



Northern Ireland
Assembly

Committee for Agriculture, Environment and
Rural Affairs

OFFICIAL REPORT (Hansard)

Environment Bill: Brexit & Environment

27 February 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Declan McAleer (Chairperson)
Mr Philip McGuigan (Deputy Chairperson)
Ms Clare Bailey
Mrs Rosemary Barton
Mr John Blair
Mr Maurice Bradley
Mr William Irwin

Witnesses:

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|---------------------------|----------------------|
| Professor Charlotte Burns | Brexit & Environment |
| Dr Mary Dobbs | Brexit & Environment |
| Dr Viviane Gravey | Brexit & Environment |

The Chairperson (Mr McAleer): We have saved the best to last. *[Laughter.]* I welcome Dr Mary Dobbs and Dr Viviane Gravey from Queen's University Belfast (QUB), and Professor Charlotte Burns of Sheffield University. You are very welcome. You can take 10 minutes to brief the Committee, and then there will be an opportunity for questions. Tear on there.

Dr Viviane Gravey (Brexit & Environment): I will start, and we will share the 10 minutes across the three of us.

We are here presenting on behalf of Brexit and Environment, which is an Economic and Social Research Council-funded (ESRC) network of academics looking at how Brexit is impacting on the environment. Today, we are talking about the Environment Bill, which was at the heart of last year's Queen's Speech. It is the UK Government's answer to their stated environmental promises and environmental ambition and to the regulatory and governance gaps opened up by Brexit. Over 40 years of EU membership, EU institutions have shaped how we make environmental law in the UK but also how that environmental law was enforced through the role of the European Commission and the Court of Justice of the European Union. The Environment Bill is about patching the gaps in UK law across the UK and its four nations but especially for England and a bit for Northern Ireland, due to Brexit.

Our evidence looks at how the Bill delivers on both these promises: on meeting the high ambition that the Government are promising and on patching the gaps. Our evidence focuses on key provisions of the Bill. Although the documents have been, at first, done for England, it is important to realise that Scotland and Wales have decided to go a completely different way with this. They have different

systems of environmental governance. They have developed their own institutions and have decided not to join the institutions created by the Bill. Northern Ireland, at the behest of DAERA, has been included, because, without the Assembly, there was no home-grown ability to develop a Northern Irish response.

What we need to discuss when we look at the Bill are environmental improvement plans and environmental principles. Famously, those were in the European treaties, and they now need to be brought into UK law. There is the question of environmental governance, because we do not have the European Commission and the European Court of Justice any more. There are also questions about changes to key powers and policies. In our evidence, we looked at water, but other areas are affected.

Dr Mary Dobbs (Brexit & Environment): To build on what Viviane has said, and as we heard from the previous witnesses, there is a need for certainty in the environmental improvement plans and the policy statement on principles. An environmental improvement plan is partially about providing some guidance and certainty on what will happen. It is also about ensuring high standards.

The Bill provides for Northern Ireland to create environmental improvement plans, but its treatment of Northern Ireland differs from its treatment of England. For instance, no targets are mandated for Northern Ireland. There are extremely important and binding long-term and short-term targets that should be in there, partially to ensure a high level of environmental protection and partially to provide that certainty and to make sure that we keep moving forward with environmental protection. There are flaws in the approach taken to the English proposals as well, but the targets are not even in the Northern Irish proposals. If you adopt the English plans for Northern Ireland, you need not merely copy and paste them but consider how to expand and develop them for Northern Ireland. One target that is specifically missing is soil quality, which is essential for biodiversity and for Northern Ireland. We should look at the priority areas and expand on them. I am happy to go into further detail on the plans.

The principles, as Viviane said, are part of EU law. They are therefore currently part of UK, and therefore Northern Irish, law. As they stand, they are binding on every public authority. The proposal in the Bill is to incorporate them into a policy statement to which it would be essentially binding in principle for Ministers to have due regard. That is an improvement on the previous version, but it is a very weak formulation still. The range of principles is also narrow.

You heard from the previous witnesses about the potential to expand the range of environmental principles. They are flexible and malleable. They bend against each other. They do not have to be outright, requiring pollution to be treated at source every single time. That does not mean that if I spill this glass of water, and, for some reason, it contaminates the entire place, it has to be dealt with here. It can move. The principles are flexible in that manner. They work with one another.

