



## **The Environment (Wales) Bill**

### **Evidence Paper to the National Assembly for Wales's Environment and Sustainability Committee**

#### **Introduction**

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared by Gweithgor UKELA ar gyfer Cymru, the UKELA Wales Working Party.

UKELA has only provided evidence in respect of the provisions in Part 1 of the Bill as these are potentially the most contentious in terms of the coherence, integration and transparency of the bill.

In general, UKELA welcomes the innovative approach to natural resource management in Part 1 of the Bill which will have an important impact on the quality of the environment in Wales. However, we make some suggestions in this evidence paper to improve the Bill in a number of respects.

## Summary of Evidence

UKELA has concerns about whether the bill's definition of natural resources, which, although it is 'not limited', should nonetheless specifically include landscapes.

UKELA recommends the expansion of the overall objective of Natural Resources Wales (NRW) so as to more clearly integrate with the Well-being of Future Generations (Wales) Act 2015.

UKELA recommends the expansion of the principles of sustainable management of natural resources to incorporate the preventive and precautionary principles and to include public participation.

UKELA makes recommendations in relation to the biodiversity lists and the biodiversity duty related to them so as to make the provisions clearer, in terms of the (i) content of the duty; (ii) the applicability of the duty; and, (iii) compliance with the duty requirements.

UKELA makes a number of recommendations relating to the National Natural Resource Policy (NNR policy) with respect to the requirements on Welsh Ministers to consult and designed to strengthen the duties imposed on Ministers.

UKELA also highlights the need to establish clear links between the biodiversity lists and the 'biodiversity' duty on public authorities as well as those between the biodiversity lists, the State of Natural Resources Report and the NNR policy.

UKELA recommends that the provisions on Area Statements be revised to remove ambiguity, to better respect the need for consultation and to enhance the observance of related duties.

UKELA generally welcomes the land management agreement provisions but questions whether the provisions take sufficient account of existing domestic legal obligations (including the Human Rights Act 1998).

UKELA does not consider that the case has been made for suspending certain of NRW's existing statutory obligations when exercising experimental powers; indeed, this is viewed as a dangerous precedent.

## Detailed Evidence

### Part 1: Sustainable Management of Natural Resources

#### *Natural Resources and Sustainable Management of Natural Resources*

*Do you agree with the Welsh Government's proposals on definitions for 'natural resources' and 'sustainable management of natural resources'? Are there things missing that you think should be included?*

1. This Part of the Bill sets out the objective and seeks to implement the “ecosystem approach” contained in the UN Convention on Biological Diversity, which defines ecosystems as “a dynamic complex of plant, animal and micro-organisms, and their living environment interacting as a functional unit”. However, the absence of the UN Convention definition is disappointing and weakens the Bill. UKELA, therefore suggests that this should be included in clause 2. Although Natural Resources are defined in that clause there is a need to be explicit about the coverage of the Bill. In this respect, UKELA believes that it should be extended so as explicitly to include protected landscapes, notwithstanding the fact that the current definition is non-exhaustive. Whilst it is recognised that the sustainable management of natural resources is a necessary condition for the protection of these assets, it is not necessarily a *sufficient* condition which is why we suggest that they should be explicitly included in the definition of natural resources in clause 2.
2. In respect of sustainable management of natural resources, the drafting of clause 3(2) is fundamental to the overall objective of Natural Resources Wales. It is important, therefore, to ensure that the objective is clear and appropriate. In order to align the legislation with the provisions of the Well-being of Future Generations Act and to emphasise the role of Natural Resources Wales in relation to protection of biodiversity, UKELA proposes that clause 3(2) should be expanded, to read as follows:

“The objective is to maintain and enhance a bio-diverse natural environment and healthy, resilient ecosystems, and the benefits they provide, and in doing so, to meet the needs of the present without compromising the ability of future generations to meet their own needs”

***Principles of sustainable management of natural resources***

3. Clause 4(a) should make it clear that action should follow as a consequence of monitoring and reviewing. It is insufficient to require a review without provisions requiring follow up action where the review has identified shortcomings. UKELA also suggests that the existing provisions of clause 4 should reflect the internationally agreed principles of prevention and precaution. Therefore, we propose that clause 4 be strengthened as follows:

4(a) – adopt a preventive approach and manage adaptively by planning, monitoring, reviewing action and taking appropriate steps where shortcomings are evident.

...

4 (c) – promote and engage in collaboration and cooperation with relevant statutory bodies and non-governmental organisations.

4 (d) – take account of all relevant evidence and where uncertainty exists adopt a precautionary approach.

...

