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Llywodraeth Cymru
Welsh Government

Our ref: MA-P/LG/2876/18

Mike Hedges AM
Chair
Climate Change, Environment, and Rural Affairs Committee
National Assembly for Wales

5 September 2018

Dear Mike

Thank you for your report on Common Frameworks for the Environment after Brexit.

Please find attached a response on behalf of the Welsh Government to the Committee's recommendations.

Regards

A handwritten signature in black ink that reads "Lesley Griffiths". The signature is written in a cursive style.

Lesley Griffiths AC/AM
Ysgrifennydd y Cabinet dros Ynni, Cynllunio a
Materion Gwledig
Cabinet Secretary for Energy, Planning and
Rural Affairs

A handwritten signature in black ink that reads "Hannah Blythyn". The signature is written in a cursive style.

Hannah Blythyn AC/AM
Gweinidog yr Amgylchedd
Minister for Environment

Written Response by the Welsh Government to the Climate Change, Environment and Rural Affairs Committee's report: Common Frameworks for the Environment after Brexit.

September 2018

Recommendation 1

The UK and Welsh Governments should formalise inter-government working mechanisms. There is a need for a shared governance model to ensure that decisions are made and actions taken on the basis of parity of esteem. The Joint Ministerial Committee (JMC) should be reformed, or a new UK Council of Ministers should be established, to take these matters forward. There must be arbitration and adjudication mechanisms associated with this body to resolve disputes. It must be transparent.

Response: Accept

We welcome the Committee's support for the proposals we set out in our Brexit and Devolution Paper in June last year. We set out a blueprint for reform calling for a 'UK Council of Ministers' capable of making binding joint decisions with an independent adjudication mechanism. The Council of Ministers should also be capable of dealing with the new form of shared powers and responsibilities which exist with Common Frameworks.

We agree that the current Joint Ministerial Committee (JMC) structures were not designed for shared governance and decision making. At the Plenary meeting of the JMC on 14 March, the Committee agreed that officials should review and report to the Committee on the existing inter-governmental structures, including the Memorandum of Understanding, to ensure they are fit for purpose in light of the UK's exit from the EU.

The review will cover the following 3 areas of inter-governmental relations:

- Constitutional framework and principles
- Liaison arrangements, and
- Governance arrangements (frameworks, decision-making, dispute resolution, data-sharing).

An inter-governmental project team of officials has been set up to take this work forward. The Welsh Government is represented on this project team and is playing its full part in taking the review forward, but it is too soon to anticipate the outcomes.

Financial Implications: None

Recommendation 2

The Welsh Government should clarify the role it has taken in the development of the UK Government's provisional assessment of common frameworks. The Welsh Government should clarify its position on the UK Government's provisional assessment and should publish a formal response to it.

Response: Accept in Principle

The UK Government's provisional assessment of Common Frameworks, published in March 2018, is not a joint document and the Welsh Government did not contribute to its drafting. Welsh Government has had, and continues to have, discussions on what areas will need a Common Framework and to what extent those areas will need to be covered. One of the aims of the current phase of work will be to further refine the shared understanding between all four Administrations on Common Frameworks, including what specific areas may need to be underpinned by legislation.

Work to date would suggest that the areas which will need to be legislated on jointly between all four Administrations will be far narrower and will have changed from the initial list provided by the UK Analysis. In April 2018, the Welsh Government and the UK Government agreed an Inter-Governmental Agreement (IGA) in relation to the EU (Withdrawal) Act. The IGA reflects the UK Government's provisional assessment of Common Frameworks and is a published document. The Inter-Governmental Agreement acknowledges that legislative underpinning "*...may not be necessary in all of the 24 areas identified, and that only specific elements of some areas will require legislation...*"

Financial implications: None

Recommendation 3

The Welsh Government should publish any explanation it has received from the UK Government about the rationale for determining whether frameworks are legislative or non-legislative.

Response: Reject

Common Frameworks refer to those areas where commonality may be required between the four Administrations on areas that are currently subject to EU administration, which can be either legislative or non-legislative.

