

EPGBTWB 06 - Tystiolaeth gan: Cymdeithas Cyfraith Amgylcheddol y DU | Evidence from: UK Environmental Law Association

Senedd Cymru | Welsh Parliament

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

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



UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) RESPONSE TO THE SENEDD CYMRU | WELSH PARLIAMENT CONSULTATION ON ENVIRONMENT (PRINCIPLES, GOVERNANCE AND BIODIVERSITY TARGETS) (WALES) BILL

INTRODUCTION

1. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants, in the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. This document responds to the Senedd Cymru | Welsh Parliament consultation on the Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill. It has been prepared by UKELA Wales in consultation with other UKELA Groups. It does not seek to represent the views and opinions of all UKELA members but has been drawn together from a range of its members.

BACKGROUND

3. As an EU member, environmental law in the UK was informed by environmental principles written into the Treaty for the Functioning of the European Union (TFEU).
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Article 191(2) of the TFEU contains the four principles now included in the Bill (see below). These four principles are also embedded within EU environmental policy and action programmes including the European Green Deal. EU withdrawal has meant that these provisions cease to have effect in the UK. In England, the Environment Act 2021 embeds the principles into domestic law and this legislation places a statutory duty on the Northern Irish Department of Agriculture, Environment and Rural Affairs to publish a policy statement on environmental principles. The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 closely aligns the domestic law in Scotland.

4. Prior to EU withdrawal, the European Commission and the Court of Justice of the European Union (CJEU) had a role in ensuring the correct and complete application of EU environmental laws within member states. Post-Brexit, these governance structures no longer apply leaving a gap in environmental governance. In response, the Office for Environmental Protection (OEP) was established with a remit over England and Northern Ireland and Environmental Standards Scotland (ESS) was established for Scotland. In 2018, the Welsh Government committed to enshrining the principles and governance into domestic law¹.
5. In 2021 the Senedd declared a 'nature emergency' owing to declines in Welsh biodiversity of anthropogenic origin.² In 2022, the UK Government were a signatory to the COP15 commitment to, amongst other aims, effectively manage at least 30% of land, freshwater and sea for nature by 2030, halt and reverse the loss of nature by 2030 and achieve recovery by 2050 as part of the newly adopted Kunming-Montreal Global Biodiversity Framework (GBF). In advance of the adoption of the GBF, and in response the declaration of the nature emergency, the Welsh Government launched a biodiversity deep dive in 2022 aiming to develop a set of collective actions we can take in Wales to support nature's recovery under the 30x30 target.³

¹ <https://record.assembly.wales/Plenary/4915#A10000092> at 409

² Senedd Cymru Plenary 30/06/2021 <https://record.senedd.wales/Plenary/12320#C371405>

³ <https://www.gov.wales/written-statement-biodiversity-deep-dive>

6. The proposed Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill aims to address each of gaps in policy, principles and governance in Wales. The three primary purposes of the Bill are to:
- 1) establish environmental principles and an environmental objective;
 - 2) establish an independent environmental governance body, the Office of Environmental Governance Wales (“the OEGW”); and,
 - 3) establish a biodiversity target setting framework aimed at halting and reversing the decline in biodiversity in Wales, in addition to imposing a duty on the Welsh Ministers to promote awareness in Wales of the importance of, and the threats to, biodiversity.

CONSULTATION QUESTIONS

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

7. UKELA believes that the Bill is necessary and overdue. We set out above the post-Brexit gaps in environmental governance and the need to urgently reverse biodiversity loss in Wales. The Bill provides an appropriate vehicle to deliver these objectives. Although we would have welcomed these measures at an earlier stage of the Government’s legislative programme, there is some room to learn from earlier introduction of legislation and other provisions in other UK nations and, where appropriate, we refer to this experience. We acknowledge that interim measures have been pursued in Wales in the run up to this Bill, and while these are welcome, they have lacked the statutory basis to be provided by the Bill.

