

# Report on operation of the interim environmental protection measures

September 2022

## 1. Introduction

- 1.** Following the end of the Brexit transition period (31 December 2020), the oversight of the European Commission in relation to environmental governance in the UK ceased. As environmental protection is devolved, the Welsh Government is responsible for determining replacement environmental governance arrangements for Wales.
- 2.** In order to bridge the gap between the end of the Brexit transition period and the implementation of permanent environmental governance arrangements, the Welsh Government established interim environmental protection measures ('interim measures'), headed by an Interim Environmental Protection Assessor ('the Interim Assessor').
- 3.** In February 2021, the Welsh Government appointed Dr Nerys Llewelyn Jones as Interim Assessor. She took up post on 1 March 2021 for a two year period. There is an option to reappoint Dr Llewelyn Jones for an additional year, subject to agreement by both parties.

### Our approach

- 4.** In agreeing its priorities for the Sixth Senedd, the Climate Change, Environment and Infrastructure Committee ('the Committee') committed to scrutinise the on-going operation of the interim measures until such time as permanent environmental governance arrangements are put in place.
- 5.** On 30 June 2022, the Committee took evidence from Dr Llewelyn Jones and from representatives of the environmental sector on the first year of the operation of the interim measures. The session was informed by the [Interim Assessor's Annual Report 2021-22](#), (June 2022) and written submissions from stakeholders.



6. We would like to thank all those who contributed to our work.

## 2. The interim measures

### How do the interim measures work?

7. The Terms of Reference for the Interim Assessor set out the broad framework within which the interim measures operate and define the roles and responsibilities of the Interim Assessor, Welsh Ministers and Welsh Government staff.

8. In outlining the purpose of the interim measures, the Terms of Reference state:

*"[They will] provide members of the public with a mechanism to raise submissions about the functioning of environmental law in Wales. It will further provide for those submissions to be considered by an Interim Assessor, who will advise the Welsh Ministers if the submissions raised are valid and make recommendations for any action they consider may need to be taken".*

9. Dr Llewelyn Jones explained 'the functioning of environmental law' "could mean considering whether the law is still fit for purpose or whether it is still relevant, whether the information or explanatory material on the law is accessible or whether the practical implementation of the law is prevented in any way". She emphasised that she is not able to consider breaches in environmental law or areas of non-compliance of environmental law.

10. The Annual Report 2021-22 provides details about the scoping process to determine whether a submission relates to the functioning of environmental law in Wales. The Interim Assessor "will identify key legislation/case law and any wider issues, including media attention and any work that the [Welsh] Government or other bodies are undertaking in relation to the issues raised".

11. If within scope, the submission will undergo a prioritisation exercise to decide whether it should be the subject of a report for the Welsh Ministers. Dr Llewelyn Jones explained three main factors are taken into account when prioritising submissions: impact, risk and resources. She added:

*"...on impact, we try to focus our resources where they'll be most valuable, so for example, prioritising issues where change of law would provide an improvement in the outcome for the environment. Risk, then: we try and focus our resources on deficiencies in the law that have a good chance of*

*having a significant impact if not addressed. And then, in terms of resources, we have to try and research into matters only where it is proportionate to do so."*

**12.** In reporting to the Welsh Ministers, the Interim Assessor may make recommendations for action needed to correct functioning issues that will improve environmental outcomes. Dr Llewelyn Jones explained, *"I don't have powers to require action to take place as a result of any recommendations that I make or to require public bodies to undertake certain actions as a result of recommendations that I've made either"*.

### **Filling the governance gap?**

**13.** Representatives from the environmental sector welcomed the Interim Assessor's role "as a short term stop gap" while permanent environmental governance arrangements are being developed. However, they asserted that the narrow scope of the interim measures means a governance gap exists in Wales.

