EPGBTWB 02 - Tystiolaeth gan: Dr Viviane Gravey a Yr Athro Ludivine Petetin | Evidence from: Dr Viviane Gravey and Professor Ludivine Petetin

Senedd Cymru | Welsh Parliament

Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | Climate Change, Environment, and Infrastructure Committee

Bil yr Amgylchedd (Egwyddorion, Llywodraethiant a Thargedau Bioamrywiaeth) (Cymru) | Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill

1. What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

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1) Principles

1. The proposed Welsh approach to environmental principles is the most robust offered in the UK since Brexit. It differs from the English, Northern Irish and Scottish approaches in two major ways: through the environmental objective and through the stronger 'bite' of special regard. While innovative in many ways, this Welsh approach still suffers from a too narrow focus on (a) policy-making instead of the life-cycle of policy (b) lack of clarity around policy statement (c) and narrow reading of key principles.

A welcome environmental objective firmly anchoring principles in Welsh practice

2. The principles exist alongside an environmental objective ("the attainment of a high level of environmental protection and an improvement of the environment"). This builds on existing European Union practice, providing a direction of travel to interpret the principles.

3. But the use of the environmental objective is not just a nod to EU practice. It is used to tie in (formerly EU) environmental principles to Welsh home-grown approaches to principled environmental law in the Well-being of Future Generations (Wales) Act 2015.

4. It is further used in Section 1 to outline a series of overarching areas of priority for Welsh environmental action, 'maintaining and enhancing the resilience of ecosystems and the benefits they provide', 'mitigating and adapting to climate change', 'contributing to halting and reversing the decline in biodiversity', helping make the Bill and its objectives more tangible.

A welcome – but under-defined – use of 'special regard'

5. The fact that the ministers must 'have special regard to the environmental principles when making policy' is very much an improvement on simply having 'due regard' to the principles (which is the chosen approach in rest of the UK). However, greater guidance is needed on 'special regard' and this is not done here.

6. For example, there is extended guidance on the meaning of 'special regard' in Section 46 of the UK Internal Market Act.[1] Such detailed guidance is needed to clearly understand what this means in the Welsh environmental law context within this Bill. Further, there should be separate guidance and examples for Welsh Ministers, NRW and public authorities under the duty to give as much support as possible to those under the duty. The statement should clearly state that such examples are only indicative, i.e. non-binding, and that they reflect current the approach at a specific point in time and that the situation could evolve.

Special attention – and consultation – needed for shaping the Statement

7. The definition and interpretation of each of the four (or five) environmental principles considered in the Bill are not settled and the statement has the possibility to shape the Welsh stance on those debates. The Statement on Environmental principles and integrating Environmental Protection was not put forward with this Bill and therefore we are not able to comment on it. It is very difficult to know what actually will happen with Section 6. This is kicking the ball further down the line. This also means that there is no debate and no scrutiny of the Statement by the Senedd and this committee which is quite problematic.

8. For example, regarding the prevention principle, it needs to be made clear that Wales should stay away from adopting a pure 'cost-benefit analysis' (as for example the US does) to ensure that both environmental and social benefits and objectives remain and do matter in the decision-making process – in line with current Welsh practice and legislation.

9. Precaution and its participatory approach (i.e. where precaution plays a role in the risk management phase of the decision-making process) should remain as the key guiding principle in case of scientific uncertainty (and not adopting a

[1] **https://www.gov.uk/government/publications/northern-irelands-place-in-the-uk-internal-market-and-customs-territory**

pure scientific approach) as it is currently the case in order to enable non-scientific factors or other legitimate factors to play a role in the decision-making process. If Wales were moving to a pure scientific approach, then the current ban on growth hormones in farming (or rBST) would need to be ended as it relies on consumer anxiety (at the time due to the BSE crisis and see the *WTO – EC Growth Hormones case*) – yet farmers and consumers do not want growth hormones in the meat or milk. Another example would be GMOs and how these would have to be approved and grown in Wales despite stakeholder opposition. Moving from one approach to another could have widespread repercussion in Wales, its approach to farming and its environment.

