

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

PG08

Ymateb gan : Y Gymdeithas Frenhinol er Gwarchod Adar (RSPB)

Evidence from : Royal Society for the Protection of Birds (RSPB)

Inquiry into environmental principles and governance post-Brexit

Statement from RSPB Cymru

RSPB Cymru is part of the RSPB - the UK's largest nature conservation charity, inspiring everyone to give nature a home. Together with our partners, we protect threatened birds and wildlife so our towns, coast and countryside will teem with life once again. We play a leading role in BirdLife International, a worldwide partnership of nature conservation organisations.

Overview

The RSPB is grateful for the opportunity to give evidence to this inquiry.

We welcome the approach taken in the Welsh Government's consultation document to setting out the role and application of environmental principles under the Treaty on the Functioning of the European Union (TFEU) as well as other international agreements. We recognise that Wales has already taken steps to bring many of these principles through into domestic legislation, and appreciate and value the approach taken, with the overarching sustainable development context provided by the Well-being of Future Generations Act 2015 (WFGA), within which the sustainable management of natural resources nests. While implementation is, in many ways, still in its infancy we recognise the legislative framework has had an important impact on the Welsh Government's approach to policy development around sustainable land and sea management, as well as in this week's seminal decision on the M4.

It is important to reflect, however, that Wales' legislation was developed beneath the umbrella of EU membership, and the application of the core principles through the Treaties. While we welcome the positive intent demonstrated in the consultation document to enshrine the principles in Welsh legislation with a meaningful duty on all public bodies, we consider more than the proposed amendments to the SMNR duty and principles will be needed to secure equivalence to those principles' current role. We also welcome Welsh Government's recognition that a governance gap will arise after we leave the EU, and its commitment to ensuring access to justice (via a citizen complaints procedure) and to designing truly independent oversight arrangements.

Securing the environmental principles, along with robust and independent governance, is vital to ensure that our environmental protections and standards are not weakened. However, the evidence – including the recent IPBES report – shows us that simply maintaining existing standards is not enough. We need a more ambitious approach to tackle the catastrophic declines in nature that we are seeing in Wales and across the world. We consider targets for nature's recovery, with legislative underpinning, are needed to drive forward effective implementation of the iterative approach enshrined in the Environment (Wales) Act (EWA) to achieve a Wales that is richer in nature, to the benefit of all.

Principles

The Welsh Government has identified that the ‘polluter pays’ and ‘rectification at source’ principles are missing from Welsh legislation currently, whereas, it argues, the precautionary and prevention principles are included.

We do not agree that the precautionary principle is included. The Welsh Government argues that the key components of EU guidance of the application of the precautionary principle are reflected in SMNR principles a, e, g and h. This is not sufficient, because there is no indication in the legislation that these principles are intended to be applied together and amount to applying the precautionary principle. In addition, we are concerned that the specific wording of principle h (take action to prevent significant damage to ecosystems) suggests significant damage must be shown to require action to be taken. The precautionary principle, in contrast, requires action in response to ‘potentially dangerous’ effects. The precautionary principle is internationally recognised, and a critical component of environmental protection; we therefore consider it is vital that it is set out plainly, as a principle in its own right, on the face of legislation.

Within Article 191(2) of the TFEU the four core principles are set out with the aim/overarching objective of securing *a high level of environmental protection*. They are implemented through environmental law and policy and, with their overarching objective, guide interpretation by the courts. We consider that the four core principles should be clearly articulated as overarching principles in the context of this objective in Welsh law.

In considering whether other principles need to be included we have considered the list of principles included at section 16 of the Withdrawal Act, which have shaped Part 1 the recent Defra Environment Bill:

Sustainable development – we agree with Welsh Government that this is an overarching objective rather than a principle, and that it is already enshrined in Welsh law via the Well-being of Future Generations Act.