**14.** Annie Smith (RSPB Cymru) explained that, unlike the Interim Assessor, the shadow Office for Environmental Protection (OEP) provided a mechanism for citizens to complain about breaches in environmental law or non-compliance of environmental law. When the OEP was placed on a statutory footing, in November 2021, "those issues were considered, and that's formed part of its ongoing reporting and work as a statutory body...That hasn't happened with the Interim Assessor's role". Annie Smith added, the Interim Assessor is "not an invalid or invaluable role - it's just completely different, and it is not anything equivalent to having access to environmental justice. It is not a route to accountability for someone who has not fulfilled their statutory duties".

**15.** Professor Steve Ormerod said "there's a whole range of problems that arise as a consequence of the way we're now operating", including a reliance on Judicial Review to challenge compliance with environmental law, and "not being able to handle substantial environmental legal issues". He added, "we are a very long way, certainly, from replacing what we had before we exited the European Union, but a long way, probably, from what we need". Similar views were expressed by Gareth Cunningham (Marine Conservation Society).

**16.** Dr Llewelyn Jones acknowledged the interim measures "[don't] equate to exactly what was in place before [the end of the Brexit transition period]". She added, "without the crucial legislation to create a more substantial body, there is only so much we can do".

## 3. The first year of operation

### Initial activities

**17.** The Interim Assessor's Annual Report 2021-22 summarises the preparatory work undertaken to establish the service, including publishing information on the Interim Assessor, agreeing terms of reference, and putting in place secretariat support. It also outlines stakeholder and cross-border engagements undertaken by the Interim Assessor to raise awareness of the service, develop a professional network across Wales, and build working relationships with counterparts in the other UK nations.

### Reviewing and improving processes

**18.** According to the Annual Report 2021-22, during the first year, "significant time" was spent putting in place processes to enable the Interim Assessor to undertake their work. This included "constantly reviewing and amending those processes, taking into consideration the number and type of submissions received, feedback from stakeholders, and lessons learned during our first year of operation". This has resulted in the introduction of a new process for scoping submissions; the development of prioritisation principles; the publication of a pro-forma for submissions to ensure the right evidence is provided; and the production of an infographic setting out the different environmental regulators in Wales to help the public direct their concerns to the most appropriate body.

### Demand on the service

**19.** Dr Llewelyn Jones reported that demand on the service had been greater than anticipated during the first year, with 21 submissions received covering a wide range of different environmental issues.<sup>1</sup> According to the Annual Report 2021-22, this "clearly demonstrates that there is a high degree of public engagement with the subject of environmental protection and an appetite to ensure that the law protects the environment in Wales". RSPB Cymru commented that the number of submissions "indicates that there is significant concern in Wales regarding the implementation of environmental law".

**20.** The Annual Report 2021-22 refers to receipt of "a steady number of submissions during the initial six months of the year", followed by "a notable spike in submissions during November

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<sup>1</sup> The submissions can be broken down as follows: forestry (four); water quality (five); hedgerows (four); protection of wildlife and nature (three); air quality (two); waste (one); access to environmental information (one); management of Sites of Special Scientific Interest (one).

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and December [2021]", with 15 submissions received during this period. Dr Llewelyn Jones suggested this may have been driven by the establishment of the OEP and Environmental Standards Scotland, and COP26.

**21.** Of the 21 submissions, six were outside scope, mainly because they related to potential breaches of environmental law or matters subject to legal challenge; six were in scope and were currently being considered; and scoping was still taking place for the remaining submissions.

**22.** The key themes of the submissions were: forestry, water quality, and hedgerows. Further details of individual submissions are set out in the Annual Report 2021-22. Dr Llewelyn Jones said she would be publishing a report to the Welsh Ministers on forestry "in the very near future". She was planning to host a panel discussion at the Royal Welsh Show to inform her work on hedgerows. On water quality, she said she was keen to complement the work already undertaken by the Committee and would be focusing on whether the law needs to be changed or strengthened.

## Reports to the Welsh Ministers

**23.** The Annual Report 2021-22 explains, given the number of submissions, "it is not possible to produce a report for each of them". Dr Llewelyn told the Committee, "there is a great advantage in grouping issues together and looking at them as a whole", including "a more comprehensive report".

