

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

PG09

Ymateb gan : ClientEarth

Evidence from : ClientEarth

ClientEarth is thankful for the opportunity to give evidence to Wales' CCERA Committee regarding the gaps in principles and environmental governance post-Brexit in Wales. We focus on the Welsh Government's consultation proposals and questions concerning environmental principles and the function, constitution and scope of the proposed governance body.

Summary

Leaving the EU would mean a loss of crucial aspects of environmental law that are currently found in the EU Treaties or carried out by EU institutions. To prevent the coherence and effectiveness of environmental law being undermined, action must be taken at the domestic level to enshrine environmental principles into the law and to establish new governance mechanisms. ClientEarth has previously published reports on both of these matters, available on our website [here](#)¹ and [here](#).²

In particular, we raise the following in response to this consultation:

Principles

- To ensure consistency in the application of environmental principles post EU-exit, the full set of EU environmental principles should be clearly stated as principles in primary legislation. Additional constructs such as non-regression are also worth specifically legislating for.
- An overarching statutory environmental objective is also needed to tie together and direct the effect of the principles. New binding environmental objectives should also be used to guide the development of environmental law as a whole.
- The duty to pursue sustainable management of natural resources and the application of the sustainable management of natural resources (SMNR) principles should be extended to additional Welsh public bodies as well as other actors exercising public functions to the extent that they are dealing with or relate to environmental issues.

Governance

- The governance gap created by leaving the EU is wide, multifaceted and problematic for both people and nature.
- A new body must be created in order to replace the role of the EU institutions in overseeing full and proper compliance with environmental law.
- This new body must be responsible for holding public authorities to account and ensuring their compliance with environmental law. As such, it is crucial that it is properly independent from

¹ Available at: <https://www.documents.clientearth.org/library/download-info/environmental-principles-in-uk-law-after-brexit/>

² Available at: <https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/>

government in particular in terms of its funding, appointments process, and accountability to the Welsh assembly.

- To ensure full and proper implementation of environmental law and policy it must also be able to take meaningful enforcement action where necessary. It should have access to a bespoke enforcement procedure and while the aim will be for most matters to be resolved via amicable means, legal teeth will be needed.
- The body's functions should allow it to act in advisory capacity with regards compliance with the law, be able to scrutinise the implementation of environmental legislation and receive, respond to and investigate complaints.
- To reflect the transboundary nature of environmental issues, cross-border collaboration between the Welsh Government, the EU and other UK Governments will be necessary. A coordinated governance mechanism must be developed, preferably through the establishment of a co-designed and co-owned UK-wide institution.

Environmental principles

Question 1: Do you agree the following principles should be included within legislation for Wales?

o **Rectification at Source;**

o **Polluter-pays**

Yes, in addition to other principles as detailed below.

Question 2: In addition, to the principles already within Welsh primary legislation and the two outlined in Question 1, do you think there are other principles, which may also need to be included?

Yes

Additional principles should be included in the proposed legislation, as should other important environmental legal constructs which are sometimes considered to be 'principles'. The following are key tenets of environmental law that should be specifically and appropriately recognised within the proposed legislation.

The **precautionary** principle is a crucial component of environmental law. We are not of the view that it is already adequately encapsulated within the sustainable management of natural resources (SMNR) principles. The precautionary principle is complex in its definition and application and, as such, there is real value in having it stated clearly as a principle in primary legislation.

Given that the Welsh Government does not appear to be opposed to the precautionary principle, it is unclear why it would not clearly set it out in the new proposed primary legislation. Such an approach would improve clarity and coherence for all stakeholders, and ensure that Welsh environmental law and policy continues to be in line with this essential principle.

While **integration** does constitute one of the five ways of working in the Well-being of Future Generations Act (WFGA), this is in a more limited form than in the Treaty on the Functioning of the European Union (TFEU).