A broader range of principles that are suitable for Northern Ireland and that include cross-border issues, non-regression and environmental improvement are ones that we could think about and bind public authorities to. Again, I am happy to go into that in further detail.

Professor Charlotte Burns (Brexit & Environment): I will talk about the Office for Environmental Protection (OEP), which is a key innovation in the Bill. We are calling for some clarity on resourcing. That means money but also appropriate staff and expertise of the Northern Irish context. How that will be operationalised is important, because there is not that much clarity in the Bill.

There is a need for clarity on when the OEP will become operational. There are no interim arrangements, so if we do not have an OEP in place in Northern Ireland by the beginning of January next year, there is an environmental governance cliff edge. That therefore needs to be dealt with.

There is provision for a Northern Ireland member to be part of the OEP, but there will be no Assembly involvement in the process. I would call for there to be Assembly involvement in appointing the Northern Irish member. Similarly, in the English context, I would call for Parliament to be involved in oversight of OEP members.

Although it is good to see that the Government are moving to try to plug some of the governance gaps through the creation of the Office for Environmental Protection, it is important, in the Northern Irish context, to have an independent environment agency, which is something that is still not in place. We do not want the creation of the Office for Environmental Protection to be seen as an alternative to the creation of an independent environment agency, because that is required as well. Is there anything else that we want to say?

Dr Dobbs: I think that that is all.

Professor Burns: I think that we are done.

Dr Gravey: For our opening statement.

Professor Burns: Yes, for our 10-minute opening statement.

The Chairperson (Mr McAleer): OK. If there are issues that you want to elaborate on, you will be able to do so as members take the opportunity to ask some questions. Mary mentioned the need to "have due regard", and I note:

"Ministers are only to have 'due regard to' the policy statement on principles."

I am aware that the Brown principles were incorporated into the Rural Needs Act 2016 to strengthen the need to have due regard. Will the provision strengthen the policy statement, or is it already part of the policy statement?

Dr Dobbs: First, it is a policy statement rather than legislation that the principles are being incorporated into, so it is about having "due regard" to the policy statement. The policy statement may be amended at any time. That, first and foremost, is extremely concerning. On the phrase "have due regard", the current approach is that all environmental law created at EU level must be founded, if you like, on those environmental principles. Every time that an environmental case gets before the courts, they will interpret the legislation in the light of the principles. Every time that it comes before an agency, it must interpret the legislation in the light of the principles. Every time that we create any implementing measures, that must be done in the light of the principles and, obviously, the overarching objective of high-level environmental protection. "Have due regard" is better than "have regard". It is better than saying, "I have had regard to the glass of water. Let us move swiftly on". It is better than that.

The Government specifically stated, in response to the Environmental Audit Committee (EAC), that they do not want to have anything stronger in there — anything that is further binding — because it would be onerous. The obligation is already there, and this is a weakening of that obligation. Yes, "have due regard" is still too restrictive. We need to go beyond that by putting into legislation that, "All law must be founded on this or must be read in the light of it". That would strengthen the provision beyond what you are indicating.

The Chairperson (Mr McAleer): Professor Burns, your reference to the OEP was interesting. We have discussed the topic throughout the day. The departmental officials said that DAERA would appoint a representative to the OEP. Obviously, DAERA is a Department of the Government here. Do you think that it would be better if the wider Assembly and not just one Department made that decision? How should the process happen? We want to maximise the Assembly's role, because the OEP representative is such a crucial position.

Professor Burns: It is reasonable for DAERA to be involved in the processes, as it is the responsible Department, but it seems to me that it would be entirely appropriate for you to request that whomever it appoints comes and answers questions in front of this Committee to ensure that you feel happy that the individual is the right one to take on the role. That is my view. DAERA obviously needs to be involved, but it seems to me that the Assembly needs to be involved in the conversation as well. I have made the same point about the House of Commons being involved in appointments.

Dr Gravey: In general, an NI representative on the OEP would be there to hold DAERA accountable. In that case, it would be better if it were not just DAERA that appointed the person.

The Chairperson (Mr McAleer): That would almost be a conflict of interest.