10. It is also important to highlight the differences in approaches regarding precaution in the recent trade agreements ratified by the UK. The recent ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) introduces a notable shift in approach regarding sanitary and phytosanitary (SPS) measures. Under the CPTPP, where such measures deviate from established international standards or guidelines, they must be justified by 'documented and objective scientific evidence'. This effectively precludes the application of the precautionary principle as a legitimate basis for SPS restrictions (such as the ban on growth hormones). In contrast, the Trade and Cooperation Agreement (TCA) adopts a markedly different stance: Article 391 enshrines a non-regression clause in relation to environmental protection, while Article 356 explicitly permits the UK to invoke the precautionary principle in situations characterised by scientific uncertainty.

11. Further, Section 6(5) states that the 'Welsh ministers may review the statement from time to time'. This is too vague. It should be an obligation to review the statement every five to seven years in order to ensure that the latest evidence is utilised in the Statement and is available for all to read. Considering the stated objective to have statement and duty applied 6 months after the Bill receives Royal Assent,[2] the OEGW will not be in position to provide feedback to the first version of the statement. This suggests the first statement should be rapidly reviewed and revised once OEGW is fully operational.

12. Section 6(5) is also too weak. It is also important to note that embedding the principles within the decision-making will take time, effort and resources to actually see changes in policy and resulting legislation. Therefore, this should be acknowledged in the Statement.

An overly narrow focus on policy-making

13. Section 3 aligns the Welsh approach with what has been agreed in the rest of the UK, hereby diverging from EU practice. It restricts the role of principles and

[2] As discussed in online briefing to stakeholders by Welsh officials working on the bill on 20 June 2024.

the integration principle to the drafting stage rather than policies and legislation AT ALL STAGES. At EU level it applies at all stages including when courts are interpreting environmental legislation. This broad application has been key to ensure the principles do not only inform policy development but the policy at it is applied (useful, in particular, for the polluter pays principle or the precautionary principle).

14. Such a narrow approach on policy-making, while understandable due to the shorter loop between policy development and application in Wales post-Brexit is problematic. Giving serious consideration to the principles cannot simply be a matter for Welsh ministers but should also be used by frontline regulators and the judiciary in choosing and ruling on how the law should be applied.

15. Having environmental principles solely playing a role at the drafting stage is likely to lead to engagement with those principles becoming a mere tick-box exercise. As noted, at EU level, the principles play a role beyond policy formulation and are considered at implementation, interpretation stage by the CJEU and beyond the environmental field.

16. Thus, while extending the scope of the principles to NRW when making policy and to public authorities in regard to environment assessment is welcome, it could be improved. Section 5 should be widened to include the application of environmental principles to wider public authorities 'when discharging functions relating to the environment' and not just relating to environmental assessments. Considering the climate and biodiversity emergencies we are facing, this would be a brave step that is clearly needed to be taken due to urgency the world is facing.

17. Furthermore – even if the focus on policy-making is maintained – the scope of policy itself should be reviewed. In Section 3(3), the interpretation of the meaning of 'policy' should be broader to also include strategies, plans and programmes. In order to think forward for future generations and improve environmental protection, such an approach would be more holistic.

An overly narrow reading of key principles

18. In Section 2, the role of the precautionary principle is limited to application to the environment realm. This seems to contrast what is in the Explanatory Notes to the Bill at 3.91 or page 36, which also covers public health and safety. This is an important point as much there is much jurisprudence/case law from the EU on how the precautionary principle has been widened to include public health and safety or could be applicable more generally. For example, the scope of application of the precautionary principle in the *Artegodan GmbH and Others v. Commission of the European Communities* case is defined as follows: 'as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving

precedence to the requirements related to the protection of those interests over economic interests'.[3]

