

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 ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

PG01

Ymateb gan : Wyese Consulting Limited

Evidence from : Wyese Consulting Limited

Introduction

1. My name is William Wilson, and I am a barrister and director of my own consulting company, Wyese Consulting Ltd – www.wyeseconsulting.com. I have specialised in environmental law for over 25 years, in government, consultancy and private practice. In 1996-97, on secondment from DETR, I undertook a Harkness Fellowship in the USA, visiting 25 states and writing a book *'Making Environmental Laws Work – Law and Policy in the UK and USA'* which compared and contrasted approaches to effective environmental governance in the UK, USA and EU. These comments represent my personal views and not those of any other organisation.

Committee's questions

2. The Committee is seeking views on:

Gaps in environmental governance structures and principles 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 environmental principles, and the function/constitution/scope of the proposed governance body; and

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

I have tried to reflect on those questions in this evidence, and to take into account the Committee's initial Report and the Welsh Government's response.

Brexit uncertainties

3. It is not known yet, as at May 2019, whether, when, how, on what terms or even if the UK will leave the European Union. The terms of departure may include parallel commitments with major implications for the way that environmental laws are applied. Other political commitments to regulatory alignment will affect this area, for example commitments to "maintaining environmental standards." There are also some other legal considerations, such as the "non regression" commitments in the

Withdrawal Agreement between the UK and EU. Some of the answers to the Committee's questions therefore remain subject to decisions yet to be taken on these wider aspects.

Why this matters

4. Finding effective ways to implement environmental laws is both a vital national priority, but also an important factor in international negotiations. We can say what will be lost in terms of enforcement of EU environmental law through Brexit, but the question is what will replace it, and also how that will be seen by the UK's trading partners. "Non-regression" sounds like an obscure technicality, but is really about whether the UK and its component parts have the commitment to maintain the same level of environmental protections as they have done of late.
5. In a major new report published in January 2019 by the UN Environment Programme, *Environmental Rule of Law: First Global Report*, the authors noted that -

"While environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete and ineffective."

That is what is at risk: whether the UK and Wales is really committed to have properly enforced and fully effective environmental laws.

EU Exit and UK response

6. For environmental laws, EU Exit will mean that the UK no longer has -
 - (i) Treaty obligations reinforcing environmental laws (e.g. Article 191 Treaty for European Union);
 - (ii) Application of environmental principles through EU law;
 - (iii) Enforcement by the European Commission;
 - (iv) Enforcement by the Court of Justice of the European Union;
 - (v) The ultimate sanction of Member States risking fines for continuing breaches of EU law;
 - (vi) Legal requirements on government to ensure that penalties for breaches are "effective, proportionate and dissuasive" (see e.g. Water, Waste, Air Quality Framework Directives, REACH etc);
 - (vii) The right of individuals to activate enforcement of environmental laws, at no cost, through complaints to Commission; and
 - (viii) Application of EU derived environmental laws throughout the UK.
7. The political commitment by the UK government was to 'repatriate' the whole of the *acquis communautaire* or body of EU law, to allow for decisions on what should replace

it to be taken by future governments.

8. In environmental law terms and at UK level, this resulted in section 16 of the European Union (Withdrawal) Act 2018, which committed the Secretary of State to publish a Bill setting out how he would apply environmental principles, and to set up a body which would be able to challenge Ministers for non enforcement of environmental laws.
9. Section 16(2) of the European Union (Withdrawal) Act 2018 sets out what the UK government considers to be the main EU environmental law principles involved -

“(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of -

- (a) the **precautionary principle** so far as relating to the environment,
- (b) the principle of **preventive 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.**“

The CCERA Committee of NAW will be aware that this resulted in publication of the *Environment (Principles and Governance) Bill*, and its pre-legislative scrutiny by two committees of the House of Commons, the Environmental Audit Committee and the environment Food & Rural Affairs Committee. Whilst recognizing that this mainly applied to England, a great deal was learned from this pre-legislative scrutiny and consideration in detail of the UK government’s proposals, and both of the reports contain important reflections which could be of assistance to the CCERA Committee (if only in seeking to avoid the same pitfalls in Wales) -