Dr Gravey: It can always choose someone more sympathetic. We do need Northern Irish expertise, of course, but the Assembly can also provide a check that the person has Northern Irish expertise.

Professor Burns: I want to pick up the point about "regard" and "due regard". A new provision, paragraph 17 of schedule 1 to the Bill, states:

"the Secretary of State must have regard to the ... independence"

of the OEP, rather than "have due regard". It would be good to see that changed to "have due regard" to the independence of the OEP. Viviane makes a really good point that it is difficult to be independent if you are being appointed by the body that you will be holding to account.

The Chairperson (Mr McAleer): I picked up on the missing "due regard" because, when the former Agriculture and Rural Development Committee was scrutinising the then Rural Needs Bill, the original draft stated "to consider rural needs".

A mountain of representations was received from witnesses who wanted that strengthened to "to have due regard". We managed to get "to have due regard" inserted into the Bill, and then we had the legislation strengthened again to incorporate the Brown principles to operationalise the concept of due regard.

Mr Blair: I am reflecting on the fact that, with the greatest respect to the latest Secretary of State, politicians in general tend to have differing degrees of independence. The message from his headquarters in London is that there is not much flexibility around independence in current times. That takes us to the issue of independence of people or an agency. I have referred to that already, so I am repeating my question, to some extent.

Thank you, Charlotte, for the report. Thank you, Viviane and Mary, and I also thank you for coming back to the Committee again. There is some excellent detail in the report. However, I do not see much in it about the independent environmental protection agency (EPA), which we have cross-party agreement to deliver. I asked departmental officials about that earlier. Is it simply not in the report because of timing? Did the signing of the agreement and the restoration of the Assembly not fit in with the timing of the report?

Separately, do you feel that there is scope to add the independent agency? What structures do you think should be in place if we have an OEP here in Northern Ireland, with a Northern Ireland representative or representatives on it? How should the OEP's role fit with that of any forthcoming independent agency to protect our environment?

Dr Gravey: Let me start with that. It is important to realise that Northern Ireland does not start from the same point as the rest of the UK nations when it comes to environmental governance.

Everywhere is facing Brexit environmental gaps, but Northern Ireland has pre-existing environmental gaps. It is the only one of the four without an independent environment agency. When it comes to the time that we cannot access the European institutions to provide another avenue, it is extremely important that governance here be seen to be independent. That is why it is really important that we get an environmental protection agency.

If Northern Ireland takes what is perhaps the easy route of adopting the English proposal, which has been amended a bit, and opts in to the OEP, that will free up space for not just the Assembly but the Department to spend more time setting up the environmental protection agency.

It is a lot of work to do both, so you will have an oven-ready Office for Environmental Protection here. Pick that up, but perhaps limit how long you have it for, and then focus your energy on getting the environmental protection agency up and running.

How will they work together? England already has an independent environment agency, Natural England. It will have to come up with ways of working with the OEP. That is a normal problem to have. It will be sorted out, albeit potentially differently in England from here, but it is not a new problem.

Professor Burns: The two would have different roles and functions. The OEP's role will be to hold public authorities to account, and the environmental protection agency's role would be to hold, for example, corporations and other bodies to account, to implement and monitor, and perhaps to provide data to the OEP. As Viviane said, it is not unusual to have to work such things out, and there are models that could be quite quickly adopted.

From reading the Bill as it is currently structured, I believe that there will be one person in Northern Ireland who will be responsible for the OEP in Northern Ireland. I suggest that that is not a great idea. There needs to be a proper office, properly resourced, with appropriate expertise. There need to be

some clear conversations undertaken around exactly who will be doing the monitoring, where the data will come from, and how everything is going to be resourced. That comes back to your question. It would be very easy to fudge it and tell you to put money into the environmental protection agency and not the OEP, but you need to do both, and to a sufficiently high standard.

Dr Dobbs: You mentioned a report. Do you mean the document that we created for you?

Mr Blair: Yes.

Dr Dobbs: The simple answer to that is that we were asked to focus on the Environment Bill, and the environmental protection agency is not a part of it. We added a mention of it, because we did not want to be forgotten. There is that danger that we focus on the OEP and forget that we need the independent environment agency here as well.