Integration in the WFGA refers only to integration among the well-being objectives and goals, whereas a fuller version of integration should be enacted that ensures that environmental considerations feature in the design of all government policy. Article 11 TFEU, on the other hand, requires that environmental protection is integrated within and across all policy areas and decision-making – not just that which is immediately focussed on environmental issues. The principle can help to fill normative gaps and ensure that environmental protection is a consideration in all relevant decision-making.

Integration should be explicitly recognised as a principle, along with mechanisms of implementing it such as requiring all Welsh Ministers to make a statement whenever they produce a new policy explaining how it will impact on the environment and existing environmental commitments. This could be designed in such a way to complement and bolster the existing reporting requirements under the WFGA.

The consultation document claims that **non-regression** is “reflected in the objective of SMNR” – but this important and emerging core principle of environmental law clearly has much more to offer. Non-regression requires that environmental regulation and standards should not be diminished, promoting a ratcheting up of ambition in subsequent law reform and policy. Non-regression has found recognition in a number of places, including the 2017 Draft Global Pact for the Environment and the French Environmental Code.³ It has an increasingly important role to play in environmental law. It should be incorporated as a specific standalone component of environmental law, though we note that it will require different legal framing than the existing SMNR principles.

Also mentioned in the consultation document are some of the **Aarhus rights** – these rights are hugely valuable aspects of environmental law. However, rights do not have the same legal character as principles: they provide specific and enforceable legal advantages rather than pointing in a general direction. Their legal treatment must reflect this. As such, while it is crucial that the Aarhus rights are protected in domestic legislation, they cannot be properly provided for through the same legal mechanism as the principles. The Aarhus Convention itself could also be brought closer to Welsh law in a manner similar to the WFGA’s treatment of the Convention on Biological Diversity.

Environmental rights – including those to access to information, public participation and to access to justice and effective remedies should be enshrined in legislation – should be enshrined in domestic law. There would also be considerable value in enshrining the right to a healthy environment in law. The Welsh Government has recognised the value of designing legislation in line with UN frameworks (including in the consultation document), and its environmental legal framework should also be consistent with the UN’s Framework Principles on Human Rights and the Environment.⁴

Finally, the environmental principles must be tied to an overarching statutory **environmental objective** in order to bring direction and purpose to the interpretation and application of the principles. The TFEU contains such an objective (a high level of environmental protection), and this has proved valuable to the principles, including in cases before the CJEU.

There would be further value in applying such a legally binding overarching objective of environmental law beyond the principles. This would set a clear direction of travel for government, business and the public and provide a unifying and integrating yardstick for environmental action

³ See Greener UK, ‘Briefing on non-regression in the Environment Bill’. [https://greeneruk.org/sites/default/files/download/2019-01/Greener UK briefing on non-regression in the Environment Bill.pdf](https://greeneruk.org/sites/default/files/download/2019-01/Greener%20UK%20briefing%20on%20non-regression%20in%20the%20Environment%20Bill.pdf)

⁴ Available at

<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>

and improvement. Environmental protection and restoration must be clearly enshrined as a legitimate objective within the law, in part to ensure that it receives appropriate consideration in decision-making by all public bodies

The objective in Welsh law to 'maintain and enhance the resilience of ecosystems and the benefits they provide' currently only relates to the sustainable management of natural resources under the EWA 2016 and the WFGA. An objective is needed that covers all aspects of environmental law and policy. The objective should also be framed in such a way that it creates an obligation of result on the government.

Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

The duty to pursue sustainable management of natural resources and the application of the SMNR principles should be applied to additional Welsh public bodies as well as other actors exercising public functions to the extent that they are dealing with or relate to environmental issues.

Question 4: On which Welsh public bodies, within devolved competence do you consider a duty to pursue SMNR should apply?

The duty to pursue SMNR should also apply to public authorities and actors that exercise public functions that deal with or relate to environmental issues. All public bodies have specific and general responsibilities, powers and duties with regards the state of the environment. Given this, all public bodies must be subject to meaningful duties to pursue sustainable management of natural resources and with apply the principles.

