

Stakeholder Consultation on Environmental Principles and Governance in Wales Post European Union Exit

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Stakeholder events

In support of the consultation on the document on *Environmental Principles and Governance in Wales Post European Union Exit* issued on 18 March 2019, stakeholder events were held on 25 April and 10 May 2019 in Aberystwyth and Cardiff respectively. A further event planned in Bangor in April failed to attract a sufficient number of attendees to make the event viable, though some who registered did attend in Aberystwyth. The format of the stakeholder meetings was the same in each venue. Robert Lee, who facilitated the events, gave short introduction to environmental principles initially and later to environmental governance issues, post Brexit. After each of these introductions, there was small group discussion based largely on the questions posed in the Consultation Document. The outcomes of these discussions were reported back to the attendees as a whole. Finally Robert Lee offered a summary of these to ensure the accuracy of the views recorded.

Environmental Principles

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

- a. Rectification at Source;
- b. Polluter Pays

While it was clear that cons as well as pros were foreseen in including principles within legislation for Wales, the broad consensus was that it made good sense for the principles enshrined in Article 191 of the Treaty for the Functioning of the European Union (TFEU) to be re-articulated in legislation in Wales. This would necessitate the inclusion of the polluter-pays principle and that of rectification at source alongside the precautionary principle and the preventive principle, which are to some degree already represented in existing legislation. There was a view expressed by stakeholders that principles may be particularly beneficial given environmental challenges such as climate change and bio-diversity loss. There was no strong expression of a viewpoint that environmental principles were simply not needed though (as we will see) views differed on which principles might be included.

There was an acceptance at the meeting that in the Welsh context principles might do more than guide policy in that they had an operational function in delivering sustainable development and the sustainable management of natural resources (SMNR). This led some stakeholders to argue that what matters is not merely that the principles are copied over into legislation, but that they are applied so that the challenge to operationalise the principles and give them traction is met. Some stakeholders doubted whether this was yet so in relation to prevention and precaution in Welsh law.

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This in turn led to two related discussions. One was that there was room to clearly (re)articulate in legislation the relevant principles including prevention and precaution. This was thought necessary to prevent too piecemeal an approach and there was a widely held view that principles would better function if located within a cohesive and clear structure. There was also a view that guidance, at least to public bodies operating within these principles, might be necessary and that much might need to be done to allow a better understanding of the role of environmental principles.

Question 1: Broadly there was support for the inclusion of the principles of rectification at source and polluter-pays but with questions about how well these might be operationalised and what guidance might accompany these.

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

The stakeholders then considered whether other principles might be included alongside the four emanating from Article 191 TFEU. One difficulty in answering this question was quite what constitutes a principle rather than an objective (such as sustainable development) or a right (such as the right to participate in environmental decision-making). There was some debate on this issue, but broadly there were suggestions of other imperatives that might be articulated in legislation in Wales. So, for example, commonly mentioned was a high level of environmental protection which is an objective articulated within Article 191 TFEU. So too principles of integration and non-regression (or for some, progression) were mooted. It was recognised by some that existing Welsh legislation contains these elements for example in the ways of working under the Well Being of Future Generations (Wales) Act 2015 and under the principles of SMNR within the Environment (Wales) Act 2016. Nonetheless there was a view that Welsh legislation had been framed within an EU law context and that post-Brexit it might be worthwhile to re-iterate some of the wider understandings within EU environmental law. Alongside this was a view that bolting on more bits to existing legislation might complicate rather than clarify the Welsh legislative framework. A slightly different articulation of this view was that care was needed to ensure that a whole raft of new principles was not seen as a sign of a lack of confidence in existing Welsh frameworks. There was wide acceptance that we have only early experience of the 2015/2016 legislation but one view was that well-being and SNMR are good organising themes within which principles can and do sit.

Of the other 'principles' which were mentioned, in addition to a high level of environmental protection, integration and non-regression, the proportionality principle was commonly mentioned. This was sometimes as a balancing mechanism in the application of other principles such as polluter-pays or precaution. On the precautionary principle, there was some doubt expressed as to whether its articulation in section 4 of the 2016 Act in terms of gathering evidence in the face of uncertainty fully encapsulates the international law framing of this principle. In relation to integration it was accepted that there were some difficulties in that any integration was necessarily dependent on limits of devolved competence. Of the more imaginative principles mooted were that of environmental accountability and the possibility of a prohibition on transboundary harm within the United Kingdom.