19. Section 3 limits the role of the principle of integration. It builds on the EU's approach of treating the integration principle differently than other environmental principles.[4] In that respect it differs from the approach chosen in rest of the UK to treat all 5 principles together. But the EU's approach came with a very wide remit: the integration principle applies to all EU policies and activities, from design to implementation. The Welsh approach has a different scope. While treated differently, integration and the four principles, as explained in explanatory notes, 'will apply not just to 'environmental policy', but to all areas of policymaking in relation to Wales which has or could have an environmental impact.' This could be very powerful – as the notes state 'the greatest damage to the environment occurs in other areas, not from within the framework of environmental policy'. Indeed; for the four principles, this potentially gives them a greater scope than in the EU.[5] But the lack of clarity around how the scope of application for the principles will be tested (who gets to decide whether a policy has or could have environmental impact, according to what criteria) needs to be addressed.

20. As explained further below (see Section 3), approach to principles and throughout Bill more generally is a missed opportunity to take compliance with the Aarhus Convention seriously and mark a step change in access to environmental information, justice and participation.

2) Governance body

A late mover advantage?

21. The Office for Environment Protection (OEP, England and Northern Ireland, as well as non-devolved UK environmental policy) and Environment Standard Scotland (ESS) were set up in late 2021. Wales favoured instead an interim body, the Interim Environmental Protection Assessor for Wales, established earlier that same year but with fewer powers and resources. By only proposing legislation for the Office of Environmental Governance Wales (OEGW) in 2025, Wales is moving very late. This is at odds with the self-perception of Wales as

[3] De Sadeleer, N. (2006) 'The Precautionary Principle in EC Health and Environmental Law, *European Law Journal*, 12(2), 139-172 **https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2006.00313.x**

[4] In the Treaty on Functioning of the EU, the integration principle is listed at Art 11 and applies to 'the definition and implementation of the Union's policies and activities', with precautionary principle, preventive action, rectification at source and polluter should pay are listed at Art 191.2 applying instead to 'Union policy on the environment'.

[5] Although – see previous point re precautionary principle, while the 'precautionary principle with regard to the environment' would apply to all policies with potential environmental impact, it does not detract from issue with limiting precautionary principle to environment only.

an environmental leader. But it offers an opportunity, as with principles, to learn from what has worked, and not worked in the rest of the UK. This can be seen through the Bill which takes inspiration from ESS and OEP but differs from both.

22. As OEP, ESS and IEPAW, OEGW will be tasked with monitoring environmental law. As with ESS, its investigative focus will not just be on non-compliance (as OEP) but also on the effectiveness of environmental law. Finally, as OEP (and contrary to ESS) it will also offer advice on policy development. As such, the OEGW offers, at first glance, the best of both OEP and ESS models. Yet, doing more than comparable bodies (after IEPAW was able to do much less) raises concerns for capacity, effectiveness and independence of the body.

Capacity concerns

23. OEGW needs sufficient resources. Costs included in the memorandum around 3 to 4.5 million per year are notably higher than in the white paper (2.5-3 million) – this would see OEGW better funded than ESS and roughly a third of OEP funding.[6] Considering the greater scope of powers than ESS (advice role) higher level of funding is to be expected. Nevertheless, concerns arise regarding the adequacy of resources allocated to the OEGW, particularly with respect to staffing levels, which may not be commensurate with the scope of its powers. Such a disparity risks undermining the OEGW's capacity to fulfil its mandate effectively, thereby diminishing its credibility.

24. Hence, in relation to the number of members/Commissioners, limiting the scope of the group is quite concerning (from 3 to 5 persons) beyond the Chair and Deputy Chair and could lead to gaps in expertise. Ensuring there is a robust Body implies that relevant expertise is present. Although we welcome the creation of Committees and sub-Committee to support the work of members of the OEGW (Schedule 1, Part 5).

25. OEGW needs to retain institutional memory of the early post-Brexit years – this means taking IEPAW transition seriously. The Bill reveals a notable and concerning absence of details regarding the transition or handover process between the Interim Environmental Protection Assessor for Wales (IEPAW) and OEGW. This omission represents a significant gap in the current framework for environmental governance, which must be addressed in the Bill. It is imperative that the legacy of the IEPAW's work, along with the insights and lessons derived from its operation, are not disregarded by the new governance structure.