Question 2: *What are your views on the Bill’s provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?*

Part 1 - Environmental objective and principles (sections 1 to 7)

8. UKELA supports the overarching environmental objective to guide the application of environmental principles as well as the goal to integrate environmental protection during the wider policy making process. Other UK jurisdictions have included a (fifth) principle of integration alongside the four principles covered in the Bill. Wales has some existing legal architecture. In the Well-being of Future Generations (Wales) Act 2015, one of the five ways of working is expressed as integration of well-being objectives such that these align with other objectives. All five ways of working speak to integration to some degree. Similarly, the legal framework for the sustainable management of Natural resources (SMNR) in the Environment (Wales) Act 2016 (EWA 2016) already guides the management of the environment in Wales by Natural Resources Wales (NRW) and other public bodies. Against this background, we see the logic of the duty in section 6 of the Bill to place Welsh Ministers under a duty to prepare an ‘environmental principles and integrating environmental protection statement’ rather than merely include integration as a principle in its own right. If anything, this emphasises and strengthens the integration of environmental principles into other policy realms.
 9. The four principles chosen are well recognised in international law, but customary international environmental law continues to develop, and we note that there is no provision to allow the chosen list of principles to be reconsidered via delegated powers to make regulations.
 10. The environmental objective is the attainment of a high level of environmental protection, which commitment is contained in the TFEU, so that it was pledged pre-Brexit, and an improvement in the environment, which sits well with Parts 2 and 3 of the Bill. The objective is said to be there with a view to:
 - “(a) meeting the needs of the present without compromising the ability of future generations to meet their own needs and contributing to achieving the well-being goals in section 4 of the Well-being of Future Generations (Wales) Act 2015;
 - (b) maintaining and enhancing the resilience of ecosystems and the benefits they provide;
 - (c) mitigating and adapting to climate change; and,
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(d) contributing to halting and reversing the decline in biodiversity.”

11. One of the well-being goals in section 4 is a healthier Wales but given the impact on human health of exposure to pollution, we wonder whether it might be better to emphasise protection against pollution more directly, especially given its linkages to the principles all of which, precaution, prevention, rectification and polluter-pays, have immediate relevance to combatting the health impacts of pollution on the Welsh population.
 12. It may assist to explain the status of environmental principles. They do not as such confer rights, impose duties or set out procedural requirements of environmental law. Rather they provide guidelines to policy and decision makers as to how environmental protection ought to be pursued and they offer a framework for courts and others to assist in interpreting provisions of environmental law.
 13. Although the Bill envisages the embedding of principles in domestic law, these are well represented in international environmental law and applied globally. Partly because of this, there is no standard definition of any particular principle and the precise content and reach of the principle is often open to debate. This explains the need for guidance in the form of an 'environmental principles and integrating environmental principles statement' (section 6) on the application of principles in the course of making policy decisions relating to the environment such that environmental protection considerations are integrated into such policy making. UKELA supports this approach while pointing out that, as an aid to legal interpretation, guidance published by Welsh Ministers needs to be consistent with that adopted by the UK and Scottish governments.
 14. In terms of the weight to be given to environmental principles in decision-making, we welcome the duty in section 3 on Welsh Ministers to have *special regard* to environmental principles in making policy which may impact upon the environment. Then in fulfilment of that duty Ministers must have *regard* to the section 6 statement. This appears to give primacy to the principles by requiring greater attention to be paid to the principles themselves over the statement of the principles, which we strongly support. The notion of special regard is found in statutory formulations (see, for example, section 66 of the Planning (Listed Buildings and Conservation Areas) Act
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1990). Paying ‘special regard’ would suggest a higher threshold of consideration than merely paying ‘regard’ and confers some degree of priority over other considerations which may need to be taken into account. To pay regard requires that the statement is actively considered and that there is some reasoned justification in the event that the statement is not followed. The courts for their part in reviewing the duty to pay regard will take account of the legislative context including that the statement has been laid before Senedd Cymru. Note that between ‘special regard’ and ‘regard’ one often finds the statutory formulation of ‘due regard’. This for example is the standard applied to consideration of the public sector equality duty under the Equality Act 2010 and is a well understood expression which if adopted might do more to tie in the statutory objective. That is to say that Welsh Ministers, NRW and public bodies would be required to pay the level of regard to the principles that is due in order to fulfil the environmental objective. UKELA supports the wording of *special regard* in relation to the obligations of Welsh Ministers in policy making and the adoption of a standard of *due regard* elsewhere.