**24.** During the reporting period, the Interim Assessor did not produce any reports to the Welsh Ministers. Dr Llewelyn Jones explained although she had hoped to report on forestry within the first year, demand on the service between November and December 2021 "had a great impact on the timetable that we had, and all of the other work that we're doing".

## Staff and resources

**25.** Dr Llewelyn Jones was contracted for a minimum of 20 days per annum. She receives secretariat support from civil servants, employed by the Welsh Government. Currently, the secretariat comprises two FTEs.

**26.** Dr Llewelyn Jones said the office of the Interim Assessor is "a small body with limited resources...particularly as we compare with other oversight bodies, such as the OEP and ESS". She said, in practice, she has worked more than 20 days in the first year. She added:

*"It was very difficult to predict how many days would be required or how many issues would be raised, and so on, at the time of establishment. But,*

*clearly, that needs to be reviewed on an ongoing basis, and I think having more resources in order to deal with complaints would be of great benefit".*

**27.** In his letter to the Committee, dated 18 July 2022, the First Minister said, while the interim measures are in place the Welsh Government "will continue to consider what more can be done...to ensure that the Interim Assessor has the resources she needs to carry out her role".

## **Public awareness and information**

**28.** Representatives from the environmental sector referred to the "low profile" of the interim measures, particularly compared to the OEP, which, according to Annie Smith, has "a strident public presence". RSPB Cymru suggested the Interim Assessor's role "has not been widely promoted".

**29.** Dr Llewelyn Jones said awareness of the Interim Assessor service was good in the legal sector, but she acknowledged the need "to do more work on communication...on a broader level publicly, and we're looking to develop our publicity platforms". She also acknowledged that "more needs to be done, particularly perhaps in terms of the agencies that provide free advice to people, so that we can ensure that any environmental issues have the attention they deserve".

**30.** In an [open letter to the First Minister](#), representatives from the environmental sector criticised the Interim Assessor website as "[not] easily navigable (or even, easy to find)". RSPB Cymru said "finding the relevant Welsh Government web-page depends on people knowing what to look for online". Annie Smith explained:

*"In the early days, you had to actually Google raising a complaint about the functioning of environmental law in Wales in order to find the relevant information. I think if you contrast that to the websites of the OEP or Environmental Standards Scotland, there's a world of difference there".*

**31.** However, she went on to suggest that, more recently, some improvements had been made.

## **Transparency**

**32.** Other than the Annual Report 2021-22, there is no information on the Interim Assessor's website about their on-going programme of work. This has led to criticism from the environmental sector about a lack of transparency. Dr Llewelyn Jones accepted this criticism and explained she would shortly be meeting with stakeholders to seek feedback on her work. She

added, "clearly, there is more work still to be done in ensuring that transparency, and that's hugely important for me".

**33.** According to RSPB Cymru, Dr Llewelyn Jones had recently committed to quarterly meetings with stakeholders. Annie Smith welcomed this as a positive development.

**34.** Professor Ormerod questioned "how transparent or well-informed people were about access to the European Court of Justice...So, I don't know if we're in any better or worse a position than we were then".

## Monitoring and evaluating impact

**35.** When asked whether and how she intended to monitor the impact of her work, Dr Llewelyn Jones said:

*"There aren't any formal processes in terms of monitoring, because, as I said, I don't have the power to enforce action on these recommendations, but I think that is a very good question...And perhaps that is something that could be looked at in terms of strengthening the process currently, before the permanent body is established."*

**36.** She added, "if there isn't an outcome following the recommendations, then I certainly wouldn't be happy if I didn't feel that it had had an impact. I have no enforcement powers in terms of those changes, but I would very much hope that it would have a positive impact".

**37.** Annie Smith highlighted the Committee and the Senedd's role in holding the Welsh Ministers to account for the delivery of actions recommended by the Interim Assessor. She said, "there's no stick more sever than the scrutiny that you're able to exact".

## 4. How 'interim' are the interim measures?

**38.** When announcing the Interim Assessor's two year appointment, the Welsh Government said, during that time "[we] will develop a permanent environmental governance oversight body, allowing for a period of transition from the interim to the new arrangements".