EAC Committee report 25 April 2019

‘MPs call for urgent action to plug gaps in environmental protection’

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/>

EFRA Committee report 30 April 2019

‘New environmental watchdog needs greater independence and sharper teeth’

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/>

10. Both reports were highly critical of key areas within the draft legislation as published, calling it a ‘significant regression’ from EU standards of enforcement. They called for greater independence and additional enforcement powers for the proposed Office for

Environmental Protection; more accountability for Government Departments and public bodies; enforcement of environmental law in the climate change area; reinstatement of the aims for a high level of protection of the environment from the EU treaties; and removal of the wholesale exclusions from the application of environmental principles.

11. Neil Parish MP, the Chair of the Environment, Food and Rural Affairs Committee, said:

“Although the Government has made a real attempt to establish a robust framework for environmental governance, the draft Bill clearly fails to meet its own ambition to ‘ensure the environment is even better protected in future’ as we exit the EU. In some areas it actually marks a significant regression on current standards.

“Given this unique opportunity to rethink how we protect the environment in the future, we cannot afford to see the standards we currently adhere to slip.

“There is also little point in setting up an environmental watchdog if it is unable to fulfil its essential function of holding the government to account. The new watchdog must not solely be a creature of Government but needs real independence.

“To achieve real independence there needs to be a role for Parliament in all decisions relating to the membership of the OEP’s board. Funding for the OEP must also not be solely at the whim of Defra ministers, as is currently the proposal. Sustained cuts to arm’s length bodies such as the Environment Agency and Natural England demonstrate the need for the OEP to have greater budgetary protection to guarantee genuine independence.

“The watchdog will also need sharper enforcement teeth. The Government must explore appropriate ways to ensure greater personal accountability for Ministers and public servants if they fail to uphold environmental law before presenting this Bill to Parliament.

“It is imperative to future generations that the Government does not squander its chance to get this right it is unlikely they will get another any time soon.”

It might be thought that similar considerations will apply to any comparable body established in Wales.

12. The EAC Committee report in particular noted the particular differences between UK and Welsh legislation through the implementation of the Well-Being of Future Generations Act 2015, Planning Act 2015 and Environment (Wales) Act 2016. The EAC Report, on devolution, noted that -

“170. We are disappointed that limited effort has been made to co-design a body and governance framework to cover all four nations of the UK, given this would provide greater independence, a level playing field and more coordinated action. We consider that although it appears coordination has improved since the publication of the Bill, the lack of action in the lead-up to, and drafting of the Bill, had already ruled out possible areas of collaboration which could extend into the future.

171. *The Government should set out in response to this report how it intends for the Office for Environmental Protection to work collaboratively and without overlap with its potential equivalent bodies in Wales and Scotland. The response should clearly set out which provisions*

are within the scope of the Office for Environmental Protection in respect of reserved matters. “

13. Welsh Government consultation questions

Environmental Principles

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

- (a) Rectification at Source;**
- (b) Polluter-pays**

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

In my view Wales (and all parts of the UK) should include a commitment in their legislation to apply the same four environmental principles as are presently found in Article 191.2 of the Treaty for European Union (the precautionary principle, preventive action, rectification at source and polluter pays). The whole of the UK is legally committed to observe those principles at present. I don't agree that it helps to argue that the precautionary principle is the same as the duty in s. 4 Environment (Wales) Act 2016 to “take account of all relevant evidence”.

I also believe that it is wrong for the UK government to have so far failed to re-enact Article 191.1 of the Treaty for European Union, and think that this too ought to be reflected in the law in Wales, and each part of the UK-

“A.191.1 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.”