15. In England, under the Environment Act 2021 the Environment Agency has no direct duty to have regard to environmental principles in the manner that is expected of Ministers of the Crown, even though it will devise policy like the Enforcement and Sanctions Policy, which should surely be informed by (e.g.) the polluter pays principle. UKELA therefore supports the extension of the duty to have special regard to environmental principles and to integrate environmental protection in policymaking to NRW.
 16. Other public authorities in Wales must have regard to the environmental principles in carrying out certain functions. These functions are any functions in connection with the assessment of plans and programmes relating solely to Wales or to any part of Wales under the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004. This means that the obligation falls upon public authorities charged with carrying out a strategic environmental assessment (SEA) so that while the notion of public authority is wide-ranging as defined in the Bill, in practice the duty is likely to fall upon local authorities and national park authorities, though it could extend to, e.g., regional transport strategies. UKELA notes that this again goes further than the English legislation and can see the advantages of certainty in knowing when the duty to have regard to the principles applies. However, there is a structure under the 2004
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Regulations which covers matters of environmental impact and integration, whereas there are other forms of policy assessment outside of SEA that fall particularly on local authorities. One example might be the designation and management of local nature reserves under the National Parks and Access to the Countryside Act 1949. Due regard to the environmental principles and the guidance of the statement would be most useful in such contexts and ought to be considered. This is consistent with UKELA's response to the White Paper and that:

“UKELA considers that the duty in relation to the environmental principles and accompanying guidance should apply to all public bodies, whether Ministers, Council members, officers and anyone else in public office. It should apply to the development of all policies and legislation (whether primary, secondary, local, statutory and non-statutory). It should apply to policy making and decision-taking whether it is strategic or on a particular issue.”⁴

Question 3: *What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?*

Part 2 - The Office of Environmental Governance Wales (sections 8 to 32 and Schedules 1, 2 and 3)

17. UKELA welcomes the shift from present interim governance mechanisms to the establishment of the OEGW. While the work of the interim assessor has done much to establish that there is a room for independent review of the effectiveness environmental law and its enforcement, statutory powers of the type written into the Bill together with mechanisms to ensure compliance are essential. UKELA considers that the genuine independence, effective accountability and sufficient funding of the OEGW are critical to its operational effectiveness. While there are strong indications of independence both procedurally (e.g. in terms of appointments) and substantively (e.g. in terms of the cooperation duties of section

⁴ Paragraph 15, UKELA response to the Welsh Government Consultation: *securing a sustainable future* (UKELA, 20.4.24), www.ukela.org