Other than that, I echo what has been said. We need both to be in existence. We need them to be independent of each other but to work together. There has to be communication. As was mentioned, the OEP is the body that could be holding DAERA to account. It can help provide advice, as is outlined in the Bill, but, at the end of the day, it has to be able to take action against DAERA, if necessary. Therefore, you should not have the same people populating both offices. They should not be one unit or merge too much.

Mr Blair: Thank, Mary.

Ms Bailey: Thank you very much and thank you for your briefing paper. It is another one that I will be keeping close to me. It makes so much sense and helps me easily understand your work.

You are calling for the immediate publication of environmental improvement plans. I agree that that is a big one that we are missing. In your opinion and experience, how do you see their publication taking shape? Do you think that we have the evidence available to be able to move quickly to establish plans? Do we have the resource? If we wanted improvement plans signed off quickly, would that be a straightforward enough thing to do?

Dr Dobbs: Quickly, but not rushed.

Ms Bailey: Yes. You will not be doing it overnight, but it will not have to take, for example, six years.

Dr Dobbs: No, but you have a draft environmental strategy and all the data that has been gathered over the years as a result of existing reporting requirements. That is just for Northern Ireland. Yes, there are sometimes gaps in the knowledge, and it would be great to have that knowledge and be able to develop it further, but we can also access the expertise and information that is widely available, including — currently — that of the European Environment Agency.

Any environmental improvement plan should be a Northern Irish document, but it does not have to be created independently, without looking elsewhere. We have the data for Northern Ireland, and then we also look at what targets are being set elsewhere. We determine whether targets have been chosen because of international commitments, because something just plain needs to be done or because they are feasible in a specific country, landscape and environment. I think that we can do it. We have to do it, but extra resources would be nice.

Ms Bailey: I want to move on to the five principles. Again, those are aspirational and not embedded in law. If we were to use the five principles to take action that resulted in court proceedings, what would be the difference between their application and rights under, for example, the Aarhus convention?

Dr Dobbs: I will take that question. My PhD was on environmental principles.

There are two things to say. For the main part, the Aarhus principles are about procedure. They are rights, and they have been acknowledged by the UK Government as rights in the response to the EAC, but they are about access to information. They are about being able to participate. They are procedural rights that facilitate individuals in holding people to account and ensuring effective governance in the system.

Environmental principles can be to do with processes and procedures, but they are also about achieving positive outcomes. A very strong example of how environmental principles work is in the area of habitats. There, the principles were used to interpret the legislation to raise the standard of proof for protected sites. It now has to be proven beyond reasonable doubt that activities will not harm protected sites. The court, in interpreting the legislation, used environmental objectives and principles. The Aarhus convention will not do that. It gets you into the court and allows you to argue, but it does not provide that strength.

Ms Bailey: If we were to get the principles embedded properly, would the two together provide a very strong framework?

Dr Dobbs: Yes.

Ms Bailey: Thanks.

Dr Gravey: They can, but, at the same time, it is the current framework. It is the framework that we had already under EU law. This is about making sure that we have as much access to the principles as we had before. Pre-existing problems will not go away, however.

Professor Burns: This is also about having them in a policy statement rather than embedded in law. Having the principles in the form of a policy statement weakens where we are.

Ms Bailey: I hear you.

Dr Gravey: I will add one point about the principles. One thing that we know is that, in the treaty, the principles go hand in hand with the objective of a high level of environmental protection. The principles are interpreted in a way that makes sure that we get that high level of environmental protection. We do not have that overarching environmental objective in the Bill, however. We hope that the 25-year plan will be treated as an environmental plan, but, again, environmental plans will not be legally binding. Therefore, that is a big gap as well.

The Chairperson (Mr McAleer): You mentioned rights earlier. Do you think that the principles in the Bill should be considered by the Ad Hoc Committee on a Bill of Rights when it is considering environmental rights?

Dr Dobbs: I would be very happy if it did. Viviane and I published a policy paper with some colleagues, and we wrote an article in which I mentioned an environmental charter. France has a charter for environmental rights, objectives, duties and principles, and all are combined. It would be wonderful to have the principles in a bill of rights. A bill of rights is a very positive thing to have. I would not leave it to relying on the creation of a bill of rights. In the first instance, the principles need to be introduced into the general legal system and embedded in legislation. In the long term, yes, absolutely put them in a bill of rights, but, in the short term, let us get them embedded into the legal framework. You mentioned the protocol in your earlier sessions, but the environment is only lightly touched on in the protocol nowadays, so it is down to Northern Ireland to do this.