It is true that Welsh legislation in particular applies the principle of sustainable development, in its own way, as Sustainable Management of Natural Resources (which may reflect the third indent of Article 191.1 above). I understand that the view of Welsh Government may be that any gaps in application could be different for Wales with its distinct legislation than for the rest of the UK. However, Article 191.1 and 191.2 of TFEU matters for each part of the UK.

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

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

I suggest that it ought to be possible to apply all four of the main environmental principles to the discharge of their functions by all government departments and public bodies, so far as relevant to those functions, and that ought to apply also to the SMNR principle.

Accountability

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

I have set out at paragraph 6 above the gaps that I suggest will arise on EU exit.

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

If any body is to do the job presently carried out by the European Commission of holding government to account for non compliance with environmental law, it must be established in a properly independent way, with some role for the National Assembly in ensuring that its appointments and funding are protected by statute and by its relationship with the Assembly. This measure of independence from the executive might be possible by adding to the role of the national auditor, as is done with the Commissioner of the Environment and Sustainable Development in Canada, or through a new body.

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

I suggest that part of the new body's role would be to scrutinise the Welsh Government's implementation of environmental law. That part of its job would be similar to the role of a Parliamentary Commissioner for the Environment, for which there are successful models in New Zealand, Canada, and in some ways the role of the UK Climate Change Committee.

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

I suggest that Wales should not replicate the mistake made in England with the draft *Environment (Principles and Governance) Bill* of trying to take an artificially narrow definition of environmental law.

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

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

It is suggested that all government departments and public bodies should be required to apply the high level environmental principles as far as relevant, and that the remit of the new body should therefore match this requirement.

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

Experience elsewhere suggests that a new body able to call government to account must be robustly independent, and that the National Assembly will need to have a role independent of the executive in confirming appointments and ensuring that the new body's budget is protected.

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

Some models of Parliamentary Commissioner have included an ability to assist inquiries by Parliaments or to review and respond to annual environmental reports from agencies. It should not duplicate the work of other agencies such as NRW.

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

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

The new body will need sufficient resources, know-how and experience to be able to investigate and speak with authority about whether environmental legislation is being properly applied.

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 right that EU citizens currently have to bring complaints of breaches of EU law by public bodies to the attention of the Commission for investigation is a very important right in practice. It will need to be able to prioritise complaints, reject those with no merit, but investigate those of significance, and to challenge ongoing non compliance.

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?

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

The new body needs to be able to resolve investigations without formal action once there is a proper answer to suggestions of non-compliance. Ultimately it will need a straightforward way - whether by reference to a Tribunal or otherwise - of confirming that a government department or public body remains in breach of environmental laws, and the means to require that department or public body to come back into compliance (the EU law obligation is for this to be done as quickly as possible) – ultimately by some mechanism such as judicial review. Having the power to require that Ministers responsible for government departments or the heads of public bodies should be required to attend National Assembly hearings to explain continued non-compliance with environmental laws might also be a significant practical sanction.

Other

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

Yes. This is done at the moment through EU law, and without undermining the different devolution settlements. It is not clear how the environment would benefit from having gaps in the application of core environmental principles in the different parts of the UK as the UK diverges from the application of these principles in the rest of the EU.

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

It is a matter for real regret that the UK government did not address this need more effectively in its proposed legislation. I agree with the House of Commons Committees' criticisms of this lack of action, and very much welcome the willingness of the Welsh Government (reflected in the consultation) to continue to look for ways to make this sort of collaboration work in practice.

It is notable that the UK Climate Change Committee seems to be widely respected in all parts of the UK, perhaps because of its structure and the way that it reports to each Parliament, so that there is 'ownership' of the Committee in each part of the UK.

It may be that this sort of structure, fully respecting the differences in devolved environmental law, could still be developed. I support the suggestion that this could be further reviewed in 5 years time.

Meanwhile I would suggest that all bodies established to carry out similar functions in the different parts of the UK should be subject to a statutory duty to seek to collaborate and cooperate with their counterparts, with a view to encouraging the adoption and promotion of similar principles and standards.