18. 23), UKELA is attracted to the mechanisms in Scottish legislation whereby the independence of ESS is guaranteed under paragraph 1(1), Schedule 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. This states that “in performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government.” There is a proviso that this is “subject to any contrary provision in this or any other enactment” so that Government has room to limit the reach of ESS when making future legislative provision.
 19. To further bolster independence, there may be room to amend paragraph 8(2), Schedule 1 which currently states that before appointing the chairperson or deputy chairperson of the OEGW, the Welsh Ministers must consult a committee of Senedd Cymru for the time being with remit for environmental protection on the proposed appointment. UKELA suggests that the Committee should confirm the appointments in question.
 20. Once the Bill receives Royal Assent, and the OEGW is established it would require repeal of (at least) Part 2 of the resultant Act to wind up the OEGW. It is possible, however, to curb the activity of OEGW by controlling the resources made available to it to discharge its functions. Equivalent legislation elsewhere in the UK contains somewhat loose guarantees of ‘sufficiency of funding’. UKELA accepts that this is a promise which is hard both to assess and enforce. Paragraph 17, Schedule 1 of the Bill states that the “Welsh Ministers may make such payments to the OEGW of such amounts, at such times and on such conditions, as the Welsh Ministers may determine.” Could this contain an assurance that a certain minimum level of agreed funding would be ring-fenced for an agreed period (say, five years?) to support the OEGW. While accepting that this offers no long-term assurance, there is a hope and expectation that this might take the OEGW to a point that wider public recognition of its functioning might offer it further protection.
 21. Since the OEGW is monitoring compliance with and reviewing the implementation and application of environmental law (section 11), the definition of environmental law is central to the OEGW’s remit. The wide formulation encompassing any devolved provision “wholly or mainly” relating to environmental protection seems, on the whole, a useful formulation. However, it might be argued that activity such as the
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development of a circular economy in Wales is mainly directed at resource efficiency rather than at environmental protection, which might be seen as a subsidiary goal. Because UKELA believes that the OEGW ought to play some part in the oversight of the development of a green economy in Wales, the definition might be widened such that it relates to devolved provisions which “wholly or mainly relates to or which might substantially enhance environmental protection.”

22. In relation to the enforcement mechanisms included in the Bill, UKELA is broadly supportive of these and is grateful for additional clarity that has been brought to the proposed powers of the OEGW. There is much that we welcome, including: the broad freedom of the body to investigate including on its own initiative (section 15(2)); the capacity of the OEGW to decline to advise the Welsh Ministers (section 12(3)); and the proposed use of improvement reports (section 20). In general, the timescales for action and other procedural issues have been greatly clarified. There are some relatively minor queries. One is whether the urgent compliance notice procedure is sufficiently speedy in the most egregious of emergency cases, requiring as it does at least seven days’ notice and a review period which may last for up to a further seven days. In our view, the OEGW should have the ability to make an emergency application for an interim injunction to the High Court. This would be on the usual basis that there is a serious issue to be tried, where damages would not prove an adequate remedy and where the balance of convenience favours injunctive relief. The usual requirement for a cross undertaking in damages would mean that OEGW would exercise any such power to apply to the court sparingly. It may be that the supplementary powers of the OEGW in paragraph 23, Schedule 1 are thought wide enough to cover the pursuance of such proceedings, but the extent of the powers of the OEGW might be made more explicit in this regard.
23. Improvement notices may relate to activity on the part of more than one authority (section 20(3) of the Bill), but compliance notices are directed at a (*single*) public authority including a public authority which has failed to comply with an information notice. UKELA suggests that there might be scope in section 16 to serve a compliance notice on more than one public authority where (for instance) multiple authorities have failed to comply with an information notice. This would not seem to hinder an OEGW application to the High Court under section 19 if only some of the authorities in question fail to take the action specified in the compliance notice.
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24. UKELA notes the provisions of section 18 of the Bill and the procedure for the review of a compliance notice via an internal process conducted by a panel including ministerially approved members. UKELA expresses no strong view on this as such as there are pros and cons attaching. However, that review may end, for example, in the withdrawal of the compliance notice with the review committee giving notice of its determination to the public authority that requested the review. UKELA would hope for greater transparency here in the form of a published determination of why a compliance notice has been withdrawn or varied. Failure to do so might result in a loss of public confidence in the independence of the OEGW, particularly perhaps where the compliance notice had been directed at Welsh Ministers.
 25. On a section 19 application for a High Court review, the public authority may be required to take the action specified in the compliance notice, but we note that in accordance with section 19(2)(b) of the Bill the High Court may vary that action as it considers appropriate. Our assumption is that this means that the ordinary remedies available on an application for judicial review would be available to the High Court including, for example, an injunction and, in cases where there could be a separate cause of action (such as for the tort of breach of statutory duty) damages could be awarded. UKELA points this out because the White Paper which preceded the Bill took the stance that financial penalties might prove ineffective and counterproductive.
 26. The legislation needs to include a clear focus on cross-border issues, reflecting the existing cooperation between UK and devolved nations through the OEP and ESS. The legislation needs to ensure that there are no obstacles to the sharing of relevant data and other forms of cooperation between the between the various environmental oversight. To this end, it would be useful if the confidentiality provision (section 25) included a clear exception to ensure that there is no hurdle to cooperation with the OEP and ESS. For example, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, section 40, exempts disclosures made to the OEP, or any other environmental governance body, when the disclosure is for purposes connected with the exercise of their environmental governance function.
 27. In producing its strategy, the OEGW is required only to consult the relevant Senedd Committee together with anyone it considers appropriate, leaving the choice of persons entirely its own discretion (paragraph 2(1), Schedule 2). The strategy is a
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key document laying down how the OEGW will exercise its functions and determine its priorities in line with its statutory duties. The OEGW would be well advised to consult widely not least to build public knowledge and confidence in its functioning. Nonetheless UKELA suggests that this is made an explicit requirement, given the significance of the Strategy. To offer an example, the Equality and Human Rights Commission, which has jurisdiction in Wales, in preparing its strategy is required by section 5 of the Equality Act 2006 to:

- "(a) consult such persons having knowledge or experience relevant to the Commission's functions as the Commission thinks appropriate*
- (b) consult such other persons as the Commission thinks appropriate,*
- (c) issue a general invitation to make representations, in a manner likely in the Commission's opinion to bring the invitation to the attention of as large a class of persons who may wish to make representations as is reasonably practicable, and*
- (d) take account of any representations made."*

28. Provisions akin to section 5(c) and (d) of the Equality Act 2006 above might usefully be written into Schedule 2 of the Bill.

Question 4: *What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?*

Part 3 - Biodiversity targets, etc (sections 33 to 38)

29. The Bill amends Part 1 of EWA 2016 to introduce a biodiversity target setting framework. UKELA supports this as urgently needed to halt and reverse biodiversity decline, which is the purpose of the targets. We note that the earlier suggestion in the White Paper of a "nature positive" mission statement has been dropped. UKELA has no strong view on this. What matters is the activity promoted by the Bill. The Bill places a duty on Welsh Ministers to set at least one target in each of the priority areas, contained in the new section 6C(2) of EWA 2016. These targets should be contained in a draft regulation laid before Senedd within three years of Royal Assent. Given the continuing decline in biodiversity this is a long period of time, and any foreshortening of this three-year period is encouraged.

30. That said, UKELA has made the point in earlier processes of consultation that reliable baseline data is critical in setting effective targets. It requires up to date, complete data based on careful monitoring of habitats and species. For example, we are data poor when it comes to the present and predicted impact of climate change on nature conservation in Wales. Having regard to climate change also illustrates why targets may need to be adaptive. Another example is that under the influence of climate change, species which may previously have been considered visitors to Wales are now resident, so there is a need for flexibility in the regulation to allow for the dynamics of biodiversity.
 31. UKELA understands that the Joint Nature Conservation Committee (JNCC) is already commissioned to undertake data gathering and further work will need to be extensive and accompanied by resources, not least to fund NRW, for ongoing monitoring and to generate specific, measurable, achievable, realistic, and time-bound (SMART) datasets. Monitoring may fall on a range of bodies, depending on the nature of the targets such that their costs will need to be accounted for. The depth and accessibility of basic data is an important consideration. Support for the various biodiversity recording schemes is essential as is making them accessible and interoperable. In its work on environmental impact assessment (EIA), the OEP has pointed out that much relevant ecological study and analysis is undertaken within the EIA process but then lost, rather than being available for others to use, so enabling a cumulative accretion of knowledge, rather than costly repetition of basic work.
 32. Beyond the time required to introduce targets, there is the issue of the lack of any specification on the timescale of the targets themselves (the new section 6B(4)(b) of EWA 2016 and whether target setting will be short- or long-term or both. This may allow targets to be specific and suited to the condition of species or habitats, but it might be useful to consider linkages to the dates set in national and international biodiversity strategies, not least to make reporting easier.
 33. One final temporal element relates to the review of targets in accordance with the new section 6G of the EWA 2016. This is set in permissive language so that Welsh Ministers *may from time to time* review a target (new section 6G(1)). Welsh Ministers must review a target if a date for that target specified in a regulation is reached. However, given that there is no indication of how long term these targets may be, it
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might be better to place an obligation (rather than a power) to review targets on a chosen anniversary of the regulation coming into force, perhaps every three or five years. Note that this same “time to time” formulation applies to review of the Statement under section 6 and again UKELA would prefer periodic review.