Representatives of the environmental sector expressed frustration at the lack of progress towards development of the new arrangements. RSPB Cymru said, "our chief concern is that the work to develop permanent, statutory measures has stalled and there is a risk that the interim measures will be in place longer than the two years originally envisaged by the Welsh Government". It added, "we are extremely concerned that in Wales there is still no clear timeline" for legislation to establish a permanent oversight body.

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**39.** The Welsh Government in the Fifth Senedd established the Environmental Governance Stakeholder Task Group ('the Group') to assist with the development of options for environmental governance in Wales. The Group reported in September 2020. Annie Smith explained the Welsh Government had accepted the Group's recommendations, which included the establishment of an independent Environment Commission to oversee the implementation of environmental law. However, she said, "I certainly haven't been involved in, and I'm not aware of, any further work to develop those [recommendations] further...It feels like it has been parked".

**40.** According to the Terms of Reference for the Interim Assessor, one of the strategic objectives of the interim measures is "to contribute to the development of the permanent approach to environmental governance in Wales". However, Dr Llewelyn Jones told the Committee she did not have a role in the development of permanent arrangements beyond sharing her experience as Interim Assessor. She said she was yet to have any formal discussions with the Welsh Government about her experience.

## 5. Conclusions and recommendations

### Overview

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The Interim Assessor was appointed for two years. The Welsh Government said it would use this time to develop a statutory environmental governance oversight body, allowing for a period of transition from the interim measures to the new, permanent governance arrangements. But, 19 months on, we have seen no evidence of demonstrable progress towards developing such a body. This is deeply disappointing.

Despite continuous calls from this Committee, and from our predecessor committee in the Fifth Senedd, for the Welsh Government to prioritise legislation to establish a statutory oversight body, there will be no Bill in year two of the legislative programme. As pointed out by the First Minister in his recent letter to us, the Welsh Government has committed to bringing forward several Bills in the coming year "aimed at creating a greener Wales". As welcome as this new law may be, it is imperative that environmental law is underpinned by a robust governance framework that provides effective oversight of implementation and accountability of government when it fails to deliver. This is sorely missing in Wales.

The First Minister's vague assurance that "the Bill is on its way" does nothing to address our concern, and that of the environmental sector, that the statutory oversight body, promised by the Welsh Government in the Fifth Senedd, is still years away.



As we wait with growing impatience for a Bill to be brought forward in Wales, all other UK nations now have statutory oversight bodies up and running. While not without criticism, these bodies provide key governance functions of compliance and enforcement, and uphold citizens' rights to access to environmental justice. We must not see Wales' reputation downgraded from a nation that puts the environment and sustainable development at its heart to one with the weakest environmental governance structures in Western Europe.

There are five months remaining until the end of the Interim Assessor's two year appointment. It appears inevitable that the Welsh Government will seek to reappoint for another year. It would be unthinkable for a statutory oversight body not to be in place before the end of the reappointment, in February 2024. The Welsh Government must explain how it intends to deliver this.

The interim measures perform an important function and have the potential to deliver improvements to the working of environmental law. However, they are narrow in scope, and fall significantly short of the fully functioning, well-resourced oversight body that Wales needs to deliver effective and coherent environmental governance. We should emphasise this is not a criticism of the Interim Assessor's performance or the work of the service to date, but a question of the on-going and unacceptable gaps in Wales' environmental governance.

Although the Interim Assessor service is still in its infancy, we were encouraged by how much it has achieved during its first year, and with limited capacity and resource. While the service has experienced some teething problems, particularly in relation to the submissions process, it has managed to overcome these. There is, however, room for further improvement, particularly in relation to public awareness and information, and transparency, which the Interim Assessor has acknowledged. We were encouraged by how receptive the Interim Assessor was during her evidence session to suggestions for improvements to the service. We hope she finds the recommendations in this report helpful and responds positively to them.

**Recommendation 1.** The Welsh Government should clarify whether it intends to reappoint the Interim Assessor for a further year, until February 2024. If so, it must explain the steps it intends to take to ensure that a new statutory oversight body is operational before the end of the reappointment.

