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law;

(c) make provision for the issue by the Welsh Ministers of a code of practice;

(d) provide for the general functions of the Commissioner and recommendations as to good practice to apply in relation to such a code with such modifications as may be specified in the regulations;

(e) provide for enforcement of compliance with any requirement of the regulations; and

(f) contain such transitional or consequential provision (including provision modifying any enactment) as the Welsh Ministers consider appropriate.

Explanatory Notes to clause XYZ - Power to make provision relating to environmental information

This clause provides that the Welsh Ministers may make regulations to implement the “Aarhus Convention” – a United Nations Economic Commission for Europe (UNECE) Convention, which the UK (and all other European Union Member States) signed at Aarhus in Denmark in 1998.

The Convention deals with access to information, public participation in decision-making and access to justice in environmental matters. To meet the requirements of the Convention in Wales, Welsh regulations may be made. It should be noted that these regulations will implement only those provisions of the Aarhus Convention which relate to access to environmental information.

This clause will allow the creation of a revised free-standing access regime in Wales for environmental information, replacing the current EIRs (the Environmental Information Regulations

2004). Clause [XYZ] gives the Welsh Ministers power to make regulations to implement those Articles of the Aarhus Convention which relate to the provision of access to environmental information. The regulations may include provisions for the purpose of dealing with matters arising from those Articles, or amendments to them. This clause permits the regulations to include provisions enabling charges to be made in connection with the disclosure of environmental information.

Clause [XYZ] also gives Welsh Ministers power to make provision for enforcement of the regulations. The regulations may also make provision for a code of practice to be issued by the Welsh Ministers to apply to any authority, persons or body (as defined in the Convention) subject to the regulations. The regulations may also make provision for any transitional or consequential provisions that are appropriate.