26. OEGW further needs to build and retain its own institutional memory – this can be facilitated by rethinking Board term limits and appointment procedure. In

[6] Gravey, V. and Petetin, L. 'Late mover advantage? Designing a post-Brexit environmental watchdog for Wales' *Brexit & Environment* **https://www.brexitenvironment.co.uk/2024/04/08/late-mover-advantage/**

relation to the composition of the Body and the length of appointment, it should be ensured that all members are not renewed at the same time to ensure some continuity and smooth transitioning. Further, the Chairperson and the Deputy Chairperson's terms should not end at the same time either to ensure that the OEGW keeps functioning smoothly.

Effectiveness – how strong are the OEGW's 'bark and bite'?

27. The post-Brexit environmental oversight bodies/watchdogs in the UK have each different strength of 'bite' and varied options to 'bark'. But it is important to note that OEGW, as ESS and OEP, is deprived of the biggest 'bite' of the EU system: fines. The power to impose fines on the government and other bodies for non-compliance represents the loss of a significant lever for driving enforcement which should be duly considered. The power to fine acts as a deterrent on the government and other public bodies should be seriously considered. Fines collected could be utilised for environmental benefits, i.e. fund projects that would enhance environmental protection. The lack of fines makes getting other powers right critical so that OEGW has ability to contribute to the environmental objective.

28. Addressing information gathering problems head on is key. Both the ESS and OEP have identified issues with obtaining information in particular when relating to a complaint in relation to availability sufficiency and timeliness from the public authorities that need to comply. There has been a lack of cooperation transparency and disclosure from the part of the public authorities. Yet, sections 23 and 24 do not provide a timeline as to when such information must be disclosed. Therefore, a strict timeline should be included for the public authorities to respond in order to in to avoid similar issues as in England, Scotland and Northern Ireland.

29. Using the term 'representations', rather than 'complaints' – and hereby following the ESS approach – can be fruitful in that it opens the door to OEGW receiving broader range of communication (such as suggestion for improving environmental law and not just query about compliance).[7] But it should be made clear in both Bill and ultimately OEGW strategy and communications, that complaints are a form of representation – indeed likely to be the main form of representation. Not mentioning the term 'complaint' could create (i) confusion in the persons who would like to raise issues to the OEGW as they may think that they need a lawyers involved as it is often assumed that only lawyers can make representations; (ii) compliance issues under the Aarhus Convention as this could potentially be interpreted as a barrier to access to justice in environmental matters as utilising the term 'representations' could deter members of the public from complaining as it seems to call for the use

[7] As discussed in online briefing to stakeholders by Welsh officials working on the bill on 20 June 2024.

of a lawyers, i.e. representation, before being able to lodge a complaint/representation.

30. Responsibility to authors of representations – Section 34 of the Environment Act 2021 includes a 'duty to keep complainants informed'. Even if the Bill continues to choose representations over complaints, similar duty to respond and update complainants/authors of representations should be included (frequency and mean of information to be detailed in strategy).

31. Review – a simple way to undermine the OEGW? At first glance, the possibility (section 18) for the OEGW's review of compliance notices is welcome. As a new body, the OEGW will have to establish its credibility – and providing a simple mechanism for affected public authorities to query the compliance notice served may help. Similarly, the ability for the OEGW to apply to the High Court for an order requiring the public authority to comply is useful. But while the principle of the review is welcome, the review committee and how it is appointed (paragraph 10, Schedule 1) is concerning. 2 out of 3 members of the review committee are to be picked from a list decided by the Welsh ministers (who should have experience of/capacity in environmental law and policy, science or investigation). Appointing to that list a majority/only members favouring light touch interventions or indeed opposing the mission of the OEGW would allow the Welsh ministers to effectively defang the OEGW.