Decisions on whether a Common Framework will be legislative or non-legislative will not be for the UK Government to make, but will need to be developed through a common understanding between all four Administrations of what will be the best way to manage each policy area.

One of the priorities of the work is for all four Administrations to mutually agree which areas will require some degree of legislative underpinning under a Common Framework. Some of the 24 areas identified by the UK Government's analysis are very broad, therefore, it is important to note that the UK Government's analysis will require "*...more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part.*"

Working groups of officials from all four Administrations will be seeking to identify more accurately which aspects of these areas will require legislative underpinning. Official-level work is already indicating that the areas requiring legislation will be much narrower in scope than the list of 24 identified in the UK Government's provisional assessment of Common Frameworks.

It also possible that additional legislative Frameworks may be identified beyond the list of 24 areas, where all the administrations agree it is desirable.

Some Common Frameworks may be underpinned by non-legislative agreements. These could include arrangements between the four Administrations such as a Memorandum of Understanding or other inter-government arrangement that would underpin a common approach between the Administrations.

Financial Implications: None

Recommendation 4

The Welsh Government should clarify how it has ensured that uniquely Welsh matters, such as the Welsh language, have been taken into account when considering common frameworks. The Welsh Government should also confirm whether it has assessed the impact of the UK Government's provisional assessment on the Welsh language.

Response: Accept

The Framework Principles and the Inter-Governmental Agreement establish that the development of Common Frameworks is fundamentally a joint endeavour between all Administrations. Welsh Government officials will be involved in the development of all Common Frameworks relevant to Wales and will be able to represent Welsh interests in their development. This is not a case of influencing UK Government policy; Common Frameworks will be jointly developed.

Welsh Government officials also sit on the central co-ordinating board that coordinates the development of all Common Frameworks. Welsh specific issues, including impacts on the Welsh Language, will be an important part of their contributions.

Work has moved past the UK Government's initial assessment published in March. When coherent positions begin to be jointly developed their impact on Welsh Language can then be assessed.

Any Common Framework that leads to functions currently operated by the European Commission being undertaken across the UK by a new or repurposed body will need to include appropriate provisions to meet Welsh Language policies.

Financial Implications: None

Recommendation 5

The UK and devolved governments should agree and publish detailed definitions of the principles agreed in the JMC communique of October 2017.

Response: Reject

As paragraph 12 of the report sets out, the principles agreed at JMC on 16 October specify that Common Frameworks will be established where they are necessary to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;

- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

The cross-cutting issues identified in the JMC communique, such as the UK internal market, are being considered alongside the main body of work on Common Frameworks.

As Common Frameworks continue to progress, the Principles agreed at JMC(EN) in October will form the basis for their development and be considered in the context of each Common Framework. As details of Common Frameworks emerge they will be published in due course for consultation and scrutiny.

Financial Implications: None

Recommendation 6

The Welsh Government should clarify how it will ensure that the Assembly has sufficient and adequate opportunities to inform the development of common frameworks and to scrutinise final proposals.

Response: Accept

The Inter-Governmental Agreement ensures that the development of all Common Frameworks is undertaken collaboratively. For those that are underpinned by legislation, the Sewel Convention will continue to apply and the UK Government will continue to seek consent in the normal way.

As the current phase of work continues and policy approaches for each Common Framework begins to be developed these will be tested with stakeholders. As proposals for new working arrangements are developed through non-legislative agreements these will be open to scrutiny.

The constitutional aspects of Common Frameworks will be of ongoing interest to the External Affairs and Additional Legislation and the Constitutional and Legislative Affairs Committees. Policy specific Common Frameworks will benefit from subject specific scrutiny as proposals emerge.

This will be a completely new form of cross administration policy development. How this is jointly scrutinised by the relevant committees from each legislature is something which may require a new form of joint scrutiny.

Financial Implications: None

Recommendation 7

Stakeholders are yet to be convinced they have been engaged in a meaningful way during the development of common frameworks. The Welsh Government must set out how it will address this.