One final issue of debate in the meetings was what to do about the Aarhus Convention and its three pillars of Information, participation and access to justice. In a sense little changes here with Brexit, as most informed stakeholders acknowledged, as the UK is a signatory to the Convention and the

European Union (Withdrawal) Act 2018 will migrate EU infrastructure on information and participation into UK law. Notwithstanding this there was a view that Aarhus rights were worth articulating in Welsh law alongside principles and as a link to the governance elements in any forthcoming legislation. There was some acceptance that ensuring better access to environmental justice might be limited by questions of devolved competence.

Question 2: There was the suggestion for the inclusion of certain other principles. What now needs to be decided if whether the inclusion of the four EU principles (only) as mooted in the Consultation Document provides the most coherent path or whether there is room to re-articulate other principles such as integration and non-regression, already represented in legislation in Wales. Finally should the Aarhus rights be given a statutory footing in Wales and if so how would that sit alongside existing rights of access to information, participation and justice?

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

This question asks about the possible extension of SMNR duties to Welsh public bodies beyond Natural Resources Wales (NRW) and the Welsh Ministers (in setting natural resources policy). What is proposed is that SNMR principles and the pursuance of SNMR be applied to additional Welsh public bodies, in accordance with devolved competence. In the stakeholder events, this generated discussion on the working of SMNR and early experience of working within it. There was a feeling expressed that SMNR principles were not well understood within the wider public sector so that any extension would need to have buy-in and engagement from an informed public sector. It was suggested that the role of different public bodies in delivering SMNR might have to be clearly articulated. Broadly, however, there was no great opposition to the extension which was seen by some as creating degree of symmetry between duties under the 2015 and 2016 Acts.

Question 3: There were thought to be good reasons, in the main, to extend SMNR principles and duties to deliver sustainable management of natural resources to public bodies across Wales.

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

As to which bodies should be the subject of any extension, one concern was budgetary considerations. There was a feeling that many parts of the public sector are tightly constrained financially and may lack the budgetary resources to effectively deliver on new obligations with which they were charged. On this view the principles would only be as effective in delivering sustainable management of natural resources as the capacity of the agencies to deliver this. There was a broad acceptance that there could be some alignment between the bodies subject to any new governance structures (question 9 below) and the public bodies with devolved competence to whom SNMR duties might extend.

A second question which arose was whether SNMR principles and duties would apply to all bodies pursuing public functions (including so-called 'emanations of the State'). Here the view split between those who thought that such bodies who might harness natural resource should be charged with its sustainable management and others who took the view that once the duty is placed upon the public

sector in Wales, it was then their task to regulate as those other bodies whose activity might govern delivery of SNMR.

Question 4: it was thought that the public bodies subject to new proposed governance arrangements might be also be the subject of extended SNMR principles and duties. This was subject to a concern as to financial capacity to deliver and a query about the position of companies or others delivering public functions which might imply a duty of SMNR, which is a matter that will require a decision.

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

Discussion on principles also included the question of whether there might be advantages in a shared core set of common environmental principles either across the UK or at least within the jurisdiction of England and Wales. It is worth remembering that to the extent that principles might help guide and shape environmental law and policy, those policies may be the subject of review and the conformity of policy with principle might be called into question. In a combined jurisdiction it makes great sense to share a common understanding of principles, a possibility to which the Consultation Document declares itself open, but one which may be foreclosed by progress made on the English Environment (Principles and Governance) Bill.

The stakeholders expressed concern about divergence. Consistency of interpretation was thought to be important. It was thought that certain of the principles might be significant in any trade talks following Brexit and some fears were expressed that there should not be dilution of environmental principles or some form of 'race to the bottom'. One stakeholder group stated that the environment does not respect boundaries and that shared principles had an inherent logic. A somewhat contrary view was that fragmentation might allow Wales to lead on matters of environmental principle and to establish simple statements of operational principle.