Integration – the EU principle that environmental protection should be integrated across all policy areas is vital to ensure policies do not have a detrimental impact. The inclusion of Integration as one of the ‘ways of working’ under the Sustainable Development Principle in the WFGA is insufficient to replicate the impact of the principle at EU level, because it is tied to specific processes within that Act. However, we do acknowledge that the construction of the SMNR duty has the potential to ensure that the SMNR objective is considered in relation to the breadth of activities undertaken by public bodies, and as such is a vehicle for integration. As set out below we believe the SMNR duty, and duty to apply the SMNR principles, will not be a sufficient approach to securing equivalence post Brexit, but they could provide a model approach on which to build in order to achieve this.

Procedural rights- access to justice, access to information and public participation are vital obligations arising from the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention). Whilst we recognise that public participation is included within the SMNR principles, the Welsh Government should give serious consideration to ensuring the complete implementation of obligations under this Convention. Specifically, replacement governance functions must consider how best to ensure citizen’s access to justice on environmental matters is secured, recognising the crucial role that the current EU citizen’s complaints process plays, as well as wider public participation in environmental decision making.

Non-regression – We have welcomed the Welsh Government’s commitment to maintain and improve environmental standards after Brexit, but we do not accept that it is effectively secured through the ‘maintain and enhance’ wording of the SMNR objective. The principle of non-regression requires

'that there should not be a roll-back in environmental standards, promoting a ratcheting up of ambition in subsequent law reform and policy and preventing any lowering of ambition or protection'.¹

This principle is now receiving global recognition as an important mechanism for protecting our natural environment and has been included in the UNFCCC's Paris Agreement.

We welcome the Welsh Government's view that non-regression (as referred to in relation to the UK's Withdrawal Agreement) is not enough, and that the UK should agree to progressive alignment² with the EU in relation to environmental standards and workers' rights. We note, on similar lines, that the Scottish Government has recently announced it will legislate for a 'keeping pace' power. We would strongly encourage Welsh Government to consider a similar approach.

Proposal to extend the scope of the duty to pursue the sustainable management of natural resources

The proposal to extend the SMNR duty to other public bodies shows commitment to applying a strong duty on the principles, namely '*must apply*' rather than the weaker alternative of '*have regard to*', and to a wide group of bodies – thus distinguishing the Welsh Government's approach from those taken either in Westminster or in Scotland to date. We warmly welcome this commitment. However, the proposal is **not currently sufficient to secure equivalence post Brexit**.

As noted above, the EU principles are implemented through environmental law and policy, and they, and their overarching objective, guide interpretation by the courts. We do not agree that the equivalent impact will be achieved domestically by bringing the principles into Welsh legislation under the banner of the Sustainable Management of Natural Resources (SMNR), because we do not consider that SMNR is *equivalent to* an objective to secure a high level of environmental protection, and nor does it adequately *encompass* the objective of protecting the environment in its own right.

We advocate amending section 1 of the EWA to reflect a broader purpose e.g. *The purpose of this Part is to enshrine the core environmental principles with the aim of securing a high level of environmental protection and to promote the sustainable management of natural resources*, and creating a new public duty that encompasses the SMNR duty (with the SMNR principles) *and* a duty to apply the core principles to secure a high level of environmental protection. For clarity and to ensure full coverage, we advocate utilising a definition of the environment which will ensure all environmental legislation and requirements are included. We recommend that the existing, regularly used and well-understood definition within the Environmental Information Regulations 2004 (originating from the Aarhus Convention) is used. We advocate that the duty be applied to **all public authorities**, as defined under the EWA section 6(9); we recognise that the Welsh Government will need to seek the permission of the UK Government to achieve this.

In addition, recognising that we are facing catastrophic declines in biodiversity and that ecosystems across Wales are currently not resilient, we advocate strengthening the wording of the SMNR objective itself – moving from 'maintain and enhance' to reflect protection, restoration and recovery of our natural world.

Governance

We welcome the acknowledgement from the Welsh Government that Brexit will lead to gaps in environmental governance in Wales. The oversight and enforcement of environmental legislation, provided by the EU institutions, has been central to its effectiveness.

