

LCM in relation to the UK Environment Bill

Part 1 on Environmental Governance

March 2020

Summary

Wales Environment Link is pleased to provide a short paper on the LCM for the UK Environment Bill. Our response focuses on Part 1 of the Bill on environmental governance and how it relates to Wales. A separate paper provided to the Committee focuses on Part 3 on Waste & Resource Efficiency, as well as the issue of marine matters in Part 1.

This is a significant piece of legislation which brings forward new environmental governance arrangements largely for England, as well as bringing environmental principles into domestic law (again, pertaining to UK Ministers and focused on England) and is stated to bring environmental principles into domestic law (again, pertaining to UK Ministers and focused on England) as well as the welcome addition of a target setting framework. It is critical to delivering the UK Government's commitments to "*place environmental ambition and accountability at the heart of government*", "*create a pioneering new system of green governance*" and "*delivering a Green Brexit*"¹. Whilst the Bill does contain important and welcome provisions, it will require amendment if it is to achieve its stated aims.

The Welsh Government must urgently bring forward legislation to address the governance gap and capture the environmental principles which have guided our environmental law as part of the EU Treaties. From 1 January 2021 (under current UK Government timetable), Welsh citizens will not have a route to hold government to account on infringements to environmental law, including nature conservation, water quality, air quality or levels of pollution. The LCM (point 79) highlights concerns from the Welsh Government about pressures on the Assembly's timetable to progress its own legislation, but due to the gap that will arise when the UK leaves the EU transition period, there will be a gap in protections and provisions if the Assembly does not introduce legislation by the end of 2020.

The Westminster Environment Bill also contains provisions establishing a framework for setting statutory targets for nature's recovery. We need an equivalent framework in Wales, to ensure the Environment (Wales) Act framework for the sustainable management of natural resources drives change at a scale and pace commensurate with the emergency response our environment needs.

The [Legislative Consent Memorandum](#) concludes that this Bill is an appropriate vehicle to "*progress the circular economy strategy*" but does list some outstanding areas of concern around the devolved competence and the duty on the Office for Environmental Protection (OEP) (Point 82). Specifically:

- The impact of clause 19 (statements about bills containing new environmental law) on devolved competence and the duty on the OEP to consult devolved environmental governance bodies.
- The impact of clause 24(4), requiring the OEP to consult a devolved environmental governance body if it considers a particular exercise of its functions of relevance. Given the possibility of the OEP

¹ <https://www.gov.uk/government/news/stronger-protections-for-the-environment-move-closer-as-landmark-bill-takes-shape>

investigating a complaint which could be concerned with reserved and devolved matters, it would require a degree of partnership working.

- The impact of clause 19 (statements on whether bills containing new environmental law include regression from current environmental protection standards) on devolved competence.
- The impact of clause 24(4)², requiring the OEP to consult a devolved environmental governance body if it considers a particular exercise of its functions of relevance. Given the possibility of the OEP investigating a complaint which could be concerned with reserved and devolved matters, it would require a degree of partnership working.

Environmental Governance – Part 1 of the Bill

There are several issues of concern and lack of clarity in regard to the UK Environment Bill and its impacts on Wales, which we think the Committee should consider.

Issues regarding the Office for Environmental Protection (OEP)

Regarding the remit of OEP in terms of reserved bodies and clarity on which body will be competent for citizen complaints:

- It would be useful if the Committee could gain clarification on the relative roles of the OEP and any new Welsh environmental governance body regarding operations of reserved bodies in Wales. A lack of clarity may cause jurisdictional confusion regarding any citizen complaints.
- Clarification is required, with examples, of the reserved functions of UK ministers that would be subject to oversight by the OEP.

We are also concerned that the OEP is not sufficiently independent from Government and that this will compromise its ability to hold that government to account. It may be a concern to the Committee of the impact of this on good governance in Wales, both regarding the issues above, and the lessons which could be learnt for the development of the Welsh body.