34. UKELA notes the power of the Welsh Minister (the new section 6F of EWA 2016) by regulations to designate a public authority in relation to a target set in regulations made under the Act. Designation by regulations may be somewhat cumbersome and will bind only chosen designated authorities. UKELA would prefer a wider ranging duty to apply to public authorities generally. This need not cut across the proper performance by public authorities of their other responsibilities, but would require them to take into account biodiversity considerations at a time of the nature emergency, This would form a duty upon public authorities in Wales to consider how their functions might be discharged in a manner which fulfils the objective of halting and reversing the decline of biodiversity.

Question 5: *What are your views on the Bill’s provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?*

Part 4 - General (sections 39 to 45 and Schedule 4)

35. Other than the comments on subordinate legislation (question 7 below) and earlier comments on definitions, including the definition of environmental law, and commencement, we have nothing to add.

Question 6: *What are the potential barriers to the implementation of the Bill’s provisions and how does the Bill take account of them?*

36. UKELA refers to the comments above on resources and on timescales. In particular, we emphasise the need to adequately secure the resource base for the OEGW and to ensure that adequate financial and human resource is made available to generate the data required and the ongoing monitoring to successfully pursue the objectives in Part 3 of the Bill to halt and reverse biodiversity decline.
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Question 7: How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)

37. UKELA notes the powers in section 39 and the so-called Henry VIII clause which confers powers on Welsh Ministers to modify any enactment, including primary legislation. The Delegated Powers and Law Reform Committee of the Scottish Parliament has recently reviewed the use of such powers in the Scottish Parliament. The Committee concludes as follows.

“The Committee recognises the need in some cases for primary legislation to provide flexibility, by allowing for laws to be updated without requiring further Bills. In such cases though, the Committee argues for any delegated powers to be clear and well defined, and steps to be taken to strengthen scrutiny of both the primary legislation delegating the power and subsequent secondary legislation made under it.”

38. The scrutiny issue is addressed in section 40(4) which requires Senedd approval of regulations made under section 39. However, UKELA queries the clarity of section 39 in terms of when the delegated power may be exercised. This is said to be where it is considered “necessary or appropriate for the purposes of, in consequence of, or for giving full effect to any provision of this Act,” UKELA suggests the changes to legislation “in consequence” of the Act might allow certain provisions of other enactments to be shielded from the governance procedures laid out in the present Bill.

Question 8: Are any unintended consequences likely to arise from the Bill?

39. UKELA hopes not. However, the governance elements of the Bill do promote a thorough and independent scrutiny of performance across all areas of law as it relates to environmental protection and Part 3 of the Bill sets targets to reverse biodiversity loss. In terms of the latter provision, the UK largely failed in its efforts to meet the Aichi Biodiversity Targets set under the Biodiversity Convention with particularly poor performance on pollution, species extinction and ecosystem restoration. There is a danger that failure to ensure a high level of environmental protection and to halt and
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reverse biodiversity decline could undermine the confidence of Welsh citizens in the capacity of government in Wales to deliver on its promises.

Question 9: *What are your views on the Welsh Government's assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?*

40. See comments above on resources and on the wide range of public authorities that may be called upon to deliver the requirements of the legislation.

Question 10: *Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters.*

41. None.

Key contributors

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