## **Public awareness and information**

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The purpose of the interim measures is to provide members of the public with a mechanism to raise concerns about the functioning of environmental law. Despite this, public information on

the service is not as easy to access as it should be. In addition, beyond the creation of the Interim Assessor website, it is unclear what steps have been taken to promote the service among the wider public.

**Recommendation 2.** The Interim Assessor should work towards improving public awareness of the service. As a minimum, they should:

- identify ways to make it easier for the public to access information on the service via the website, and
- engage with relevant free advice services in Wales as a means of developing referral routes to the complaints process.

## Transparency

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We believe it is important to ensure full transparency in relation to the interim measures and the work of the Interim Assessor, which has been missing to date. We welcome the commitment by the Interim Assessor to hold regular meetings with stakeholders as a means of improving transparency. We believe transparency could be improved further by publishing details of the Interim Assessor's rolling programme of work. This may also help increase public understanding of, and confidence in, the service.

**Recommendation 3.** The Interim Assessor should commit to publishing details of their rolling programme work on the website. This information should be updated periodically.

## Resources

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The Welsh Government must ensure the Interim Assessor is sufficiently resourced to carry out their role and responsibilities efficiently and effectively. We question whether this is currently the case. It is unclear what evidence the Welsh Government used to estimate demand on the service and to determine corresponding resource requirements, both in terms of the number of days the Interim Assessor is contracted to work and secretariat support for the role. We would welcome clarification on this.

Although demand on the service was greater than anticipated in the first year, the Interim Assessor was able to respond promptly to the majority of submissions, which is encouraging. But, meeting demand within existing capacity and resource constraints has led to delays in reporting. We are concerned about a potential backlog of reports if demand is maintained or increases over time and as public awareness of the service improves. This may impact on public

satisfaction with the service and, ultimately, undermine its effectiveness. We believe there is a strong case for the Welsh Government to review the resources available to the Interim Assessor.

**Recommendation 4.** The Welsh Government should provide details of the evidence used to estimate demand on the service and to determine corresponding resource requirements, both in terms of the number of days the Interim Assessor is contracted to work and secretariat support for the role.

**Recommendation 5.** The Welsh Government should undertake an urgent review of the resources available to the Interim Assessor. In doing so, it must satisfy itself that the Interim Assessor is sufficiently resourced to carry out their role and responsibilities effectively. The Welsh Government should report back to the Committee on the outcome of the review as soon as practicable.

### **Responding to reports and recommendations**

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There is a lack of clarity about the process the Welsh Government will follow when responding to the Interim Assessor's reports and recommendations for action. This is unhelpful. It is important that stakeholders, the wider public, and the Senedd, understand the process so they can actively engage with it. A clearly defined process will help improve transparency and strengthen accountability.

The Interim Assessor's role is advisory only. It will, therefore, be a matter for the Welsh Government to determine whether to act on the Interim Assessor's recommendations. There is a strong expectation on the Welsh Government to do this. Failure to do so would risk undermining public confidence in the interim measures.

**Recommendation 6.** The Welsh Government should commit to publishing its responses to Interim Assessor reports no later than six weeks following receipt. Responses should set out what action the Welsh Government intends to take as a result of the advice and/or recommendations, including indicative timelines for delivery. If the Welsh Government chooses not to take action, it should set out its reasons.

**Recommendation 7.** The Welsh Government should commit to notifying the Senedd when it publishes a response to a report by the Interim Assessor. This should be in the form of a Written Statement.

## **Monitoring and evaluating impact**

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According to the Terms of Reference for the Interim Assessor, the Welsh Government's Environmental Governance Team is responsible for monitoring and evaluation of the interim measures. It is unclear how this work is being taken forward in practice. It is also unclear whether this work will extend to monitoring and evaluating the impact of the interim measures on environmental outcomes. We would welcome clarification on this.

**Recommendation 8.** The Welsh Government should explain what arrangements are in place to monitor the on-going effectiveness of the interim measures and the impact of the measures on environmental outcomes.