One final point made by a number of discussion groups is that we should not be overhasty in an attempt to cover any perceived gap. It was thought to be more important to take time to ensure that effective application of environmental principles is embedded in workable structures.

Question 18: The preference would be for a shared set of principles and fragmentation was thought to be regrettable but there was an acceptance that if there was to be no common core then Wales could take time to develop something distinctively tailored to environmental law in Wales.

Governance

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

There was broad recognition that exiting the EU was likely to leave governance gaps. Stakeholders from different constituencies supported the idea of mechanisms that would increase scrutiny and allow complaints to be heard. In addition to the themes of monitoring, scrutiny, enforcement and complaints-handling, as set out in the consultation document, there was a suggestion that some

oversight might have a deterrence function and cause public bodies in Wales to 'take environmental matters seriously'. The independence of any 'body' was emphasised as a necessary component of effective monitoring and enforcement. Worries were expressed about financing of any body, partly as a factor of independence but also because resources for the environment were already seen as stretched.

One suggestion was to model what good governance looks like and structure new arrangements accordingly rather than slavishly follow the EU model. That said, the complaints function was seen to be a significant element in any governance arrangement and ease of access to Welsh citizens was thought to be crucial. Some envisioned the body as a repository of expertise in environmental matters which, they argued, was at times lacking in Wales. Finally, a number of stakeholders counselled that positioning an oversight body alongside government and enforcement agencies was a matter of some delicacy which would require careful thought and planning.

Question 5: Neither on the issue of gaps arising nor on the need to plug those gaps was there any real dissent. In general terms some form of body charged with scrutiny, enforcement and the handling of complaints was thought to be beneficial, though the precise extent of that portfolio did give rise to debate (see question 6).

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

As for the precise functions of any environmental oversight body and its relationship with existing institutional structures in Wales, this did generate considerable discussion in stakeholder meetings. Accepting that something was needed and that this should fit within existing institutional infrastructure, no one existing body was felt to be appropriate as it stands, as none had the strong environmental focus and necessary expertise. On balance a new environmental body of some kind was preferred to an extension of existing roles, but this came with the caution that duplication must be avoided given the presence of other commissioners (including the information commissioner, the public sector ombudsman and the Auditor General for Wales). Equally it was thought that there needed to be clarity between the work of this body and those which it might oversee (such as NRW). Despite this level of agreement, there was no clear view of what type of new body might be best suited to the tasks outlined. One view was that a Commissioner akin to the Future Generations Commissioner might fit well into existing structures. Other stakeholders worried that a Commissioner might be seen as too much of a campaigning figure rather than an independent scrutineer (see also question 12 below).

Two tasks that were stressed were the provision of expertise and the analysis of data. There was a feeling that as data came through the reporting structures introduced in Wales by the 2015 and 2016 Acts, there was room for a body which would provide constant advice and monitoring of the environment. This would allow for a proactive rather than reactive role and might help build resilience rather than provide mere oversight.. Some stakeholders felt that a commission rather than a commissioner might set the right tone and be able to handle the diversity of functions suggested.

Question 6: It was agreed that there was a role for a new environmental body in Wales and that existing structures did not fulfil the range of functions set out and would be difficult to adapt. This was the view expressed despite reservations as to possible duplication of functions discharged by existing bodies. There was no clear view as to the type of body that might best fulfil the duties outlined for it, but with some suggestion that a commission rather than a commissioner might be appropriate.

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

In discussing the precise remit of a body responsible for overseeing the implementation of environmental law in Wales, it was thought that essential principles of good governance should help design the role and function of the body in Wales. Stakeholders at the Aberystwyth meeting made the point that many accept legal institutions as behaving impartially and that this insight might set the tone when devising the powers to be discharged by any new body. Stakeholders were happy to see a replication of the European Commission's role in the three areas of monitoring implementation (with some possible extension to performance), the reception and investigation of complaints and the pursuance of enforcement action as necessary.

Question 7: The role of any new body should replicate the existing role of the European Union but in copying this over regard should be had to principles of good governance and careful thought given to the nature and extent of its powers.