The Chairperson (Mr McAleer): I asked this question earlier: do you see any role for the North/South bodies under the Good Friday Agreement in helping realise some of the objectives of the Environment Bill?

Dr Dobbs: The Good Friday/Belfast Agreement, as you know, provides for cooperation on the environment. However, cooperation requires, to an extent, shared values, objectives and procedures. We do not have to have identical ones. It is an incentive to create them, but it is not a mechanism for Northern Ireland to create them for itself, unless that is done by way of a common North/South framework. That is a very challenging thing to do, because of the single biogeographical nature of the island. As a single epidemiological unit, it would be very useful to have common, all-island frameworks. The Good Friday/Belfast Agreement could facilitate that, but you should not rely on it as the way in which to do it. A combination of mechanisms is required.

Dr Gravey: To add to that, the example that we use is water. The North/South Ministerial Council currently works to make sure that there is at least some discussion of the water framework directive. We have river basins that are international river basins, so we are impacted on by pollution in the South, and vice versa. There are powers in the Bill that give the Department powers to change the

ways in which it measures substances in our waters and to change the standards and levels applied. The more that you do that, the more that you end up measuring different pollutants at two points on the same river. It will become much harder in practice just to share data and work together.

It looks as though England will change some of the ways in which it measures water quality, so it is likely that Northern Ireland will have to ask itself this question: will it follow what England is doing so that you can produce and provide comparable data UK-wide, or will it keep on following what the EU has been doing so that it can have comparable data on both parts of this island? It could do both, but that would cost more money.

Sometimes, we speak of those changes in terms of principles and governance, but even changing what pesticides you choose to measure in the water will lead to the potential for divergence and create practical issues on the ground for the agencies involved.

Professor Burns: May I jump on the back of Viviane's points? One obvious way of tailoring the legislation to be more suitable in a Northern Irish context would be to look at the principles and include a transboundary environmental principle as something that is fundamental to Northern Ireland, for the reasons that Viviane has just outlined.

One of slightly ridiculous features of the way in which the whole process is unfolding is that it is beginning to look as though England, Scotland and possibly Northern Ireland will gather different types of data in order to analyse the same environmental changes. It is incredibly problematic trying to work out what your common targets are and how you are going to achieve them if you are measuring things in different ways. You want to be using similar data so that everyone can understand the problem in the same way.

Dr Gravey: That is why we need continued membership of the European —.

Professor Burns: Of the European Environment Agency.

Ms Bailey: I thought that you were going to say "European Union". *[Laughter.]*

Dr Dobbs: We will not be that political today.

Ms Bailey: I just want to follow up on that point. What you were saying is interesting. You said that Northern Ireland might choose to follow England in the way in which it collects data, in order to have a UK-wide framework. Given that we already know that two regions, Wales and Scotland, will be going their own way, it is highly unlikely that we will have a UK data set anyway.

Professor Burns: That is to be negotiated and decided.

Ms Bailey: Will that be done through a common framework rather than legislative processes?

Dr Gravey: Some common frameworks can theoretically have legislative backing, but, yes, it looks as though the direction of travel is for common frameworks to be as legally non-binding as possible, and that is very concerning. Of course, the starting point is directives that are legally binding on every member of the European Union, and we are now moving to having political agreement among four parts of the UK.

Ms Bailey: We are seeing the beginning of —.

Dr Gravey: Divergence.

Ms Bailey: Yes.

Dr Gravey: Completely.

Ms Bailey: Will there be no joined-up ways by which to measure and deliver in the UK any more?

Dr Dobbs: It could be that one area will focus primarily on specific things. It might gather just enough data that the other ones are interested in and so provide them with it, but all of that would require extra resources. It makes everything much more challenging.

The Chairperson (Mr McAleer): There are no more questions, so I thank you for coming before the Committee. I thank you, Professor Burns, for making your way from Sheffield to be here. We appreciate the time that you have taken and the effort that you have made. Thank you very much. We will see you again.