Accountability, Accessibility and Enforcement Structure

Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

There will be a significant governance gap in relation to environmental law as a result of the loss of EU functions. Robust processes, requirements and institutions are needed to implement and review environmental law in order to prevent it becoming unimplemented or ignored. The consultation document identifies a number of important gaps that must be filled on exiting the EU.

However, there are other gaps that must also be considered, such as reviewing and reporting of information regarding both the state of the natural world and performance against objectives, and the publishing of environmental information fully and transparently. Greener UK has been raising this issue since 2017.⁵

While there is an existing bespoke reporting framework in Wales under the WFGA and EWA 2016, this does not replicate much of the EU regime that is being lost. It is notable and concerning that many important governance functions, such as reporting requirements, are not being properly

⁵ The key points are available in the following briefing:

https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf

retained under the EU (Withdrawal) Act and associated secondary legislation. It is therefore crucial that a new holistic and comprehensive governance regime is established.

The governance gap is wider than just accountability, accessibility and enforcement, crucial though these are. Continued participation in EU agencies such as the European Environment Agency and/or the establishment of new mechanisms at a domestic level are needed.

Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

The capacity and expertise required for effective oversight of environmental law cannot be met exclusively by existing bodies, though the remit of some can likely be extended and improved to fill some gaps. While the Future Generations Commissioner (FGC) has a role to play in environmental governance, the consultation document itself notes that the FGC's powers "do not extend to the implementation of law", and it does not currently have the required environmental expertise to fully and properly investigate matters relating to environmental law.

The creation of a new institution is therefore necessary. The UK Government has recognised this and, in response, has proposed the creation of a new Office for Environmental Protection subsequent to the UK Parliament's instruction to do so in s16 of the European Union (Withdrawal) Act 2018. A new institution provides an opportunity to not only replace, but in fact build and improve on, the role of the European Commission in overseeing the proper implementation of the law.

Role, Scope and Constitution of a body operating in Wales

Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

There are three key ways in which the outlined role and objective should be improved. Firstly, it must be made clearer that the body will have a role in enforcing the law, and so also the consequent powers necessary to do this properly. Secondly, it must be clear that the scope of the body is not limited to that of the WFGA and EWA 2016. Thirdly, a co-ordinated transboundary approach is needed.

Assessing and ensuring the effectiveness of the implementation of legislation is noted as an important objective. In order to do this properly, meaningful legal enforcement powers will be required. As recognised below, these would be powers of last resort, but are necessary in order to impart weight onto other less formal means of ensuring effective implementation of the law.

While it is clear that any new environmental law or functions in Wales must be in line with existing Welsh legislation, the scope of any new body should not be unnecessarily limited. For example, matters such as access to information and access to green space must be covered, and any advisory capacity could usefully be deployed beyond SMNR.

The role of the new body must be to act on behalf of people and nature to ensure full and proper implementation of environmental law and policy, including by taking enforcement action where necessary. Its objectives should include ensuring that the environment is healthy, resilient and diverse for present and future generations, and that all public bodies are properly complying with their legal obligations, including those contained in WFGA and the EWA.

Question 8: Which policy areas should be included within the scope of new governance arrangements?

To ensure proper protection of the environment, the scope of new governance arrangements should be broad. All environmental issues as well as issues which touch on the environment should be within scope. In particular, the remit of the new environmental governance body must include climate change.

The policy areas listed in the EWA 2016 of 'natural resources' provide a decent starting point. However, in order to ensure a suitably broad scope is covered and to assure coherence with existing environmental law frameworks, we recommend the relevant scope of 'environmental law' draws on the definition of 'environmental information' contained in the Aarhus Convention in Article 2(3), which is already mirrored in Welsh law through the Environmental Information Regulations 2004. This definition encompasses all measures that affect or are likely to affect the environment.

Question 9: Do you consider the proposed list of bodies to be appropriate?

The proposed list of bodies should be broadened to extend to public authorities and actors that will be covered by the extension of the SMNR duty.