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

As to the environmental policy areas included within the remit of a new body, it was said that without creating a second NRW, the body should oversee the workings of environmental regulation but should also be concerned with wider governance issues. By this was meant that there should be some oversight of how well environmental policy (e.g. SMNR) was being delivered. Of particular areas of law/policy subject to its remit, there were certain areas mentioned as needing scrutiny including marine/fisheries, land management, ensuring non-regression and oversight of retained EU environmental law.

Question 8: On balance the need for a wide remit was accepted and there were no suggestions that particular policy areas should be excluded.

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

This question asked whether the proposed list of public bodies to be overseen was appropriate. The answer was broadly that the Consultation Document was broadly correct and that all public bodies listed in the consultation document should be subject to oversight by the governance body. A more

expansive view suggested by some was that all bodies discharging an environmental function should be included in the remit.

Question 9: The majority view was that the Consultation Document had included the relevant public bodies but a minority view was that it might oversee all bodies discharging an environmental function on behalf of citizens in Wales.

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

In view of the answers to question 9 there was somewhat limited discussion of question 10 as to which further bodies might be subject to oversight. One view expressed was that it would need careful consideration of existing oversight arrangements, e.g. before including utility companies which were already heavily regulated. There was some discussion of oversight of Ministers of the Crown in relation to their reserved functions in Wales, which was mentioned for example in relation to the marine environment (for which it was said that oversight was much needed). It was thought that reserved functions were not always clear cut and that some clarity might be needed here to guide any new body.

Question 10: The oversight arrangements were broadly supported but raised some issues in relation to oversight of Ministers of the Crown when discharging reserved functions. There was a view that any extension beyond the public bodies outlined in the Consultation Document would require careful consideration if only to avoid regulatory conflicts or overload.

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

As to the status, form and constitution of the body, independence was heavily stressed with a broad agreement that the body would have to be accountable to the National Assembly. Independence was thought vital to the discharge of duties which might hold government to account. There was a view expressed that this should not be a quango that might be swept away at some future point and that its statutory status should set it apart from other non-departmental public bodies. Some of the discussion here wandered into that under question 19 (below) as there was a preference for a UK wide body as being better protected from governmental interference and more independent. It was accepted that independence including financial independence was a difficult issue.

Question 11: The strong message was to find structures that would guarantee independence and to ensure that these were embedded in a statutory structure.

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

On the issue of whether the body should be able to act in an advisory capacity, some stakeholders thought that this would position the body as taking a lead on the environment and would set the right tone. On this view the body should not be seen as 'passive'. In this context, the Equality and

Human Rights Commission was mentioned as a body which sought to promote equality as well as discharging an oversight function. A contrary view was that it should not give advice or if it did then it should not make such advice public because this might prejudice its later enforcement work. One viewpoint was that the body was already positioned to exercise a number of functions including monitoring, scrutiny, complaints handling investigation, mediation and enforcement and that advice, other than that which might follow from complaints investigation, might be a step too far. Finally, there was a view that advice might not sit easily alongside political mandates for action.

Question 12: There were mixed views on an advisory role. For some it raised problems of potential conflicts of interest, but others were happy to see this as a leadership responsibility which would set an appropriate tone for the discharge of other functions.

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

This question asked whether the oversight body should scrutinise implementation of environmental legislation. The view that it should was pretty much unanimous and such power was seen as a necessary component of its scrutiny functions. One group suggested that the role of the body would be to ensure that environmental regulation was working 'on the ground'. Some would have gone further and spoke of ensuring that existing legislation was securing non-regression and climate change mitigation.

Question 13: There was clear agreement that implementation of environmental legislation should be overseen.

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

When asked about the extent of scrutiny powers, stakeholders responded with a view that monitoring should be an on-going task and one on which the new body itself should report on a regular basis. There was some thought that the new body should collate and analyse data relating to the environment, a task which might be more necessary given the potential loss of support from the European Environment Agency. Some stakeholders pointed to the width of the brief to be given to the new body, remarking that it consisted of a varied mix of significant responsibilities. Some stakeholders felt that it was difficult to consider these in detail without information on the scale and resource base of the new body. This, it was said, would shape the nature of the body and its capacity to discharge its duties.