4 (f) – take account of the long-term consequences of actions as well as the short and medium term benefits.

4. Furthermore, a new provision should be included to support public participation, where appropriate, in decision making about the sustainable management of natural resources, particularly in relation to the benefits and intrinsic value of natural resources and ecosystems.
5. UKELA also has some concerns about clause 4(b), as the meaning of the term “appropriate” is unclear. Does it refer to the most appropriate use of public authority resources or to the most appropriate spatial organisation in terms of the objective of resource protection?

*What are your views on the proposal to strengthen the biodiversity duty on public authorities operating in Wales?*

***Biodiversity lists and duty to take steps to maintain and enhance biodiversity***

6. The duty under clause 6(1) is a relatively weak duty – simply requiring public authorities to “seek to maintain and enhance biodiversity in the exercise of their functions ... and in doing so promote the resilience of ecosystems. This fails to ensure that the necessary actions will take place. UKELA suggests that omission of “seek to” would strengthen the duty to achieve the desired objective. An alternative, which may be more acceptable, would be to align the wording with that used in the Well-being of Future Generations Act i.e. “take all reasonable steps to maintain and enhance .....”.
7. In relation to clause 6(4), it is suggested that the words “Environmental Programme” should be omitted as the accepted reference is the United Nations Convention on Biological Diversity.
8. Clause 6(5) imposes a duty on public authorities to publish triennial reports on how they have complied with their duties. However, the absence of a power to ensure that these reports are published, or of any consequences of not publishing the reports, is worrying, as this will weaken the effectiveness of the legislation.
9. There needs to be more coherence between the definition of a public body in clauses 11(1) and 6(6) – as drafted there is considerable potential for confusion between the two. If s6(6) is not specific to public bodies established in Wales, but intended to apply to all public bodies **operating** in Wales this should be made clear on the face of the Bill. UKELA also considers that the Bill should contain, somewhere in clause 6, a definition of biodiversity which is more closely aligned with that contained in the UN Convention on Biological Diversity.

10. Clause 7(1) requires the Welsh Ministers to prepare and publish a list of living organisms and habitat types of principal importance, and clause 7(3) imposes a duty on Ministers to “(a) take such steps as appear to them to be reasonably practicable to maintain and enhance the living organisms and types of habitat included in any list published under this clause, and (b) encourage others to take such steps”. In UKELA’s view, it is unclear why “others” should be amenable to encouragement since no other provision in Part 1 appears even to require public authorities to have regard to the list let alone creates any duties in respect of it. In UKELA’s view it should be made clear how the information in this list is to be used, for example, by public authorities in fulfilling the biodiversity duty, by NRW in creating the State of Natural Resources Report or by Welsh Ministers in creating the NNR policy.
11. In addition, the absence in this clause of the need to consult interested parties on the preparation of the list (other than Natural Resources Wales) is of concern, particularly given the general support for public participation in environmental decision making, and the specific references to this notion in the explanatory memorandum.

***Duty to prepare, publish and implement national resources policy***

*What are your views on the proposals for a National Natural Resource Policy? Is the Bill clear enough about what this will include?*

12. Clause 9 states that Welsh Ministers should publish a document setting out general and specific policies for contributing to achieving sustainable management of natural resources; key priorities and opportunities for NRM; what should be done in relation to climate change; and anything else Ministers consider relevant. Though UKELA broadly welcomes this provision, we suggest that the *risks to NRM*, as well as the ‘priorities and opportunities for NRM’ should form part of the policy content. Also it would be helpful if there was more detail in the Bill as to what should be included in the policy more generally. Currently, clause 9 requires only that the policy should set out “key

priorities and opportunities for sustainable management of natural resources in relation to Wales, including what they consider should be done in relation to climate change.” There is no mention, for example, of any requirement to set these as time-bound objectives, whether the policy should stipulate a hierarchy for the addressing of the priorities and opportunities identified, nor to lay down guidance on what should be done if priorities conflict (which is entirely possible). In addition, there is no mention of the relationship between the NNR policy and the State of Natural Resources report created by NRW. There is also no requirement on Welsh Ministers to consult on the contents of the document. UKELA strongly suggests that there should be a duty on Welsh Ministers to consult on the policy at the outset. Moreover, UKELA has serious concerns about the relatively weak duties on Welsh Ministers to “take such steps [to implement to the policy] as appear to them to be reasonably practicable” and “encourage others to take such steps” (clause 9(4)(a)&(b)). UKELA suggests than an alternative, and stronger, drafting might be: “to take all steps they consider necessary to implement the policy” and to “direct others to take such steps”.