Is the OEGW sufficiently independent?

32. The first few years of OEP/Defra interactions has illustrated how relationship between watchdog and 'home' Department can quickly turn sour. Establishing a body for the long run requires a clear commitment to independence – both practical and legal – to allow OEGW to pursue its mission. As it stands, the OEGW's independence sits somewhere between the OEP and ESS – tentatively more independent than the OEP (although not fully) but less than ESS.

33. The approach chosen so far is inferred independence. The Bill does not give equivalent powers to UK SoS or NI Department to, for example, provide 'Guidance on the OEP's enforcement policy and functions' (Section 25), and instead through Schedule 2 tries to set clear expectations as to what such strategy should include. Thus, the position appears to be that OEGW will be independent simply because Welsh Government has fewer powers to interfere than under the Environment Act.[8] But this approach is unsatisfactory as OEGW lacks both the protection of independence in the Environment Act, and the greater distance of the ESS model.

[8] As discussed in online briefing to stakeholders by Welsh officials working on the bill on 20 June 2024

34. Protection of independence. The Environment Act 2021 Schedule 1 (17) sets out how 'In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence.' Even though Welsh ministers' powers in this Bill to influence/interfere with OEGW are comparatively fewer, a similar commitment to protecting independence would be welcome (notably in relation to the list of prospective review committee body).

35. Ability to report on lack of resources. The Environment Act 2021 Schedule 1 (14.3) sets out how, as part of its annual accounts, 'a statement of accounts must include an assessment by the OEP of whether, in the financial year to which the statement relates, the Secretary of State provided it with sufficient sums to carry out its functions' – similar wording should be added to Part 8, Reporting Requirements (Schedule 1).

36. Potential tensions inherent in the dual functions of providing advice and undertaking enforcement action have neither been explicitly acknowledged (notably in terms of access to information on policy development etc.) nor sufficiently addressed. These shortcomings are likely to hinder the ability of the new governance body to meet the high expectations placed upon it.

37. Appointments should be ultimately decided by the Senedd after proposal from the Welsh Government to ensure the accountability of the Body. Similarly, the ESS is accountable to the Scottish Parliament. See Schedule 2(2) of UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 'The Scottish Ministers may appoint a person as a member only if the Scottish Parliament has approved the appointment.' In contrast, as per the Environment Act 2021, OEP appointments are made by Government. This has created much criticism for the OEP as to its accountability if members are ultimately appointed by the UK Government.

38. The Welsh Government should be mindful of such pitfall and follow the path of Scotland with the ESS. A simple consultation of the Environmental Committee of the Senedd does not provide sufficient safeguards. Consequently, appointments should be ultimately decided by the Senedd after proposal from the Welsh Government to ensure accountability, independence and transparency.

3) Lack of Aarhus rights

39. The Bill, similarly to the White Paper, notably omits any reference to the three core pillars of the Aarhus Convention—Access to Information, Public Participation in Decision-making, and Access to Justice—constituting a significant gap in the proposed framework. The incorporation of Aarhus principles, which confer legally recognisable rights upon individuals and environmental non-governmental organisations (NGOs), is essential. As a

signatory to the Aarhus Convention, the United Kingdom is already bound by these obligations; however, reliance on international legal rights alone renders their practical enforcement challenging. It is therefore imperative that these principles be more explicitly transposed into Welsh law to facilitate their effective utilisation by citizens. Moreover, the OEGW must be endowed with the necessary authority to uphold and oversee the implementation of these rights within Wales.

40. Importantly, this issue extends beyond Wales and reflects a broader, UK-wide deficiency in compliance. For instance, the acting Chair of Environmental Standards Scotland (ESS) highlighted in the Scottish Parliament in March 2024 the need for substantive, merits-based review mechanisms under the Aarhus Convention, rather than a sole focus on procedural compliance. Nonetheless, Wales is uniquely positioned to demonstrate leadership by addressing this shortcoming and setting a precedent for more robust and rights-based environmental governance across the UK.

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