Environmental Principles

Clarity is needed around the following issues:

- To indicate whether UK and Welsh Ministers have agreed whether UK ministers, when undertaking reserved functions within Wales, will be subject to any Environmental Principles passed by the Senedd, or by the Palace of Westminster. Currently this is not the case regarding the reserved functions of UK Ministers in Scotland and Wales (as drafted in clauses 130(1) and 18(3)(c), taken together).
- Clarity on which Environmental Principles will apply to reserved bodies operating in Wales (should Welsh law diverge from the Environment Bill) is also sought.
- The Welsh Government has advocated that there should be a core set of principles applied in relation to areas of joint decision making and legislation between the administrations³ and has indicated that the four administrations have discussed agreeing a consistent set of principles rather than a common

² Requiring the OEP to consult a devolved environmental governance body if it considers a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function.

³ Paragraph 3.62, Environmental Principles and Governance in Wales Post European Union Exit

Welsh Government consultation, Number: WG35189 March 2019:

https://gov.wales/sites/default/files/consultations/2019-03/eu-exit-consultation-document_0.pdf

set applying to the UK⁴. In relation to the application of these principles, across the UK, Ministers need to outline their plans to ensure a coherent approach between countries should a divergence in the application of otherwise consistent Environmental Principles occur, and when stakeholders will be able to comment on those proposals

- To indicate why the reserved functions of UK ministers in Northern Ireland are rightly subject to the environmental principles (Schedule 2, Paragraph 8(2)), but that this is not the case in regard to the reserved functions of UK ministers in Scotland and Wales (clauses 130(1) and 18(3)(c), taken together). It is unclear if Ministers have agreed that such functions would be addressed by any similar legislation passed by the Scottish Parliament or the Senedd.

Non regression

The Welsh Government's Brexit policy 'Securing Wales' Future' identifies non regression of environmental rights and to provide continued citizens' rights to hold Government to account as priorities. The Welsh Government's consultation⁵ on environmental principles and governance also stated that there is an opportunity to develop a structure which supports a commitment to non-regression from environmental protections, and more fundamentally a commitment to enhancing the environment to meet challenges faced (paragraphs 1.3 and 1.5).

Clause 19-20: Non regression and dispute on interpretation of environmental law and devolved matters

The LCM outlines concerns regarding the impact of Clause 19 (Statements on whether bills containing new environmental law include regression from current environmental protection standards) on devolved competence and the duty on the OEP to consult devolved environmental governance bodies (clause 24(4)). Clause 19 of the Bill requires that Ministers of the Crown publish a statement before the second reading of any bill which contains environmental law provisions, to the effect that in the Minister's view the bill will not have the effect of reducing the level of environmental protection provided by existing environmental law.

In relation to Clause 19 of the UK Environment Bill, the LCM refers to "*non-regression of environmental standards*" (point 82) and "*non-regression statements*" (Point 7), although this terminology is not included in the Bill itself. **We are concerned that this provision could be interpreted as a legal commitment to non-regression, which it is not.** Whilst we recognize the intent of this provision, it does not represent a legal and binding commitment to non-regression on environmental standards. WEL and Greener UK recommend the inclusion of an unambiguous commitment to non-regression or a principle of non-regression in the UK legislation. The principle of non-regression is already a principle of international law as acknowledged by the International Union for Conservation of Nature (IUCN).

The restriction on Clause 19 to bills containing environmental law provisions potentially excludes other law and policy that impact on the environment. The scope of the provision should also be extended to include international treaties and agreements, secondary legislation, policy and guidance.