This question led to some discussion of the role of judicial review. On one hand, the rationale behind the complaints handling function of the body was that judicial review represented a somewhat difficult and limited means for access to environmental justice. On the other hand the question arose as to whether the new body might itself need to resort to judicial review to ensure enforcement. Finally the possibility of the body itself being subject to judicial review was discussed. There was a significant body of opinion that the preferred style of any new body should be conciliatory rather than confrontational in so far as this is possible in heavily contested domains.

Similarly in handling complaints, it was suggested that a process of mediation might best resolve disputes where these had arisen.

Question 14: There was a view that the monitoring and enforcement functions of any new body should be informed by data. The functions of the new body were thought to be wide-ranging but appropriate. The capacity to bring judicial review proceedings should be allowed but should be used sparingly, giving way to more conciliatory processes.

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?

As to investigatory powers when pursuing complaints, a comment was made that complaints procedures should be 'free of charge and free of risk'. It was thought that complaints could be escalated with initial procedures to sift out obviously unmeritorious or vexatious complaints and thereafter procedures could be carefully staged to allow greater investigation if initial evidence suggested its necessity. Some commented that it was important to see complaints through to a point of resolution and, if necessary, to reparation. There was relatively little comment on which existing bodies the new body might be modelled but the two most commonly mentioned were the Equality and Human Rights Commission and the Information Commissioner's Office.

Question 15: Ease of access to the complaints process was thought to be important allowing that trivial complaints could be rejected at an early stage. Thereafter an escalating investigation procedure was envisaged leading to resolution of the complaint and reparation of any damage.

Question 16: What inform and formal methods of enforcement do you consider an oversight body should operate in order to deliver on its role and objectives?

When asked what formal and informal methods might be used in enforcement, stakeholders were happy that resolution of disputes might be conducted at a relatively informal level providing that there was the capacity to move beyond this to more formal enforcement measures. Some, while agreeing that a reconciliatory approach would be welcome, expressed doubt as to whether this would prove the most effective way to resolve divided opinion in what was seen as a politically charged subject.

There was some discussion on fines. One view was that levying fines would simply place greater stress on already under-resourced public bodies and that powers such as that of the ICO to levy fines for non-compliance were inappropriate for the public sector. Some doubted the necessity of fines on the basis that they believed that public bodies would respond to adverse findings by the new body. Others thought that *in extremis* the remedies attaching to judicial review ought to be sufficient. As this suggests, the majority view was that any financial penalties might need at the very least might need to be overseen by the court and may not be that useful.

Question 16: Enforcement might move from informal to more formal mechanisms as necessary but some doubt was expressed as to the utility or necessity of fines.

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

On addressing this question, some stakeholders reconsidered the earlier question of whether advice might hinder enforcement if the body discharged both of these functions. On the other hand, it was thought important that the new body should share best practice across public bodies with which it engages. There was more discussion of fines with the question being 'if we do use fines where will the funds come from and where will the funds go?' Once again a more conciliatory approach was favoured by a majority of stakeholders in the hope that it would prevent the need for fines.

Question 17: There was limited discussion on enforcement mechanisms but once again there was some expression of a preference for collaborative working on solutions with stricter mechanisms available but in the background.

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

Both stakeholder groups saw merit in 'regulatory harmony' and in joint approaches to governance. There was a view that a UK wide structure would be ideal if only to entrench any governance body and ensure its independence and financial base. There was recognition, however, that a UK wide body was increasingly unlikely. Reservations were expressed about a joint Anglo-Welsh body in terms of the possible dominance of England and the possible lack of recognition of Welsh structures and ways of working. Stakeholders showed some awareness of the need in certain areas to work within common frameworks and stated that, because of this, early engagement between emerging bodies charged with governance would be crucial. It was also said that there was a role for Joint Ministerial Committee to coordinate the work of any such bodies.

Question 19: A UK wide body might have received much support, but there was recognition that this was a highly unlikely development. That being the case, a Welsh body was supported but with the proviso that working with other such governance bodies that might emerge in the UK would be crucial.