### ***Area Statements***

*Do you agree with the proposals for area statements? What should these cover and is the process for their development clear enough in the Bill?*

13. In clause 10 the linkages between the area statements and the NNR policy are unclear. There is also no duty on NRW to implement the policy to be prepared and published under clause 9 and no duty on Welsh Ministers to implement area statements, despite their obvious centrality to the implementation of the NNR policy. UKELA believes that appropriate provisions should be introduced into the Bill in order to ensure that NRW takes account of the policy document and Welsh Ministers take account of area statements in exercising their functions. Furthermore, there should be a requirement for Natural Resources Wales to consult on their area statements, in particular with Welsh Ministers and other relevant stakeholders, such as landowners (see paragraph 55 of the Explanatory Memorandum re “promoting engagement with stakeholders”).

Our comments in respect of relatively weak duties on Welsh Ministers in relation to Clause 9, apply equally to the duties of NRW in respect of this clause. Finally in relation to area statements, it seems inconsistent that provision is made in clause 24 for changing the time requirement for the production of the State of Natural Resources Report and National Natural Resources Policy yet no time requirement is specified at all for the production of area statements.

14. There is some ambiguity in the drafting of clause 12 (1) that needs to be corrected. It is unclear as to whether the reference to “them” refers to Welsh Ministers or a public body. Again, the absence of consultation with interests wider than public bodies, such as landowners, is troubling, particularly as Welsh Ministers have the power to direct public bodies to implement area statements. UKELA welcomes the legally enforceable duty under clause 12(3) which allows Ministers to direct a public body, and the accountability and enforcement arrangements for the other duties listed in clauses 10 (the preparation and publication of area statements); 13 (public bodies’ obligations to take account of guidance in respect of area statements); and 14 and 15 (duty of public body to provide NRW with information and assistance and vice versa).
15. There is a lack of clarity in respect of the provisions in clause 14 which oblige public bodies to provide information and other assistance to NRW unless this would “have an adverse effect on the exercise of the public body’s functions’ (cl.14(2)(b)). It is not clear whether ‘an adverse effect’ could include an adverse *financial* effect. UKELA considers that this contingency should be explicitly addressed.

#### **Land Management Agreements and Experimental Powers**

*Are you content with the proposals for NRW to have wider powers to enter into land management agreements and have broader experimental powers?*

16. The power for NRW to enter into a management agreement with regard to any of its functions is eminently sensible.

17. Management agreements are entered into voluntarily. However, clause 16(2) refers to the imposition of obligations etc. This being the case an appeals process should be provided to ensure compliance with the Human Rights Act.
18. The relationship with existing SSSI management mechanisms under section 28, Wildlife & Countryside Act 1981 (as amended) and these proposals require further clarification.
19. UKELA notes that the clause 17 provisions on successors in title are different to those currently used under section 15 of the Countryside Act 1968. It is not clear why a different approach has been considered necessary nor has this been explained in the Explanatory Memorandum entries relating to cl.17 (at pp. 325-6).
20. UKELA notes that clauses 16-21 do not refer to management agreements entered into in respect of European sites under regulation 16 of the Conservation of Habitats and Species Regulations 2010 (as amended).
21. Proposals under clause 22 allowing the exemption or relaxing or modifying statutory requirements for which NRW is responsible, even with consultation, is of concern and not supported by UKELA. Such a provision would set a dangerous precedent. The power for NRW to conduct research and experimental schemes is sensible but no evidence has been presented that suggests that existing statutory requirements would prove an obstacle to such initiatives?

## Overarching Question

*For your views on the relationship between this Bill and the Well-being of Future Generations Act 2015 and the Planning (Wales) Bill? Are the links and connections between them clear?*

22. Though there are commendable efforts to integrate the requirements of these 'flagship' provisions there are some areas of inconsistency and potential confusion.
23. Perhaps most significant in this respect is the lack of guidance on the integration of, for example: NNR policy, well-being objectives, and the National Development Framework; as well as area statements, local well-being strategies and local development plans.
24. The Environment Bill imposes a biodiversity duty on all public authorities, which are defined (in clause 6(6)) so as to include statutory undertakers. However, statutory undertakers are not subject to well-being objective duties in the Well-being of Future Generations (Wales) Act 2015. Clearly the WFGA provisions are set (for the time-being at least) but it does seem incongruous to have statutory undertakers subject to the biodiversity duty but not (at least not directly) subject to well-being duties, though we realise that this may relate to differing obligations at international level. The point relating to the confusion over the designation of a 'public body' has already been made at paragraph 9 *supra*.