We note too that a new body will not only need advisory and scrutiny functions over these public bodies (as suggested in the consultation). Enforcement functions are also necessary.

Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of a body?

Yes

All public bodies have specific and general responsibilities, powers and duties with regards the state of the environment. There also needs to be collaboration between the new body and the Office of the Future Generations Commissioner so it can give guidance and support to FGC.

Question 11: What should be the status, form and constitution of an oversight body?

It is crucial that a new environmental body is sufficiently independent from Government. This independence can be assisted through a combination of various structural features including through an appropriate funding source and process; a robust and transparent procedure for the appointment of key members of staff; and accountability to the Welsh Assembly rather than Government.

In general, independence can be better achieved by making key ties with the legislature rather than the executive. This helps prevent the watering down of powers or reduction in capacity of the body over time.

The expertise and skills necessary to ensure a well-functioning body will be extensive and varied: lawyers will of course be needed, but so too will those with specialist technical knowledge and understanding of local issues, priorities and histories. This will be important across the body's

functions – from developing its overarching strategy and priorities to investigating specific cases of potential breaches of the law.

Functions of a body operating in Wales

Question 12: Should an oversight body be able to act in an advisory capacity?

Yes

The advisory functions described in the consultation document would be valuable. It is worth noting that advice should be geared towards improving implementation of existing law and policy, and therefore connected to the body's overall enforcement function.

In order to effectively perform this function, the body should be able to initiate inquiries of its own accord as well as respond to requests from public bodies. It would also be valuable for such inquiries to be general in nature, considering systemic issues with implementation of the law by all (or a range of) public bodies, rather than just one. Guidance and recommendations would then be general in nature, comparable to those of the FGC.

Recommendations produced by the body should have a meaningful legal status, with public bodies required to normally follow them, unless there is a legitimate and compelling reason of public interest for them not to do so. Recommendations may vary in the level of detail they provide, depending on the nature of the issue at hand and the body or bodies to which the advice is directed.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

The overarching aim of this body should be to improve compliance with the law. This new body must be able to conduct deep and thorough assessments of public body (in)action, looking at whether they are implementing the law in the most effective way.

Question 14: What should be the extent of this function?

The ability to undertake thematic reviews of implementation of the law would be a useful function, and related to the above advisory function. These should cover not just the state of the national resources in Wales but also the implementation of environmental legislation. A careful balance will need to be struck to make sure the body is exhaustive in its coverage while not being overly prescriptive or overburdening. Off the back of such reports, the body should be able to make recommendations that public authorities must normally follow.

This generic scrutiny power may prove a useful pre-emptive power that could be used to identify and avoid potential breaches of the law (including systemic issues) before they occur.

In conducting thematic reviews and other assessments of implementation, this body should adopt open, deliberative and iterative processes. Stakeholders should be involved regularly, with important goals being to understand the nature of the issues at hand and seeking to co-develop solutions with wide buy-in. In general, the body should seek to improve compliance with environmental law and resolve issues via collaborative means where possible before relying on harder edged legal processes.

Question 15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?

The body should receive, respond to and investigate complaints. In doing so, it should continue to involve the complainant(s) and other relevant stakeholders throughout follow-up procedures. The body's processes should be transparent, deliberative and iterative – seeking to engage complainants, understand their concerns, build consensus and develop solutions with wide buy-in.

Transparency and information sharing throughout the investigation of a complaint are crucial. Relevant information should be made public throughout, and if the body proposes not to pursue a complaint at any stage, the complainant should receive a formal notification of this with a chance to respond and challenge in an appropriate forum.

There is also a need to ensure there is full and proper connection between the complaints and enforcement functions. A complainant must have satisfaction that the body has done all within its powers to remedy the complaint at hand. As such, the complaints process must not end simply with the providing of recommendations, but should be explicitly linked into further harder enforcement powers of the body – to be applied as and when necessary.

Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?