The LCM identifies this provision as requiring legislative consent because, unlike the rest of the Bill, "*environmental law*" for the purposes of this clause (19) includes devolved legislative provision. It states that "*the effect of this is that the requirements in clause 19 apply equally to UK bills involving environmental law applying in Wales*". The LCM notes that there is a difference of interpretation between the UK Government and Welsh Government in relation to this, with the UK Government of the view that the provision relates to

⁴ Correspondence from the Minister for Environment Energy and Rural Affairs Lesley Griffiths to the CCERA Committee, 20th January 2020: <http://senedd.assembly.wales/documents/s97913/Letter.pdf>

⁵ Environmental Principles and Governance in Wales Post European Union Exit Number: WG35189 (March 2019) <https://gov.wales/sites/default/files/consultations/2019-03/eu-exit-consultation-document.pdf>

parliamentary process, with 'Parliament' a broadly a reserved subject, and the Welsh Government's view is that whilst the process is one delivered through an accountability procedure in Parliament, that its purpose is truly an environmental one – a devolved subject matter. (Point 10 in LCM).

Clause 24 (4): Co-operation duties of public authorities and the OEP

WEL agrees with the Welsh Government's assessment that the consultation clause needs to be strengthened to ensure the OEP co-operates with a future Welsh governance body. This will be critically important for issues which might involve reserved functions, or cross border impacts. Given the possibility of the OEP investigating a complaint which could be concerned with reserved and devolved matters, it would require a degree of partnership working.

Clause 43: Meaning of environmental law

The LCM states that Clause 43 requires consent in as far as it relates to clause 19 on non-regression.

Clause 43 defines environmental law as *"any legislative provision which is mainly concerned with environmental protection"*. The term 'mainly concerned' is vague and lacks clear legal meaning. 'Related to' would be a better alternative. Dr David Wolfe QC, drew attention to this issue in his written evidence⁶ to the pre-legislative scrutiny of the draft Bill: *"And, even then, there is no basis for a 'mainly concerned with' test. If any provision of any Act or regulation is concerned with an environmental matter, then it is 'environmental law'."*

Environmental Review (clause 35) and the Upper Tribunal

Any governance body created in Wales will have to have its ultimate legal sanctions provided by a Court or Tribunal in the common jurisdiction of England and Wales. Obviously, this is not an area over which the Senedd has any jurisdiction, therefore ensuring proposals made in Parliament suit Wales's situation is important.

The current proposal from UK Government is that this be the Upper Tribunal. WEL is supportive of this approach in principle. However, the proposed environmental review process, from an English perspective, is unsatisfactory. This is because:

- There is a need to move away from traditional Judicial Review, which have proved unsatisfactory in dealing with environmental complaints. While the Environmental Review model appears to be an attempt to do just that, the way it is currently curtailed by reference to Judicial Review principles means the substance of the review is, in essence, Judicial Review in disguise. We do not believe that this approach should be supported for Wales as it weakens existing approaches; something Welsh Government have committed to avoid.
- There is also a problematic difference between the approach and powers of the OEP and (as currently drafted in the Bill) those of the Upper Tribunal. The OEP will be able to reach different findings of fact to those of the public authority in question, and make recommendations on that basis, but it is unclear whether (and if so how) the Tribunal will be able to back up those findings. In addition, the OEP may be limited in the recommendations it can make since, unlike the Tribunal, it may not be able to require a public body to reverse a decision. This creates a fundamental mismatch between the work of the two bodies. We are concerned a similar problem awaits the Welsh body.
- The remedies and sanctions available through the Environmental Review process are too weak. The Upper Tribunal must be empowered to grant meaningful, dissuasive and effective remedies including, where

⁶ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/prelegislative-scrutiny-of-the-draft-environment-principles-and-governance-bill/written/97141.pdf>

appropriate, financial penalties – just as the Court of Justice of the European Union (CJEU) is currently able to do, if we aren't to weaken any current protections. The constraints imposed on the Upper Tribunal in clause 35(8) severely limit the ability of the Tribunal to gain meaningful remedies, undermining the entire enforcement process.

Wales Environment Link (WEL) is a network of environmental, countryside and heritage Non-Governmental Organisations in Wales, most of whom have an all-Wales remit. WEL is a respected intermediary body connecting the government and the environmental NGO sector in Wales. Our vision is a healthy, sustainably managed environment and countryside with safeguarded heritage in which the people of Wales and future generations can prosper.

This paper represents the consensus view of a group of WEL members working in this specialist area. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.



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