Response: Accept

The Welsh Government has been undertaking extensive stakeholder engagement on future policy. For example, in our 'Brexit and Our Land' document which is currently the subject of consultation, there has been engagement throughout the process including the Brexit Stakeholder Roundtable, stakeholder engagement at the Royal Welsh Show and other consultation events. Our approach to Common Frameworks will be informed by the policy objectives and requirements in any given area. Therefore, for agriculture our approach will be informed by the stakeholder engagement we have been undertaking.

As initial proposals are developed in each Common Framework area, the Welsh Government will engage with relevant stakeholders at the earliest opportunity. This should be done in a co-ordinated manner, alongside the other Administrations

This is a programme of work that will take several years with the aim being to establish legislative and non-legislative Common Frameworks in time for the end of the proposed transition period in 2020.

Financial Implications: None

Recommendation 8

The Committee recommends that the current rights enjoyed by citizens to challenge the application of environmental legislation must be preserved in common frameworks for the UK. The process for challenging the application of legislation must be clear and accessible.

Response: Accept in Principle

As a Government we have been clear and consistent in our message that Brexit must not result in a dilution of the rights which currently flow from the UK's membership of the EU. We agree our citizens must be able to continue to have the opportunity to challenge the implementation of environmental legislation but we would not distinguish between environmental legislation, which relates to Common Frameworks, and legislation, which does not.

We have already made a commitment to address governance gaps arising from the UK leaving the EU and have acknowledged access for citizens to challenge the implementation of environmental law as one of the gaps.

Until further information is provided on the detail of the UK Government's proposals and our own analysis is finalised, including discussions with our Welsh stakeholders, it is too early to give a definitive response on whether a UK-wide approach is the most appropriate solution. We will provide an update to the Committee when we have reached a proposed decision on whether a UK-wide approach is appropriate or not. Therefore, although we agree with the spirit of the recommendation, we are not able to accept fully the entirety of the recommendation at this time.

We do not envisage a separate citizen complaint process for Common Frameworks but a single clear and accessible complaint system for citizens to challenge the implementation of environmental legislation.

As we outlined in our response to the Committee's Report on environmental governance arrangements and environmental principles post-Brexit, we are currently considering options for addressing the governance gaps.

Discussions are ongoing with both the UK Government and other Devolved Administrations on the potential for a UK-wide approach and what this could entail. Currently, further information is required on the detail of the UK Government's proposals, particularly in relation to 'reserved' areas to fully determine where these proposals provide a suitable basis for a UK-wide approach to enable citizens' complaints.

The gaps in Wales are different to those in other areas of the UK due to the nature of the devolution settlements and the unique legislative landscape we have here in Wales.

Financial Implications: None

Recommendation 9

The Welsh Government must ensure that the points raised by stakeholders in paragraphs 26-47 of this report are reflected and addressed in discussions with the UK Government about common frameworks.

Response: Accept

As indicated in the responses to other recommendations, Welsh Government is still in the early stages of discussions with UK Government and the other Devolved Administrations on areas of commonality. Nonetheless, Welsh Government will ensure that matters raised within paragraphs 26-47 of this report are reflected in these discussions.

As per the response to Recommendation 7, stakeholder views on developing policy are key in shaping discussions around Common Frameworks. Also as proposals are developed in each area we intend to engage with relevant stakeholders, which will provide a further opportunity to address the issues raised by stakeholders.

There is a misconception that the outcome on Common Framework discussions will result in a 'downgrading' of policy areas currently underpinned by legislation. This is not the case. Legislation will remain in areas that are not currently listed in the 24, for example Environment Impact Assessment (EIA) and Strategic Environmental Assessment (SEA). Each Administration would still be able to bring forward their own legislation as they can do now, as these areas would be no different from any other area of devolved competence.

Additionally, there may be areas that are not currently contained in the list that may in future develop into a Common Framework.

With regard to reserved matters, the Welsh Government is currently working with UK Government to understand their reasoning on why they believe certain areas to be reserved. However, areas that are currently fully devolved, such as agriculture and the environment, should remain so. As the JMC Principles state, and which the UK Government jointly agreed, frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the

competence of the devolved institutions will not normally be adjusted without their consent;

- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the Devolved Administrations.

Financial Implications: None