There is clearly a need for both formal and informal methods, and both hard and soft powers, for the oversight body. When a matter first comes to the body's attention, either via a complaint or through its own processes, it should seek to resolve the matter via dialogue and consultation to the satisfaction of all involved. Where this is not possible, the body should have the power to issue an escalating series of notices (initially advisory and then binding) to which the relevant authority must respond. If a public authority elects not to comply with the body's notices, then it must state its reasons why it believes to do so is in the public interest, and its proposed alternative course of action.

Notices issued by the body should require the public authority in question to comply with the law, including setting out the steps for doing so where necessary. Notices may also request additional information, although public authorities should be under a duty to co-operate with the body from the earliest stage possible in terms of information sharing and seeking to find a collaborative solution. Clear timeframes for response and requirements for publication should be included with respect to the notices.

Specific functions or powers may be desirable in order to improve the efficacy and effectiveness of the WFGA and EWA 2016 and compliance with the particular obligations in those pieces of legislation. However, the body's remit should extend to all environmental law.

Where softer procedures do not bring about compliance or when the potential environmental harm requires more focussed action, it is crucial that the new body has recourse to more serious mechanisms. And where compliance is still not achieved, the body should be able to launch enforcement proceedings in an appropriate court or tribunal.

Question 17: What enforcement actions do you consider need to be available?

If an authority fails to comply with a notice and continues to fall outside compliance with the law, the new body should be able to refer the matter to an appropriate judicial forum for review. This forum must be able to undertake a procedural and substantive review of the issue. In order to

ensure high quality and properly engaged decision-making, its judges or panel should include relevant non-legal experts where this is appropriate. Expertise in a range of environmental policy areas may need to be covered, including ecology, climate change and land use. A range of remedies – including fines, restoration orders, and a ‘special measures’ type procedure – may also prove necessary. A specific and specially-designed environment court or tribunal may well be the best way of ensuring these requirements are met.

Other mechanisms and processes will be needed to complement this bespoke enforcement procedure. For example, it may sometimes be appropriate for the body to take alternative enforcement actions (such as interim measures or interventions).

It will be crucial that the creation of a new body with a bespoke enforcement procedure does not diminish existing rights. As such, it must be made clear that the public and civil society are not prevented from pursuing enforcement action just because related matters are currently being considered by the new body. In fact, the new enforcement procedure should be designed in such a way that the public can also have access to it in order to seek redress for failures to comply with environmental law by public authorities, as a step toward achieving compliance with the Aarhus Convention.

Working across the UK

Question 18: Would there be advantages in have a shared core set of common environmental principles?

Yes

There would be advantages in a shared core set of common environmental principles in order to bring commitment, consistency and cooperation in environmental policy and law across the nations of the UK.

Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Environmental issues are transboundary and, reflecting this, cross-border collaboration will be important. The review should consider how effective collaboration can best be achieved including how the Welsh Government can work with the EU and other UK Governments to develop co-ordinated governance mechanisms which will better safeguard the environment. For example, continuing to participate in the European Environment Agency would be very valuable, as would specific mechanisms regarding compliance with international law and mutual non-regression across the UK.

It is also worth noting that new scrutiny and enforcement arrangements will need to be cognisant of and responsive to the cross-border nature of environmental problems. In the context of the new governance body, this will require close linkages and co-operation with EU bodies and other new bodies to be established in the rest of the UK. A co-designed and co-owned UK-wide institution remains the preferable route from an environmental perspective.

Such a body should be accountable to all devolved legislatures as well as the UK Parliament - this would enable collective decision-making. It would be more independent, more robustly resources and better able to hold the four governments to account. The body should also work closely with the other UK governments to ensure there consistency of the enforcement of environmental principles. There must also be a dispute resolution mechanism when issues arise between the four countries.

However, if this approach is not adopted, to ensure consistency and co-ordination there should be duties on each of the relevant institutions to co-operate and procedures should be developed to co-ordinate equivalent processes in other parts of the UK.