¹ ClientEarth 2018, Environmental Principles in UK Law after Brexit

² Assembly debate on the Withdrawal Agreement, 4 December 2018:
<http://record.assembly.wales/Plenary/5369#A47258>

We agree with the gaps identified, but would note:

In relation to ‘a simple and inexpensive mechanism to raise complaints’ we would add that the current system is liability-free for any complainant. This enables them to make complaints without the fear that they will be subject to future action by those they complain against, or would face costs should the complaint not proceed, or be ruled against.

The EU’s enforcement powers also include the rectification of damage caused by an offence. This is a vital aspect of the EU’s enforcement mechanisms and its loss would be a significant regression.

In addition to the above we would also add the extensive monitoring and data collection activities of the EU, including proactive monitoring of compliance with objectives and regulations. The Commission’s role in providing strategic advice and guidance to support compliance with the law and delivery of environmental objectives should also be considered.

We also note the potential for losing access to the forums that the EU and its institutions provide for information sharing between Member States and other stakeholders, particularly through the European Environment Agency (EEA). We advocate that the Welsh Government should explore ways for Wales to remain a member of the EEA, whether individually or by pressing the UK Government to join as a non-EU member.

Status, form and constitution, and role of a new body

We welcome and support the Welsh Government’s view, as set out in the consultation document, that any oversight body should be independent of government, including having independent appointment structures and independent sources of funding. We agree that it should be accountable to the National Assembly for Wales, and be independently audited.

We do not believe it would be appropriate to amend any existing body (e.g. the Future Generations Commissioner or the Public Services Ombudsman) to take on these new functions for Wales. **Wales will need a new environmental governance body to fill the Brexit governance gap.**

We are broadly supportive of the role suggested in the consultation document for a new body. However, in line with our comments above relating to the SMNR duty proposal, we consider the body’s role will need to be broader. It must reflect the objective to secure a high level of environmental protection and the ambition to restore and recover nature in Wales.

Scope of new governance arrangements

We recommend that the scope of new governance arrangements should include all policy areas which have an impact upon the environment, including for example economic, transport, social and health policies. We welcome the intent set out in the consultation document for the scope of governance arrangements to include all natural resources (as set out in the EWA) and other policy areas that intersect with them, e.g. climate change, chemicals, and agriculture. We assume the same would apply to land use and marine planning, fisheries management and forestry. Consideration should be given to the need to reflect the definition of ‘environment’ from the Environment Information Regulations that we have advocated above in relation to enshrining the environmental principles and high-level objective in the legislation.

We recommend that all public authorities operating in Wales (as defined in section 6(9) of the EWA) should fall under the remit of a governance body operating in Wales. We recognise Wales cannot do this without UK Government permission.

The value and practicality of a UK-wide approach

The consultation document understandably does not explore the question of whether a new Wales-only governance body would be preferable to a body covering the whole of the UK, or at least covering more

than one country within the UK (England and Wales, or England, Northern Ireland and Wales). It is the RSPB's view that there would be benefits to a single UK-wide body that were accountable to the legislature of each country. These include the fact that a body constituted by all legislatures would be less vulnerable to being weakened or disbanded through the action of a single legislature. In addition, with the proviso that the body would have a presence in each country, some efficiency in resourcing would be possible, and each country would benefit from a larger overall resource in terms of expertise. However, risks to this approach would include the body's attention being concentrated where resources are greatest (most likely in England), and this risk could be exacerbated if, rather than being UK-wide, a body were constituted for two or three of the UK countries. We fully recognise that for such a body to be created and operate successfully for each country, it would need to be co-designed by the relevant administrations working together.

If a separate governance body is created for Wales, it remains essential that there is co-design of arrangements to ensure that governance bodies in the UK countries are legally required to co-operate with one another. This co-operation should enable sharing of expertise; coming together to consider common or cross border issues (e.g. Invasive non-native species, or cross-border protected sites); and mechanisms to ensure that a complaint made in any country will be considered by the appropriate governance body, with transparent communication with the complainant.