

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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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.

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